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TORT IMMUNITY:
Covenants to Insure and Waivers of Subrogation

by

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TORT IMMUNITY:
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Covenants to insure in commercial contracts can be a powerful mechanism for immunizing the contracting parties (and even non-contracting parties) from liability. While the subject can be exceedingly technical in nature, it is of considerable importance not only for practitioners of insurance law but also for solicitors who are drafting commercial contracts or who are counselling clients with respect to protection against liability claims, subrogated or otherwise.

While the subject of immunity arising from insurance covenants most often arises as a liability defence to subrogated claims by property insurers, the genesis of the immunity is the intent of the parties, as evidenced by their contract, to restrict recoveries for certain types of property losses to available insurance without recourse to the other contracting party or their beneficiaries. At the end of this paper is a list of the leading and recent cases dealing with immunity arising from covenants to insure. Not surprisingly, most of the cases arise in the context of landlord and tenant relationships but the principles of immunity have application far beyond commercial tenancies.

1. COVENANTS TO INSURE: THE S.C.C. CASES

The starting point for any analysis of this subject is the following quartet of Supreme Court of Canada decisions:

(1) *Agnew-Surpass Shoe Stores Limited v. Cummer-Yonge Investments Ltd.* [1976] 2 S.C.R. 221

(2) *Ross Southward Tire Ltd. v. Pyrotech Products Ltd.* [1976] 2 S.C.R. 35

(3) *T. Eaton Company v. Smith* [1978] 2 S.C.R. 749

(4) *Greenwood Shopping Plaza v. Beattie* [1980] 2 S.C.R. 228

In *Agnew-Surpass*, *supra*, the relevant insurance covenant provided:

> "The Lessor covenants to insure the Shopping Centre including the said Building, ... against all risk of loss or damage caused by or resulting from fire, lightning or tempest or any additional peril defined in a standard fire insurance additional peril supplemental contract. All such insurance shall, to the best of the ability of the Lessor, be to the full insurable value of the property insured."

The lessee covenanted to repair, "except for ..... damage to the Building caused by perils against which the Lessor is obligated to insure hereunder".

There was a wide divergence of opinion on the Bench. Four Judges (Ritchie, Pigeon, Dickson and Beetz JJ) ruled,

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- the exception in the covenant to repair relieved the tenant from liability for all fire damage except the loss of rental income, which was not a form of insurance the Lease required the lessor to obtain; and

- the insurer should only be deprived of subrogation if it insures the tenant's interest as well as the landlord's or if it expressly waives subrogation.

Three members of the Bench (Laskin, Judson and Spence JJ) ruled,

- the lessor's covenant with the lessee to obtain fire insurance for the building meant the lessee was to have the benefit of such insurance and hence the latter was protected from liability for the subrogated claim;

- loss of rent was a risk resulting from fire and hence was a type of subrogated loss against which the tenant was also protected; and

- the failure of the lessor to obtain full coverage for loss of rental income was the lessor's problem and could not "be laid at the tenant's door".

The two dissenting Judges (Martland and de Grandpre JJ) ruled the 1937 S.C.C. decision in *United Motor Services v. Hutson* [1937] S.C.R. 294 had "implicitly established the principle that the undertaking by the landlord in the Lease to pay "all premiums of insurance upon the buildings" does not constitute the tenant a co-insured so as to permit to escape liability for fire damage caused by its negligence" (a suggestion emphatically and persuasively rejected by Laskin C.J. who noted there was "not a word" in *Hutson* "which relates to the effect of the lessor's undertaking to pay all insurance premiums"). De Grandpre J. concluded that the wording in the Lease was not wide enough to exclude the tenant's liability for damage arising from the latter's negligence.

In the result, six Judges ruled in *Agnew-Surpass* that the landlord's covenant to insure would only result in subrogation immunity if the requirement was to insure the tenant as well. Only three Judges ruled the landlord's covenant to obtain insurance was itself sufficient to trigger immunity on the part of the tenant.

In *Ross Southward Tire v. Pyrotech Products Ltd.* [1976] 2 S.C.R. 35, Justices Laskin and de Grandpre once again squared off. There the Lease simply provided "the lessee shall pay all ..... insurance rates immediately when due". The majority, *per* Laskin C.J., ruled that by "discharging its obligation to pay for fire insurance" the tenant "may be said to have qualified its obligation to repair" and the effect of the arrangement was that "the risk of loss by fire passed to the landlord ..... and the matter thereafter was between the landlord and its insurer". Since "the subrogated insurer's position in this litigation against the tenant is no better than that of the landlord itself", the subrogated claim necessarily failed. In *Ross Southward Tire*, then, the tenant's mere covenant to pay the insurance premiums gave rise to subrogation immunity.

T. Eaton Co. v. Smith [1978] 2 S.C.R. 749, saw yet another square off between Justices Laskin and de Grandpre. Again, the views of Chief Justice Laskin prevailed. In this case the Leases provided "the lessor covenants with the lessee that he will, throughout the currency of this Lease ..... keep the buildings upon the said premises insured against loss by fire in an amount not less than .....".

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After a fire loss, the insurers exercised rights of subrogation and sued the tenant. The Leases contained what Justice Laskin call "the standard repairing covenants, namely, the covenant to repair, the covenant to repair on notice, and the covenant to leave or yield up in repair". For the majority, he ruled:

> "..... The simple question before this Court is whether [the subrogating insurers] are precluded by the terms of the two Leases from succeeding in their claim, having regard to the fact that the landlords had each covenanted in the Leases to insure the premises against fire .....
>
> ..... If [the tenant] can escape this liability in the present case, it can only be on the basis that the landlord's covenant to insure is a covenant that runs to the benefit of the tenant, lifting from it the risk of liability for fire arising from its negligence and bringing that risk under insurance coverage.
>
> Had the landlord insured without giving a covenant to that effect in the Lease, the tenant's risk of liability for fire resulting from negligence would be unquestionable; and if the landlord collected from his insurer, the latter would have an equally unquestionable right of recovery from the tenant in a subrogated action .....
>
> [The contention should prevail that] ..... in respect of a covenant to insure given by the two landlords for the benefit of the tenant ..... there is no need for the covenant if it was only for the benefit of the two landlords ..... [Therefore] the effect of this insurance obligation was to entitle the tenant to protection against the risk of loss by fire caused by its negligence, and this notwithstanding the repairing covenants which, if they stood alone, would have saddled the tenant with liability for losses from such fires."

In *Greenwood Shopping Plaza v. Beattie* [1980] 2 S.C.R. 228, the landlord sued not only the tenant but also the tenant's two employees whose negligence had caused the fire. The Lease required the lessor to "insure the buildings ..... against fire and supplemental risks on the basis of replacement cost to the extent obtainable" and further provided that both parties "will arrange ..... with their respective insurers not to grant subrogation rights for the recovery of any loss through fire or supplemental perils occasioned by acts of the other, provided such loss is covered by insurance and to the extent only that payment of such loss is made by the insurer".

The insurance obligations contemplated by the Lease were not performed as contemplated. However the landlord did obtain some insurance on the buildings, albeit not for replacement cost, although he did not secure a waiver of subrogation in the policy. The action comprised a claim by the landlord for its uninsured losses and by the landlord's fire insurers for the subrogated claim. In an unanimous decision, the Supreme Court ruled,

- the covenant to insure protected the tenant against *both* those losses which were actually insured and those losses which should have been insured by virtue of the covenants; but

- the tenant's employees were not in privity of contract with the owner and therefore the covenant to insure did not immunize them from liability for either the subrogated and uninsured losses.

The privity of contract issue vis-a-vis the employees is one that can, and indeed has, been reconsidered in light of the "incremental change" to the common law of privity resulting from *London Drugs Ltd. v. Kuehne & Nagel International Ltd.* (1992) 97 D.L.R. (4th) 261 (S.C.C.) which ruled that an employee can obtain the benefit from a limitation of liability clause in a contract between their employer and another party if the following requirements are satisfied:

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(a) the limitation of liability clause must, either expressly or impliedly, extend its benefits to the employees seeking to rely on it; and

(b) the employees seeking the benefit of the limitation of liability clause must have been acting in the course and scope of their employment and must have been performing the very services provided for in the contract between the employer and the third party when the loss occurred.

In *Madison Developments Limited v. Plan Electric Co.* [1998] I.L.R. 1-3493 the Ontario Court of Appeal ruled that a covenant to insure against fire in a construction subcontract "implicitly intended the benefit of the fire insurance to extend to the employees" of the subcontractor and accordingly both the subcontractor *and* the employees were immunized from liability for the contractors subrogated claim. The British Columbia Court of Appeal found a similar implied contractual intention in *Laing Property Corp. v. All Seasons Display Inc.*, (2000) 79 B.C.L.R. (3d) 199.

In addition, in *Fraser River Pile & Dredge Ltd. v. Can-Dive Services Ltd.* [1997] B.C.J. No. 2355, the British Columbia Court of Appeal has now ruled that waivers of subrogation in favour of "strangers" in insurance contracts must also be recognized as an "established exception to the doctrine of privity" and in such circumstances, the beneficiaries of such a waiver provision can enforce the same so as to deflect liability for a subrogated claim.

The Supreme Court of Canada decisions therefore stand for the following propositions:

- a landlord's covenant to insure the leased premises is a covenant for the benefit of the tenant and immunizes the latter against any claims by the landlord, subrogated or otherwise, for losses that were or should have been insured as contemplated by the covenant;

- a lessee's covenant to pay the insurance premiums for the leased premises transfers the risk of loss by the contemplated insured perils to the landlord and immunizes the tenant against any claims by the landlord, subrogated or otherwise, for such losses; and

- a tenant's employees have no privity of contract with the landlord and hence the covenant to insure does not immunize them from liability for either subrogated or uninsured losses (a ruling which has since been modified in favour of the employees by subsequent appellate authority).

2. COVENANTS TO INSURE: THE APPELLATE AND TRIAL CASES

None of the S.C.C. cases referred to above directly addressed the question of immunity arising from a tenant's covenant to insure; the *Ross Southward Tire* decision only held that the tenant would enjoy immunity if it (the tenant) was required to pay the landlord's insurance premiums. Logically, of course, if the landlord's covenant to insure was sufficient to extend immunity vis-a-vis the tenant, then presumably the rationale would apply in reverse.

In 1985, two Appellate decisions confirmed that a tenant's covenant to insure the leased premises will indeed result in immunity on the part of the landlord for claims arising from the perils to be insured, whether those claims be subrogated or otherwise: *Majestic Theatres v. N.A. Properties* (1985) 57 A.R. 210 (Alta. C.A.); and *Atlantic Shopping Centres v. CNR* (1985) 40 R.P.R. 185 (N.B.C.A.), leave to appeal refused, May 13th, 1985 (S.C.C.). In fact, essentially the same ruling had been made four years earlier with respect to a helicopter lessee's obligation to "*provide insurance coverage against loss or damage*": *Bow Helicopters v. Bell Helicopter Textron* (1981) 125 D.L.R. (3d) 386 (Alta. C.A.).

2.1 Beyond Landlord and Tenant Cases

There is no logical reason why the protection afforded by covenants to insure should not apply beyond landlord and tenant cases. To be sure, commercial Leases are probably the most common form of agreement directly addressing obligations to insure and it is therefore not surprising that the doctrine may have developed in the context of commercial tenancies. However, so long as the covenant to insure the subject matter of the contract is properly interpreted as being for the benefit of both contracting parties, the immunity can arise from virtually any form of commercial agreement.

A review of the cases indicates the doctrine of immunity arising from covenants to insure has been considered and/or applied in the following contexts:

Subject Matter	Case
helicopter lease:	*Bow Helicopters v. Bell Helicopter Textron* (1981) 125 D.L.R. (3d) 386 (Alta. C.A.)
barge towing contract:	*St. Lawrence Cement Inc. v. Wakeham & Sons* (1995 26 O.R (3d) 321 (Ont. C.A.)
construction contract:	*Madison Developments v. Plan Electric Co.* [1998] I.L.R. 1-3493 (Ont. C.A.)
mobile home rental:	*Ruge v. Kennedy* (1991) 6 C.C.L.I. (2d) 159 (B.C.S.C.)
transportation contract:	*L & B Construction v. NCPC* [1984] 6 W.W.R. 598 (N.W.T.S.C.)
pump lease:	*Western Drill-Dredging v. Suncor* (1994) 28 C.C.L.I. (2d) 134 (Alta. Q.B.)
rig vendor-mortgagee:	*L & M Standard Industries v. Cooper Industries* [1992] N.S.J. No. 452 (N.S.S.C.)
house vendor-mortgagee:	*Sin v. Mascioli* [1997] I.L.R. 1-3413 (O.C.J.G.D.)

2.2 The Wording Necessary for Immunity

The fundamental requirement for immunity is that the covenant to insure be, expressly or impliedly, for the benefit of both contracting parties. The covenant could be entirely oral, although this will invariably result in evidentiary challenges: see, for example

Fraser River Pile & Dredge v. Can-Dive Services [1997] B.C.J. No. 2355 (B.C.C.A.) where the Court of Appeal refused to overrule the Trial Judge's finding on the evidence that the oral dealings between the parties did not amount to an undertaking to insure the subject derrick barge chartered to the Defendant.

In most landlord and tenant situations, particularly commercial tenancies, the Lease will be a substantial document extensively addressing the insurance obligations of the respective parties. In many other contexts, however, the covenant to insure may be very brief and the Court may be obliged to review all of the circumstances surrounding the transaction to determine the nature of the insurance to be obtained and whether it was intended to benefit both of the contracting parties.

It is clear no immunity will arise if the contract does not contain either a covenant by one party to insure or a covenant by the other party to pay premiums: *Matthews v. Andrew* (1986) 1 B.C.L.R. (2d) 114 (S.C.). As Laskin C.J. noted in *T. Eaton Co. v. Smith* [1978] 2 S.C.R. 749,

> "Had the landlord insured without giving a covenant to that effect in the Lease, the tenant's risk of liability for fire resulting from negligence would be unquestionable; and if the landlord collected from his insurer, the latter would have an equally unquestionable right of recovery from the tenant in a subrogated action."

In *Matthews*, *supra*, the Defendant argued, unsuccessfully, that even though the Lease was silent with respect to a covenant to insure or to pay premiums, the use by the landlord of the rental monies to purchase insurance gave rise to an *implied* covenant to insure on the tenant's behalf. The Court commented,

> "If the landlord had not insured the building, the tenant could have had no complaint under the Lease and no means by which to compel him to insure. It seems to me that, in the absence of an agreement between the parties, how the landlord chose to spend his rental income is his own business and not a matter from which I should infer any joint intention of an obligation on his part to insure for the tenant's benefit."

Similarly, in *Yale Properties v. Pianta* [1987] I.L.R. 1-2222 (B.C.S.C.) where the Lease was silent with respect to insurance obligations but required the tenant to pay any damages not covered by the landlord's insurance, the Court ruled this did *not* amount to a covenant to insure such that the tenant was immune from a subrogated action by the landlord's insurer for fire damage.

It is difficult to reconcile the conflicting case law respecting the wording necessary to establish a covenant to insure for the mutual benefit of both contracting parties. In *Ross Southward Tire Ltd.* [1976] 2 S.C.R. 35, it will be recalled the lease simply provided "the lessee shall pay all ..... insurance rates immediately when due" and the majority of the S.C.C. ruled the effect of this obligation was that "the risk of loss by fire passed to the landlord ..... and the matter thereafter was between the landlord and its insurer", with the tenant being immune from any subrogated claim. However, in *Leung v. Takatsu*, a one page transcript of an oral judgment delivered in April 1980 by the B.C. Court of Appeal and later reported at [1992] 3 W.W.R. 129, the Court ruled the words "*owner to pay property taxes and building insurance*" did *not*

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immunize the tenant from a subrogated action. The Court referred to the *T. Eaton Co. v. Smith* decision but ruled,

> "The circumstances of the lease, including this particular wording, as distinct from the circumstances in the authority cited, including the case of *T. Eaton Co. v. Smith* [cite omitted] relied upon by the learned Trial Judge, do not persuade me that the extended meaning of the wording in question was intended by the parties to be the covenant to insure as claimed; that is, a covenant by the owner to insure in such manner as to exculpate both the tenant and the wife from fire liability. I would give the wording its ordinary and plain meaning, which I would not extend to include a covenant on the part of the owner to insure."

In *Leung* the Court does not directly address the rather obvious question: if the clause was not meant to confer some benefit on the tenant, why was it inserted in the Lease in the first place? In *T. Eaton Co.*, *supra*, where the covenant to insure was admittedly more extensive than in *Leung*, Chief Justice Laskin supported the contention that "there is no need for the covenant if it was only for the benefit of the two landlords". In the same vein, Laskin C.J. had noted in the earlier *Agnew-Surpass* case, [1976] 2 S.C.R. 221,

> "Where a covenant runs to the lessee from the lessor, it goes beyond a mere promise at large or statement of intention and enures to the lessee's benefit according to its terms. The standard of appraisal is business efficacy, not conveyancing preciosity. The covenant obligations are, in my opinion, firmly stated in the present case."

Similar sentiments i.e. that the mere insertion of the covenant must be taken as meaning some benefit to be conferred on the other contracting party, are to be found throughout the case law; see for example, *Sieg Estate v. Alta Public Trustee* [1990] 3 W.W.R. 191 (Alta. C.A.); *St. Lawrence Cement Inc. v. Wakeham & Sons* (1995) 26 O.R. (3d) 321 (Ont. C.A.); *Madison Developments v. Plan Electric Co.* [1998] I.L.R. 1-3493 (Ont. C.A.); *Western Drill-Dredging v. Suncor* (1994) 28 C.C.L.I. (2d) 134 (Alta. Q.B.); *Weldwood of Canada v. Gisborne Construction* (1995) 32 C.C.L.I. (2d) 121 (Alta. Q.B.).

The following chart outlines some of the wording considered by the Courts and whether or not the particular covenant to insure gives rise to tort immunity vis-a-vis the other contracting party:

CONTRACT WORDING	RESULT
"the lessee shall pay all ..... insurance rates immediately when due"	tort immunity (Ross Southward Tire v. Pyrotech Products (1975) 57 D.L.R. (3d) 248 (S.C.C.))
lessee to "provide insurance coverage against loss or damage" to the helicopter, naming both lessor and lessee in the policy and to obtain a waiver of subrogation from insurer against lessor	tort immunity (Bow Helicopters v. Bell Helicopter Textron (1981) 125 D.L.R. (3d) 386 (Alta. C.A.))
tenant "to maintain property insurance ..... in the joint names of the lessor and the lessee"	tort immunity (Majestic Theatres v. N.A. Properties (1985) 57 A.R. 210 (Alta. C.A.))
tenant to "insure the buildings ..... against loss or damage by fire or other casualty" with the landlord to be a loss payee	tort immunity (Atlantic Shopping Centres v. CNR (1985) 40 R.P.R. 185 (N.B.C.A.))

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CONTRACT WORDING	RESULT
owner "to be responsible for vessel and cargo insurance"	tort immunity (St. Lawrence Cement Inc. v. Wakeham & Sons (1995) 26 O.R. (3d) 321 (Ont. C.A.))
"lessor will be responsible for placing and paying the premiums for replacement cost insurance on the building"	tort immunity (Rebello v. Nugget Equipment (1997) 41 C.C.L.I. (2d) 256 (B.C.S.C.))
"this is to confirm insurance coverage by NCPC"	tort immunity (L & B Construction v. NCPC [1984] 6 W.W.R. 598 (N.W.T.S.C.))
"vendor to be responsible for insurance"	tort immunity (Western Drill-Dredging v. Suncor (1994) 28 C.C.L.I. (2d) 134 (Alta. Q.B.))
"must have his own insurance policy to cover the rental premises"	tort immunity (Jarski v. Schmidt (1987) 26 C.C.L.I. 94 (Ont. D.C.))
"the lessee will pay to the lessor the increased amount of insurance premiums" payable in consequence of lessee's occupancy	tort immunity (Independent Tank Cleaning v. Zabokrzycki (1997) 41 C.C.L.I. (2d) 141 (O.C.J.G.D.))
"owner to pay building insurance"	no immunity (Leung v. Takatsu [1992] 3 W.W.R. 129 (B.C.C.A.))
owner "to pay all mobile home insurance"	no immunity (Ruge v. Kennedy (1991) 6 C.C.L.I. (2d) 159 (B.S.S.C.))
"fire insurance to be paid by lessor"	no immunity (Perlitz v. Nan [1997] B.C.J. No. 2605 (S.C.))
"L & M will insure and keep insured at its own expense, the Charged Premises including the Rig, to the full insurable value thereof ..... against loss or damage by all insurable hazards" with the vendor to be "named as beneficiary as its interest may appear"	no immunity (L & M Standard Industries v. Cooper Industries Inc. [1992] N.S.J. No. 452 (N.S.S.C.))

2.3 Breaching the Covenant: Failing to Obtain the Required Insurance

Many of the cases addressed in this paper involve breaches of the covenant to insure. Sometimes the party responsible for the insurance fails to obtain any coverage at all eg. *L & B Construction Ltd. v. NCPC* [1984] 6 W.W.R. 598 (N.W.T.S.C.). Sometimes insurance is obtained but not to the extent required by the covenant eg. *Greenwood Shopping Plaza v. Beattie* [1980] 2 S.C.R. 228. Often, even if the required coverage is obtained, one party fails to secure the necessary waiver of subrogation in favour of the other eg. *Bow Helicopters v. Bell Helicopter Textron* (1981) 125 D.L.R. (3d) 386 (Alta. C.A.).

Two questions arise in these circumstances:

- Does the immunity extend to uninsured losses?; and

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- Is the immunity enforceable against the subrogating insurer if no waiver of subrogation has in fact been obtained?

Even assuming property insurance has in fact been secured, there are many reasons why particular losses might be uninsured. These include policy deductibles, insufficient limits of coverage (and possibly co-insurance penalties), excluded loss or damage, and perhaps even policy breaches resulting in a forfeiture of coverage.

The extent of the immunity is determined not only with reference to the covenant to insure but also to the intentions of the parties as manifested by the mutual obligations expressly or impliedly arising from the entire contract. It is for this reason many of the landlord and tenant cases review not only the covenant to insure but also the tenant's covenant to repair and any exculpatory clauses that might be found in the lease agreement. Generally speaking, however, as a matter of "interpretative reasoning", the Courts have concluded that a contractual undertaking by one party to secure property insurance operates in effect as an assumption by that party of the risk of loss or damage caused by the peril to be insured against:

> "The law is now clear that in a landlord-tenant relationship, where the landlord covenants to obtain insurance against the damage to the premises by fire, the landlord cannot sue the tenant for a loss by fire caused by the tenant's negligence. A contractual undertaking by the one party to secure property insurance operates in effect as an assumption by that party of the risk of loss or damage caused by the peril to be insured against.
>
> This is so notwithstanding a covenant by the tenant to repair which, without the landlord's covenant to insure, would obligate the tenant to indemnify for such a loss. This is a matter of contractual law not insurance law, but, of course, the insurer can be in no better position than the landlord on a subrogated claim. The rationale for this conclusion is that the covenant to insure is a contractual benefit accorded to the tenant, which, on its face, covers fires with or without negligence by any person. There would be no benefit to the tenant from the covenant if it did not apply to a fire caused by the tenant's negligence."
>
> *Madison Developments Limited v. Plan Electric Co.* [1998] I.L.R. 1-3493 (Ont. C.A.) at p. 4727. (emphasis added)

In *Northwestern Metal & Salvage v. Alltar Roofing Ltd.* (1994) 25 C.C.L.I. (2d) (Alta. C.A.) the lease required the tenant to contribute to the landlord's fire insurance premiums but also provided "any damages to the building caused by the lessee or their clientele is the responsibility of the lessee". In interpreting the "apparent clash" between the immunity arising from the covenant to insure and the clause imposing responsibility for *any* damage to the building, the Court of Appeal determined,

> "The clause about insurance deals with those losses which are or can reasonably be covered by insurance such as fire insurance. The sentence about damage should be read as speaking about those losses not covered or readily coverable by fire insurance ..... if there is any part of this loss which is not covered by the fire insurance, because there is an exception or deduction which is standard in insurance policies, then the Defendant should not have the benefit of that. For example, some fire insurance policies will have a deductible of $100.00. If there were anything like that here, and it was standard, then to that very limited extent, the Defendant would be liable."

It will be recalled that in the *Agnew-Surpass Shoe Stores Limited v. Cummer-Yonge Investments Ltd.* case, [1976] 2 S.C.R. 221, the lessee had covenanted to repair "except for ..... damage to the

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building caused by perils against which the lessor is obligated to insure hereunder". In that case the lessor was obligated to insure the building "against all risk of loss or damage caused by ..... any ..... peril defined in a standard fire insurance-additional peril supplemental contract". In addition to property coverage, the lessor also obtained (partial) coverage for loss of rental income (coverage was limited to $15,000.00 whereas the actual loss was $25,000.00). Chief Justice Laskin concluded the covenant to insure provided immunity for the entire claim on the basis that loss of rent was one of the risks resulting from fire and hence was one of the risks the lessor was supposed to insure. He ruled,

> "The lessor in this case had obtained partial coverage for loss of rental income. Its failure to obtain full protection cannot be laid at the appellant's door."

Justice Pigeon agreed with Chief Justice Laskin's conclusions *except for* the claim respecting loss of rental income. He concluded that coverage for loss of rental income was *not* a form of insurance the lease required the lessor to obtain and hence any immunity arising from the covenant to insure did *not* extend to such losses:

> "Similarly, I can see no reason to extend the obligation to insure beyond its terms to cover what is not damaged to the building. The tenant cannot claim the benefit of any insurance which the owner took beyond what the Lease required and its relief from liability cannot protect it beyond the actual wording of the stipulation in the Lease. There is, therefore, no distinction to be made between the insured and the uninsured portions of the rental income loss." (emphasis added)

The *Greenwood Shopping Plaza v. Beattie* case, [1980] 2 S.C.R. 228, also involved a situation of partial coverage. The Trial Judge recognized the tort immunity arising from the covenant to insure but nevertheless awarded damages which exceeded the amounts which were *or should have been insured* under the insurance provisions in the Lease. This excluded from the judgment both the subrogated damages and the unsubrogated (uninsured) losses consisting of the difference between the amount of insurance and the cost of reconstruction. However damages for rental loss and some incidental expenses resulting from the fire were awarded and that award was expressly affirmed by the Supreme Court of Canada at the conclusion of the case when it ordered,

> "That Greenwood Shopping Plaza Limited do have judgment against the Defendants Neil J. Buchanan Limited, Robert Walker Beattie and Roy Vincent Pettipas in the amounts of its damages excepting as against the Defendant Neil J. Buchanan Limited [the beneficiary of the covenant to insure] those losses which were insured or which should have been insured by virtue of the provisions of clauses 14 and 15 of the Lease referred to in the Reasons for Judgment."

Based upon these various rulings, it is reasonable to conclude,

- the immunity arising from the covenant to insure will extend only to the losses which were or should have been insured in accordance with the covenant; but
- the immunity does *not* extend to deductibles or losses ordinarily excluded from such insurance; and
- if losses which should have been insured are not in fact covered (by reason of breach, insufficient limits, etc.) then such losses are *not* recoverable.

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Similarly, the beneficiary of the immunity will not be prejudiced by any failure to obtain from the insurer a waiver of subrogation of the sort contemplated by the contract. The rationale is obvious and is plainly set out in *Bow Helicopters v. Bell Helicopter Textron* (1981) 125 D.L.R. (3d) 386 (Alta. C.A.), a case where the required waiver of subrogation was not obtained:

> "To subrogate is to substitute. An insurer to recover a loss by way of subrogation must be able to place itself in the position of the insured. It follows, then, that the insurer is only entitled to make such claims, in the name of the insured, as could have been made by that insured. In this case Bow had no claim against Bell because of its agreement to insure Bell and to obtain a waiver of subrogation in its favour. This leaves the insurer without a remedy. It cannot succeed where its insured cannot succeed."

This rationale has been applied in many other cases; see, for example, *Western Drill-Dredging v. Suncor* (1994) 28 C.C.L.I. (2d) 134 (Alta. Q.B.).

2.4 Non-Contracting Beneficiaries and the Doctrine of Privity of Contract

At first blush it might be said the question whether non-contracting parties, such as employees, could benefit from any immunity arising from covenants to insure was firmly put to rest by the negative conclusions exactly on point in *Greenwood Shopping Plaza Limited v. Beattie* [1980] 2 S.C.R. 228 and *Atlantic Shopping Centres v. CNR* (1985) 40 R.P.R. 185 (N.B.C.A.), leave to appeal refused May 13th, 1985 (S.C.C.). Although at least one subsequent case applied the "agency exception" to the privity of contract doctrine to bestow upon employees an immunity arising from a covenant with their employer to insure the subject matter of the contract (*L & B Construction v. NCPC* [1984] 6 W.W.R. 598 (N.W.T.S.C.)), it was not until the Supreme Court of Canada's decision in *London Drugs Ltd. v. Kuehne & Nagel International Ltd.* (1992) 97 D.L.R. (4th) 261 that the ground was laid for extending immunity to such employees on a broader basis.

In *London Drugs*, *supra*, the issue was whether negligent warehouse employees could benefit from a provision in their employer's contract limiting liability for damaged goods to $40.00. The Supreme Court of Canada allowed the employees to avail themselves of the limitation. Justice Iacobucci ruled,

> "In the end, the narrow question before this Court is: In what circumstances should employees be entitled to benefit from a limitation of liability clause found in a contract between their employer and the Plaintiff (customer)? ..... I am of the view that employees may obtain such a benefit if the following requirements are satisfied:
>
> (1) the limitation of liability clause must, either expressly or impliedly, extend its benefit to the employees (or employee) seeking to rely on it; and
>
> (2) the employees (or employee) seeking the benefit of the limitation of liability clause must have been acting in their course of employment and must have been performing the very services provided for in the contract between their employer and the Plaintiff (customer) when the loss occurred.
>
> Although these requirements, if satisfied, permit a departure from the strict application of the doctrine of privity of contract, they represent an "incremental change" to the common law.'

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In the context of a covenant to insure, the *London Drugs* decision was recently analyzed in detail by the Ontario Court of Appeal in *Madison Developments Limited v. Plan Electric Co.* [1998] I.L.R. 1-3493 where it was stated:

> "As I read these lengthy excerpts from *London Drugs Ltd.*, the Supreme Court has not just distinguished the facts in *Greenwood*; it has applied new reasoning to create an incremental change in the law of privity, and has set forth a test for the application of that change which is not restricted to cases involving limited liability. In my view, it is now unnecessary to compare the facts of this case to those in *Greenwood*. It is rather a matter of applying the general principles enunciated in *London Drugs Ltd.* to a case involving an obligation to obtain fire insurance, as opposed to one imposing a limitation of liability. Looked at in this fashion there is no doubt in my mind that the parties to this subcontract implicitly intended the benefit of the fire insurance to extend to the employees.
>
> The business reality which flows directly from the terms of the subcontract is that the contractor was to obtain comprehensive insurance covering the events which occurred and it did so. Those events were unlikely to be caused by the corporate entity, the subcontractor, but rather were most likely to arise from the conduct of employees acting in the course of their employment. That is what happened. Further, the contract contemplated the subcontractor obtaining liability insurance which, if the judgment stands against the employees, would be answerable for the losses. I have already expressed the view that the obligation to obtain the comprehensive policy stands above the subcontractor's obligations to obtain liability insurance and this would be thwarted unless the employees are considered to be implicit third party beneficiaries of the covenant to obtain property insurance.
>
> It is therefore my conclusion that the contractor is barred by its agreement with the subcontractor from pursuing a claim against the employees and the insurer therefore has no right of subrogation."

In *Laing Property Corp. v. All Seasons Display Inc.*, (2000) 79 B.C.L.R. (3d) 199 (B.C.C.A.), which involved covenants in standard form shopping mall leases to obtain fire insurance including waivers of rights of subrogation against the landlord, *London Drugs* was also applied. In that decision Finch J.A. distinguished *Greenwood Shopping Plaza* and applied the tests in *London Drugs* to find that the protection of the insuring clauses extended to the landlord's employees.

Another mechanism which has been used by the Courts to circumvent difficulties with privity of contract is piercing the corporate veil so as to bestow the beneficial immunity arising from the covenant to insure upon the "alter-ego" and directing mind of the company who was party to the relevant contract: *Tony & Jim's Holdings Ltd. v. Silva* [1998] I.L.R. 1-3497 (B.C.S.C.). The case involved a family business operated by the Defendant, although all of the shares in the corporation were owned by his wife. The Court ruled that in the unique circumstances of the case, the individual Defendant was one of the intended beneficiaries of the landlord's insurance and that "no principles of privity of contract are breached nor offended" to extend the immunity arising from the corporate tenant's covenant to pay pro-rata premiums. The decision was upheld on appeal, with the Court citing *Madison Developments*, *supra*, with approval.

With some exceptions, employees, alter-egos and "directing minds" of corporations seemingly meet the *London Drugs* test for obtaining immunity arising from covenants to insure the corporation. It remains to be seen whether the Courts will further extend

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those benefits to agents, sub-tenants or other third parties related or connected to the primary beneficiary.

3. WAIVERS OF SUBROGATION

While covenants to insure may give rise to a tort immunity regardless of whether the claim is subrogated, there are at least two other separate, albeit related, bases for deflecting property insurers pursuing subrogated claims, namely,

- common law prohibitions respecting subrogated actions against insureds (named or unnamed) on the same or even on different policies; and
- express waivers of subrogation in policies of property insurance.

Most of the cases in this area concern "course of construction" or "builders risk" policies, primarily because such policies commonly insure multiple interests (an hence multiple, often unnamed, insureds) and they also generally contain an express waiver of subrogation rights. Although immunity arising from covenants to insure may also arise (mostly on account of the insurance provisions in construction contracts), cases resisting subrogation under builders risk policies usually involve *both* of the bars outlined above.

3.1 Immunity as Between Insureds

The starting point in Canada for reviewing these issues is the unanimous S.C.C. decision in *Commonwealth Construction Co. v. Imperial Oil Ltd.* (1976) 69 D.L.R.) (3d) 558 (S.C.C.) where a subrogated claim for fire losses on the part of the project owner against the negligent subcontractor was dismissed on both of the grounds outlined above. With respect to prohibited subrogation against insureds under the same policy, de Grandpre J. observed:

> "The starting point of that submission is the basic principle that subrogation cannot be obtained against the insured himself. The classic example is, of course, to be found in *Simpson & Company v. Thompson, Burrell* (1877) 3 App. Cas. 279. In the case of true joint insurance, there is, of course, no problem; the interests of the joint insured are so inseparably connected that the several insureds are to be considered as one with the obvious result that subrogation is impossible. In the case of several insurance, if the different interests are pervasive and if each relates to the entire property, albeit from different angles, again there is no question that the several insureds must be regarded as one and no subrogation is possible."

In *Commonwealth Construction* the named insured under the multi-peril subscription policy was

> "Imperial Oil Limited and its subsidiary companies and any subsidiaries thereof, and any of their contractors and subcontractors".

The property insured under the policy was described as,

> "All materials, machinery, equipment including labour charges, and all other property of any nature whatsoever owned by Insured or in which the Insured may have an interest or responsibility or for which the Insured may be liable or assume liability prior to loss or damage to be used or

> incidental to the fabrication, installation, completion, upkeep, expansion, modification, and all other charges or extensions (whether defined herein or not), all pertaining to the Fertilizer Plant situated at Redwater, Alberta."

De Grandpre J. concluded Commonwealth was an insured whose insurable interest extended to the entire works prior to the loss such that, in accordance with the basic principles, the insurers had no right of subrogation. He commented,

> "The question is: In the context of the construction contracts, did the various trades have, prior to the loss, such a relationship with the entire works that their potential liability therefor constituted an insurable interest in the whole? ..... On any construction site, and especially when the building being erected is a complex chemical plant, there is ever present the possibility of damage by one tradesman to the property of another and to the construction as a whole. Should this possibility become reality, the question of negligence in the absence of complete property coverage would have to be debated in Court. By recognizing in all tradesmen an insurable interest based on that very real possibility, which itself has its source in the contractual arrangements opening the doors of the job site to the tradesmen, the Courts would apply to the construction field the principle expressed so long ago in the area of bailment. Thus all the parties whose joint efforts have one common goal, eg., the completion of the construction, would be spared the necessity of fighting between themselves should an accident occur involving the possible responsibility of one of them."

Obviously one must carefully scrutinize the Declaration Pages, the insuring agreements and the definition provisions of each policy in order to determine whether any particular party qualifies as an insured, named or otherwise, under the policy. Generally speaking, however, in cases involving builders risk coverage, the Courts have included as "insureds" those persons without whose contribution to the project in its entirety the project itself could not be completed (for the most part, trades) and have excluded those persons whose services were remote from or parallel to, but not actually within, the mainstream of the construction activities. Cases addressing the former category include,

> *Commonwealth Construction v. Imperial Oil* (1976) 69 D.L.R. (3d) 558 (S.C.C.);
>
> *Sylvan Industry v. Fairview Sheet Metal Works* (1994) 89 B.C.L.R. (2d) 18 (B.C.C.A.);
>
> *Madison Developments v. Plan Electric Co.* [1998] I.L.R. 1-3493 (Ont. C.A.);
>
> *Timcon Construction Ltd. v. Riddle, McCann, Rattenbury & Associates* (1981) 16 Alta. L.R. (2d) 134 (Q.B.);
>
> *Esagonal Construction v. Traina* (1994) I.L.R. 1-3091 (O.C.J.G.D.);
>
> *Earl Redmond v. Blair LaPierre Inc.* (1995) 27 C.C.L.I. (2d) 201 (P.E.I.S.C.);
>
> *Janeland Developments v. Michelin Masonry* [1996] I.L.R. 1-3298 (O.C.J.G.D.).

Two cases which exemplify the "distance" from the construction project necessary for disqualification as an "insured" (and who hence qualify for exposure to subrogated claims) are *CP v. Base-Fort Security* (1991) 48 C.C.L.I. 22 (B.C.C.A.) involving the security company providing security services at the construction site and *Stuart Olson Construction Ltd. v. Allan*

Forrest Sales Ltd. (1994) 28 C.C.L.I. (2d) 185 (Alta. Q.B.) dealing with the supplier of water coolers to be incorporated into the building under construction.

Outside of the construction context, common examples of multiple persons whose interests may be insured under the one policy (and may therefore be immune from subrogation as between each other) would include condominium complexes and owner/mortgagees. In *Peel Condominium Corp. v. Vaughan* (1996) 34 C.C.L.I. (2d) 245 (O.C.J.G.D.), the Court ruled that, although the owner of a condominium unit was an insured and therefore immune from suit such immunity did not extend to the tenant of that owner and subrogation against the tenant was therefore permitted. With respect to loss payees, there are at least two directly conflicting rulings, namely, *L & M Standard Industries v. Cooper Industries* [1992] N.S.J. No. 452 (N.S.S.C.) which permitted subrogation and *Sin v. Mascioli* [1997] I.L.R. 1-3413 (O.C.J.G.D.) which prohibited subrogation against the vendor-mortgagee who was negligent in the original construction of the home.

3.2 Waiver of Subrogation

Most property policies contain clauses specifically addressing the insurer's rights of subrogation following payment under the policy. It is also common for the subrogation provisions to expressly waive rights of subrogation against various persons who may or may not be named insureds under the policy.

The standard auto policy and the standard garage policy both contain waivers of subrogation against persons who, with the named insured's consent, have care, custody or control of the automobile. Although litigation over such waivers is relatively rare, they have been routinely enforced in favour of non-contracting parties; see, for example, *J. Clark & Son Ltd. v. Finnamore* (1972) 32 D.L.R. (3d) 236 (N.B.C.A.), *Mumford v. Casey Mercury Sales* (1979) 108 D.L.R. (3d) 551 (N.S.C.A.) and *Canbra Foods v. C & L Transport* [1981] I.L.R. 1-1355 (Alta. Q.B.).

In the *Commonwealth Construction* case, *supra*, the policy provided,

> "The insurers shall have no right of subrogation against any subsidiary or Allied Company owned or controlled by the Insured nor against any person, firm or corporation in respect of which the Insured has assumed liability under any contract or agreement."

In *Sylvan Industries Ltd. v. Fairview Sheet Metal Works* (1994) 89 B.C.L.R. (2d) 18 (C.A.) the relevant clause read in part,

> "The insurer upon making any payment or assuming liability therefor under this Policy, shall be subrogated to all rights of recovery of the Insured against others and may bring action to enforce such rights. Notwithstanding the foregoing, all rights of subrogation are hereby waived against any corporation, firm, individual or other interest with respect to which insurance is provided by this Policy .....".

In both cases the Courts concluded the work product of the subcontractors or tradesmen in question was insured under the policy and that the waiver of subrogation therefore applied to prevent recovery.

3.3 Privity of Contract (Again)

In July 1995 the B.C. Supreme Court threw a potential spanner in the works by ruling in *Fraser River Pile & Dredge Ltd. v. Can-Dive Services Ltd.*, 9 B.C.L.R. (3d) 260 (B.C.S.C.), that

- the doctrine of privity of contract precludes a non-party to the insurance contract from enforcing a waiver of subrogation clause; and
- an "additional insured" under the policy likewise did not enjoy immunity from subrogated suit unless it could establish the "agency exception" to the doctrine of privity of contract (including the requirement of consideration flowing from the additional named or unnamed insured).

The action arose out of the sinking of a derrick barge owned by Fraser River and under charter to Can-Dive at the time of the loss. The standard "fleet" policy issued to Fraser River contained an "additional insureds clause" as well as a "waiver of subrogation clause" which provided in part as follows:

> "..... Permission is hereby granted for these vessels to be chartered and the charterer to be considered an Additional Insured hereunder. .....
>
> ..... The insurers waive any right of subrogation against:
>
> (b) any charterer(s) and/or operator(s) and/or lessee(s) and/or mortgagee(s)."

On October 27th, 1997 the B.C. Court of Appeal unanimously reversed the trial decision [1997] B.C.J. No. 2355 (Q.L.). Mr. Justice Esson referred to the *Commonwealth Construction* decision, *supra*, as,

> "..... A case in which the Court, having identified circumstances where it was commercially undesirable to allow subrogation, walked undeterred through the obstacles thrown up by the strict rule of privity."

He went on to comment,

> "Insurance law is a special area of contract law. Many general principles of contract law apply to contracts of insurance but are modified to deal with the particular problems inherent in insurance.",

and later after an extensive review of the *London Drugs* decision, *supra*,

> "..... On the *London Drugs* analysis, it is of first importance that the contract expressly or impliedly extend its benefit to the person seeking to rely on it. The second consideration justifying an incremental change was that, as a matter of policy, it was unjust and unfair for the employees, whose negligence in the course of their duties had caused the loss, to be liable to a greater extent than their employer. .....
>
> ..... Here, no burden is imposed on the third party. The insurer was paid its premium by the named insured. It has received full consideration for its promise to indemnify in the event of a loss. Having expressly agreed to waive subrogation, there is no realistic basis for its complaint

> that it is being deprived of its right to recover from the wrongdoer that which it has paid to its named insured. On the other hand, to paraphrase the language of Iacobucci J. at p. 441, upholding a strict application of the doctrine of privity in the circumstances of this case would have the effect of allowing the insurer to circumvent or escape the waiver of subrogation clause to which it had expressly consented. Similarly, to paraphrase his language at p. 440, recognizing a right for a third party beneficiary to rely on a waiver of subrogation clause will have little impact on the rights of contracting parties to rescind or vary their contracts. .....
>
> Having regard to the long line of authorities which have given effect to waivers of subrogation in favour of "strangers", that must be recognized as an established exception to the doctrine of privity."

There are now two Appellate decisions (*Fraser River*, *supra* and *Madison Developments*, *supra*) which have established an exception to the traditional doctrine of privity of contract in the context of insurance law, the former with respect to the enforcement of waivers of subrogation and the latter with respect to immunity arising from covenants to insure. In the Appeal Courts, at least, the judicial winds would seem to be blowing in favour of unnamed third party beneficiaries with respect to immunity from subrogation.

4. TORT IMMUNITY AND CLAIMS FOR CONTRIBUTION OR INDEMNITY

Each province has legislated rights of contribution or indemnity as between concurrent tortfeasors who may be jointly and severally liable for the Plaintiff's loss or damage. Generally speaking, this legislation provides that such concurrent tortfeasors are "liable to contribute to and indemnify each other in the degree to which they are respectively found to have been at fault": *Negligence Act*, R.S.B.C. 1996, c. 333, s. 4(2)(b).

The question therefore arises how such rights of contribution or indemnity are affected by any tortfeasor's immunity arising from a covenant to insure or a waiver of subrogation. Absent any contractual basis for a contribution or indemnity claim, two issues arise:

- Are the non-immune tortfeasors liable for 100% of the loss or is the Plaintiff's recovery "capped" or reduced by the percentage of fault attributable to the immune tortfeasor?

- If the former, can the non-immune tortfeasors enforce rights of indemnity or contribution against the tortfeasor who is immune from any claim directly by the Plaintiff?

There is a substantial body of conflicting case law addressing these very difficult issues and a detailed analysis is beyond the scope of this paper. However, caution must be exercised in extrapolating general principles from the cases since the precise wording of the contribution legislation varies from province to province.

The British Columbia *Negligence Act*, *supra*, speaks of "fault" as the basis for contribution or indemnity between tortfeasors. On the other hand, the legislation in Alberta and

Ontario requires *liability* as a precondition for contribution. For example, section 4(1) of Alberta's *Tortfeasors Act* provides:

> "4(1) Where damage is suffered by any person as a result of a tort, ...
>
> (c) any tortfeasor liable in respect of that damage may recover contribution from any other tortfeasor who is or would, if sued, have been liable in respect of the same damage, whether as a joint tortfeasor or otherwise ....."

If liability to the Plaintiff is the basis for contribution or indemnity between tortfeasors, then wrongdoers who are immune from such liability will not be exposed to claims for contribution or indemnity. Further, in such situations the Plaintiff will be able to recover 100% of its damages from the remaining tortfeasors who *are* liable (subject to any reduction on account of contributory negligence): *County of Parkland No. 31 v. Stetar* [1975] 2 S.C.R. 884, *Giffels Associates Ltd. v. Eastern Construction Co. Ltd.* [1978] 2 S.C.R. 1346, *Bow Valley Husky (Bermuda) Ltd. v. Saint John Shipbuilding Ltd.* [1997] S.C.J. No. 111.

As indicated, however, the British Columbia legislation talks of "fault" not "liability" as the basis for contribution or indemnity between tortfeasors. Does "fault" *mean* "liability"? If so, wrongdoers who are immune from liability to the Plaintiff will also be immune to contribution or indemnity proceedings by concurrent tortfeasors. If the two terms do not have the same meaning, however, then wrongdoers who are immune vis-a-vis the Plaintiff may nevertheless be liable for contribution or indemnity vis-a-vis concurrent tortfeasors.

In British Columbia, there has yet to be a ruling from the Court of Appeal specifically addressing this issue and the underlying trial decisions are at variance. A chronological list of the B.C. decisions which any researcher should review in this regard would include:

Westcoast Transmission Co. v. Interprovincial Steel & Pipe Corp. (1985) 60 B.C.L.R. 368 (S.C.)

Grewal v. District of Saanich [1986] 43 R.P.R. 207 (S.C.)

Boyton Holdings Ltd. v. Firm of Lawyers [1988] B.C.J. No. 1664 (S.C.)

Sylte v. Jackson Bros. Logging Co. (1988) 27 B.C.L.R. (2d) 357 (B.C.S.C.)

Cook v. Teh (1988) 28 B.C.L.R. (2d) 300 (S.C.)

Cook v. Teh (1990) 45 B.C.L.R. (2d) 194 (C.A.)

Wintrup v. Surrey [1988] B.C.J. No. 527 (S.C.)

Dureau v. Kempe-West Enterprises [1990] B.C.J. No. 1480 (S.C.)

Krusel v. Firth (1991) 54 B.C.L.R. (2d) 392 (B.C.S.C.)

Tucker v. Asleson (1991) 62 B.C.L.R. (2d) 78 (S.C.)

Tucker v. Asleson (1993) 78 B.C.L.R. (2d) 173 (C.A.)

Teachers Investment & Housing Cooperative v. Jennings [1991] B.C.J. No. 3597 (B.C.S.C.)

B.C. Cancer Agency v. Keen Engineering Co. Ltd. (April 21st, 1994) Vancouver Registry No. C924308 (S.C.)

B.C. Cancer Agency v. Keen Engineering Co. Ltd. #2 (November 18th, 1994) Vancouver Registry No. C924308 (S.C.)

B.C. Ferry Corp. v. T&N PLC (1995) 16 B.C.L.R. (3d) 115 (C.A.)

Welk v. Mantelli (1995) 5 B.C.L.R. (3d) 387 (S.C.)

British Columbia v. RBO Architecture [1996] 27 C.L.R. (2d) 26 (S.C.)

Laing Property Corp. v. All Seasons Display Inc., (2000) 79 B.C.L.R. (3d) 199 (B.C.C.A)

There is another, rather unusual, case that also deserves mention, namely, *Owners Strata Plan NW651 v. Becks Mechanical Ltd.* (1980) 20 B.C.L.R. 12 (S.C.). The case turns on the specific wording of the waiver of subrogation but the result was nevertheless radical. The policy was issued to the Strata Corporation and insured not only the corporation but also all owners of individual units. The waiver of subrogation provided,

> "It is agreed by the Insurer that all right of subrogation is waived under this policy if it is claimed that loss was occasioned by or caused by the act or neglect of the Strata Corporation, the Strata Council, any management corporation engaged to manage its affairs, the individual strata lot owners, and if residents of a strata lot owner's household, his spouse, the relatives of either and any other person under the age of 21 in the care of a strata lot owner, and any agents or employees of the strata corporation."

The claim was to recover certain fire losses caused by a negligent plumber. The Defendants commenced Third Party proceedings against an individual strata lot owner who was, of course, immune from a subrogated claim. The question before the Court was whether, in view of the Third Party proceedings and the specific language of the waiver of subrogation, the insurer was precluded from pursuing the litigation at all. The Court ruled,

- the Third Party proceedings represented a "claim that loss was caused by the act or neglect of a strata lot owner";
- the waiver was of "*all* subrogation rights" rather than rights against only certain persons; and hence
- the Third Party proceedings triggered the waiver and the lawsuit in its entirety had to be discontinued.

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Esson J. suggested the wording of the waiver and the result in the case made "commercial sense" as follows:

> "Insured persons, for good business reasons, may wish to avoid being embroiled in litigation resulting from the loss which their property insurance is intended to protect them against. They may well, to that end, stipulate for a broad restriction upon subrogation rights or, more likely, see the existence of that broad restriction as an attractive feature of this particular "package" of insurance. It is, presumably reflected in the premium."

All of these issues and all of the cases referred to above were argued before Lowry J. in *Laing Property Corp. v. All Season Display Inc.*, Vancouver Registry Nos. C957265/C943577/ C956076 (Feb. 4, 1998, B.C.S.C.). In that case, a fire started in the a mall and caused substantial damage not only to the mall but also to many of the mall tenants. The tenants did not pursue damage claims against the landlord because of the immunity arising from the covenants to insure contained in the lease agreements. However, the Defendants issued Third Party proceedings seeking contribution and indemnity from the landlord and its employees. The question squarely arose whether the immunity shielded the landlord and his employees from such Third Party proceedings, whether the tenants were nevertheless entitled to recover 100% of their damages from the tortfeasor Defendants and whether the institution of Third Party proceedings was a basis for halting the entire lawsuit.

The Court of Appeal upheld the BC Supreme Court ruling that the covenant to insure immunized the landlord from liability and that in light of such immunity, the landlord did not "contribute to any actionable loss" and hence the landlord was also immune from claims for contribution or indemnity under the *Negligence Act*. However, the Court of Appeal overruled the lower court with respect to the immunity of employees and extended the landlord's immunity to the employees on the basis that the covenant to insure was impliedly intended for their benefit.

Both levels of judgment are silent on the issue of whether the Plaintiffs can recover 100% of their loss from the Defendants notwithstanding the immunity of the landlord. However, inasmuch as both Courts expressly followed the Supreme Court of Canada decisions in *Giffels Associates* and *Bow Valley Husky*, *supra*, (both of which saw full recovery by the Plaintiff, less a deduction for any contributory negligence), there is at least an implicit endorsement of the concept of full recovery.

At the time of writing this article, no appeal from the *Laing Property* decision had been launched. However, such an appeal seems certain and, indeed, in light of the two recent appellate decisions which have established an exception to the traditional doctrine of privity of contract in the context of insurance law (*Fraser River*, *supra* and *Madison Developments*, *supra*) it is entirely possible the British Columbia Court of Appeal will adopt a less conservative approach and will extend the immunity to the employees, both with respect to liability generally as well with respect to contribution and indemnity proceedings.

5. CONCLUSION

It appears the Ontario and British Columbia Courts of Appeal are increasingly prepared to side-step the doctrine of privity of contract and bestow upon contracting and non-

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contracting parties alike liability immunity arising from covenants to insure in commercial agreements and waivers of subrogation in policies of insurance. Such immunity is a powerful, though often unrecognized, defence in any case where the parties to a contract have effectively agreed to limit recoveries to available insurance. The most recent decision confirming that this immunity extends beyond the Plaintiff's claims (subrogated or otherwise) to also deflect claims for contribution or indemnity by concurrent tortfeasors confirms that covenants to insure bestow a powerful immunity indeed.

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TORT IMMUNITY:
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TORT IMMUNITY:
COVENANTS TO INSURE AND WAIVERS OF SUBROGATION
CHRONOLOGICAL LISTING OF LEADING AND RECENT CASE LAW

CASE DESCRIPTION	ISSUES ADDRESSED		
	Covenant to Insure Immunity	Subrogation Waiver	Non-Contracting Beneficiaries
SUPREME COURT OF CANADA			
United Motor Services v. Hutson, [1937] S.C.R. 294	√		
Ross Southward Tire v. Pyrotech Products (1975), 57 D.L.R. (3d) 248	√		
Agnew-Surpass Shoe Stores Limited v. Cummer-Yonge Investments Ltd., [1976] 2 S.C.R. 221	√		
Ross Southward Tire Ltd. v. Pyrotech Products Ltd., [1976] 2 S.C.R. 35			
Commonwealth Construction Co. Ltd. v. Imperial Oil (1976), 69 D.L.R. (3d) 558		√	
T. Eaton Co. Ltd. v. Smith, [1978] 2 S.C.R. 749	√		
Greenwood Shopping Plaza v. Beattie, [1980] 2 S.C.R. 228	√		√
COURT OF APPEAL			
J. Clark & Son v. Finnamore (1972), 32 D.L.R. (3d) 236 (N.B.C.A.)		√	√
Mumford v. Casey Mercury Sales (1979), 108 D.L.R. (3d) 551 (N.S.C.A.)		√	√
Leung v. Takatsu (1980), [1992] 3 W.W.R. 129 (B.C.C.A.)	√		
Bow Helicopters v. Bell Helicopter Textron (1981), 125 D.L.R. (3d) 386 (Alta. C.A.)	√		
Majestic Theatres v. N.A. Properties (1985), 57 A.R. 210 (Alta. C.A.)	√		
Atlantic Shopping Centres v. CNR (1985), 40 R.P.R. 185 (N.B.C.A.)	√		

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CASE DESCRIPTION	ISSUES ADDRESSED		
	Covenant to Insure Immunity	Subrogation Waiver	Non-Contracting Beneficiaries
Seig Estate v. Alta Public Trustee, [1990] 3 W.W.R. 191 (Alta. C.A.)	√		
CP Ltd. v. Base-Fort Security (1991), 48 C.C.L.I. 22 (B.C.C.A.)		√	√
Sylvan Industries v. Fairview Sheet Metal Works (1994), 89 B.C.L.R. (2d) 18 (C.A.)		√	
N.W. Metal & Salvage v. Alltar Roofing Ltd. (1994), 25 C.C.L.I. (2d) 116 (Alta. C.A.)	√		
St. Lawrence Cement Inc. v. Wakeham & Sons (1995), 26 O.R. (3d) 321 (Ont. C.A.)	√		
Madison Developments Limited v. Plan Electric Co. (1997), [1998] I.L.R. 1-3493 (Ont. C.A.)	√	√	√
Fraser River Pile & Dredge v. Can-Dive Services, [1997] B.C.J. No. 2355 (Q.L.)		√	√
Tony and Jim's Holdings Ltd. v. Silva, [1999] 11 C.C.L.I. (3d) 117 (Ont. C.A.)	√	√	
Laing Property Corp. v. All Seasons Display Inc., [2000] 21 C.C.L.I. (3d) 92 (B.C.C.A.)	√		

TRIAL DECISIONS

B.C.

Owners Strata Plan NW651 v. Becks Mechanical (1980), 20 B.C.L.R. 12 (S.C.)		√	√
Matthews v. Andrew (1986), 1 B.C.L.R. (2d) 114 (S.C.)	√		
Yale Properties v. Pianta, [1987] I.L.R. 1-2222 (B.C.S.C.)	√		
Ruge v. Kennedy (1991), 6 C.C.L.I. (2d) 159 (S.C.)	√		
Rebello v. Nugget Equipment (1997), 41 C.C.L.I. (2d) 256 (S.C.)	√		
Perlitz v. Nan, [1997] B.C.J. No. 2605 (S.C.)	√		
Laing Property Corp. v. All Seasons Display Inc. (2000), 79 B.C.L.R. (3d) 199 (C.A.)	√		√

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CASE DESCRIPTION	ISSUES ADDRESSED		
	Covenant to Insure Immunity	Subrogation Waiver	Non-Contracting Beneficiaries
B.C. Gas Inc. v. Spie Construction Inc., [1999] 8 C.C.L.I. (3d) 75 (B.C.S.C.)	√		
OTHER			
Canbra Foods v. C & L Transport, [1981] I.L.R. 1-1355 (Alta. Q.B.)		√	
Timcon Construction Ltd. v. Riddle, McCann, Rattenbury & Associates (1981), 16 Alta. L.R. (2d) 134 (Q.B.)		√	
L & B Construction v. NCPC, [1984] 6 W.W.R. 598 (N.W.T.S.C.)	√		
Jarski v. Schmidt (1987), 26 C.C.L.I. 94 (Ont. D.C.)	√		
L & M Standard Industries v. Cooper Industries, [1992] N.S.J. No. 452 (N.S.S.C.T.D.)	√		√
Brandy Tree Shoppes v. Westown Plaza (1993), 20 C.C.L.I. (2d) 4 (O.C.J.G.D.)		√	
Esagonal Construction v. Traina (1994), I.L.R. 1-3091 (O.C.J.G.D.)		√	√
Sherrit Gordon v. Dresser Canada (1994), 16 C.L.R. (2d) 121 (Alta. Q.B.)		√	
Stuart Olson Construction v. Allan Forrest Sales (1994), 28 C.C.L.I. (2d) 185 (Alta. Q.B.)		√	√
Western Drill-Dredging v. Suncor (1994), 28 C.C.L.I. (2d) 134 (Alta. Q.B.)	√		
Earl Redmond v. Blair LaPierre Inc. (1995), 27 C.C.L.I. (2d) 201 (P.E.I.S.C.)		√	√
Weldwood of Canada v. Gisborne Construction (1995), 32 C.C.L.I. (2d) 121 (Alta. Q.B.)	√		
Imperial Crown Investment v. Canada Custom Shutters (1995), 33 C.C.L.I. (2d) 80 (O.C.J.G.D.)	√		
Janeland Developments v. Michelin Masonry, [1996] I.L.R. 1-3298 (O.C.J.G.D.)	√	√	√
Peel Condominium Corp. v. Vaughan (1996), 34 C.C.L.I. (2d) 245 (O.C.J.G.D.)		√	√

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CASE DESCRIPTION	ISSUES ADDRESSED		
	Covenant to Insure Immunity	Subrogation Waiver	Non-Contracting Beneficiaries
Wasserman Interiors v. Centre City Capital (1996), 35 C.C.L.I. (2d) 192 (O.C.J.G.D.)	√		
Independent Tank Cleaning v. Zabokrzycki (1997), 41 C.C.L.I. (2d) 141 (O.C.J.G.D.)	√		
Sin v. Mascioli (1999), 8 C.C.L.I. (3d) 39 (Ont. C.A.)			√
Tom & Jim's Holdings v. Silva (1999), 11 C.C.L.I. (3d) 117 (Ont. C.A.)	√		√
Cilento-Gallace v. Mufuta (1999), 240 A.R. 3 (Alta. Q.B.)	√		
National Trust Co. v. Allan (1999), 15 C.C.L.I. (3d) 123 (Man. Q.B.)	√		√
Daishowa-Marubeni International Ltd. v. Toshiba International Corp. (2000) 28 C.C.L.I. (3d) 309 (Alta. Q.B.)		√	
Key Property Management 1886 Inc. v. Portokalis 2000 O.J. No. 990 (Ont. S.C.J.)	√		
529198 Alberta Ltd. v. Thibeault Masonry Ltd. 2001 ABQB 1108	√		

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