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WHO'S ON THE RISK (AND FOR HOW MUCH?): Allocating And Apportioning Indemnity And Defence Costs Among Insurers In Canada (v. 2007)

Executive Summary

by

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Executive Summary[*]

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I. INTRODUCTION

A surprising number and variety of losses may be covered by more than one policy of insurance. The result is that, on more occasions than might have been thought, one insurer may obtain from others partial or even complete recovery of its costs of resolving a claim.

II. HOW "OTHER INSURANCE" ISSUES ARISE

There are a wide variety of circumstances in which more than one policy of insurance may respond to the same risk. Four contexts in which overlapping coverage commonly occurs are as follows:

1. by design;
2. by coincidence;
3. through the inadvertent purchase of overlapping policies; and
4. in progressive injury cases, such as environmental injury.

III. HOW AN INSURER CAN OBTAIN ITS FAIR SHARE

The main focus in this paper is contribution. However, there are other methods for insurers to ensure that they pay only their fair share of a given loss. Collectively, the four methods available for recovery between and among insurers are as follows:

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[*] This is an executive summary of a published paper by the author, updating the same to incorporate subsequent developments in the law. The original, full-length version appeared in the Canadian Journal of Insurance Law, Volume 12, Nos. 4-6 (November-December 1994). This summary was prepared with the able assistance of Jonathan L.S. Hodes, who was co-counsel with the author in the *Family v. Lombard* decision of the Supreme Court of Canada, referred to herein.

1. Contribution

Equitable contribution can be described as a manner of preventing double recovery by ensuring that each insurer which has covered the same loss shares the indemnity in an equitable manner. The method of apportioning the loss among insurers will depend on the facts of each case.

2. Subrogation

The basic principle of subrogation is that an insurer that has paid a loss is entitled to step into the shoes of its insured and seek recovery from the responsible parties for their share of the loss. Historically, subrogation has been the method of recovery most commonly used by insurers.

3. Restitution

Restitution is a technique for placing a party in the position in which it would have been had the wrongful conduct of another not occurred. An example of this technique for enforcing the equitable obligations of one insurer to another can be found in *Aetna Insurance Co. v. Canadian Surety Co*,[1] where one insurer paid out a loss following another's wrongful denial, and sued for recovery.

4. Rectifying Or Voiding The Insurer's Own Policy

In at least two cases, insurers have taken the somewhat novel approach of seeking to rectify or even void the coverage which they had underwritten to avoid any obligation to contribute. See, for example, *Guardian Insurance Co. of Canada* v. *The Hartford Insurance Group*,[2] and *Protection Mutual Insurance Co.* v. *Beaumont*.[3]

IV. OVERLAPPING COVERAGE - WHAT IT IS AND IS NOT

The threshold question when determining whether one insurer should contribute towards a loss covered by another is whether the coverage afforded by each insurer does, in fact, overlap. Although the text-writers differ somewhat in their descriptions,[4] the requirements for "overlapping" or "double" insurance may be summarized as follows:[5]

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1 (1991) 2 C.C.L.I. (2d) 215 (Alta.Q.B.), reversed in part on appeal [1994] W.W.R. 63 (C.A.); see also *Federal Fire Insurance Co. of Canada v. McCabe*, [1981] I.L.R. 1-1388 (Ont. Co. Ct.), [1982] I.L.R. 1-1551 (C.A.)

2 [1992] ILR 1-2881 (NSSC), aff'd [1993] ILR 1-2936 (NSCA)

3 (1989), 40 CCLI 303 (BCSC), aff'd (1991) 58 B.C.L.R. (2d) 290 (CA)

4 see particularly Ivamy, E.R., General Principles of Insurance Law, (5th Ed.), 1986, Butterworths, London, pp. 488-92, and MacGillivray & Parkington, On Insurance Law, (7th Ed.), 1981, Sweet & Maxwell, London, pp. 709-15

5 *Family Insurance Corp. v. Lombard Canada Ltd.*, [2002] 2 S.C.R. 695

A. The Policies Must All Insure the Subject Matter of The Loss

Most of the cases and texts concur that it is not necessary for all of the overlapping policies of insurance to cover the identical subject matter or, in the case of property insurance, exactly the same property (although it has been queried whether this requirement is satisfied if the policies substantially overlap but nevertheless do not cover the identical subject matter[6]).

When there is complete overlap in coverage, policies are referred to as being "concurrent". If there are differences, for example, in subject matter, they are known as "non-concurrent". Generally speaking, only some portion of the loss must be insured by more than one policy in order for contribution to be available for at least the common part of the loss, and non-concurrent policies will still be found to overlap.

While some courts in the United States and the Commonwealth consider that general (i.e. covering many risks) and specific (i.e. covering specific property or risks) policies which both cover the same loss are not "other insurance" to each other[7] this approach was expressly rejected by the Supreme Court of Canada in *Family Insurance Corp.* v. *Lombard Canada Ltd.*[8]

Consider, for example, the increasing number of coverage overlaps, in both property and casualty contexts, as a result of the Supreme Court of Canada's decision in *Derksen* v. *539938 Ontario Ltd.*[9] As concurrent causation limits or eliminates the effect of exclusion clauses (such as those for "ownership, use or operation of a motor vehicle" in general liability policies), the number and frequency of contribution cases in Canada has increased accordingly (ex. *Taylor* v. *Maris*).[10]

Nevertheless, the legislatures of various provinces have, in the context of certain types of policies, adopted the very approach which was rejected by the Supreme Court of Canada, and made specific policies respond as primary and general ones as excess. This approach governs only with respect to automobile, fire and the other types of coverage governed by the provincial the *Insurance Acts*.

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6 *North British & Mercantile Insurance Co. v. London, Liverpool & Globe Insurance Co.* (1877), 5 Ch.D. 569 (C.A.)

7 Baldwin, Shaun McParland and Midkiff, Dawn, Apportioning Indemnity and Defense Costs: The "Other Insurance" Clause and Other Theories of Allocation, copyright 1993 and presented by Shaun M. Baldwin at the "Insurance Coverage and Practice Symposium" sponsored by the Defence Research Institute, held on June 10-11, 1993, at the Westin St. Francis Hotel, San Francisco, California at pp. 20-1

8 *Supra*, note 5

9 [2001] 3 S.C.R. 398

10 [2004] B.C.J. No. 1431

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B. Policies Must All Have Been Taken Out By or On Behalf of the Same Insured

In order for contribution to arise, the policies must also have been taken out by or on behalf of the same insured,[11] in the sense that all of the insurance must be for the benefit of the same person. It should be noted that it is possible that a given policy was intended to benefit someone other than the named insured, such that it overlaps with a policy held by that other person.[12]

It has been stated that in addition to benefiting the same person, each of the policies must have been taken out with both the authority (in the sense that the overlapping policy of insurance cannot have been effected on the insured's behalf by the "wholly unauthorized act of a stranger without his knowledge."[13]) and with the knowledge of that insured. Both can be implied.

Alternatively, if the "other" insurance was unauthorized or unknown to that person, it may still be ratified by him or her, thereby creating an overlapping coverage situation.

C. The Policies Must all Cover the Same Interest in the Loss

In addition to covering the same subject matter and insured, the policies must also insure the same interest in the loss.[14] Although the same property may be insured, the insureds may have different interests in the property, in which case the policies may not truly insure the same "subject matter".

The "same interest" can be described as a situation "where it is an insurance by the same person having the same rights, and [not] where different persons insure in respect of different rights.[15]

Policies generally will overlap when the intention of the parties, as evidenced by the terms of the various policies, or otherwise, is that all of the insurance was intended to cover the largest interest in the property in question. Extrinsic evidence may be necessary in this regard. Generally speaking, the cases suggest that once authority has been granted, or an agreement to insure is entered into, the policy which is taken out will be presumed to cover all of the parties' interests in the subject property. As such, it will by definition cover the "same interests" as any policy taken out by the other person.

D. The Policies Must all Cover the Same Risk or Peril

In order to establish a right of contribution, each policy must insure the same subject matter, insured and interest against the risk or peril which caused the loss. If not, the

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11 *Clarke v. Fidelity-Phoenix Fire Insurance Co. of New York* (1926), 1 DLR 303 (CA)

12 *Portavon Cinema Co. Ltd. v. Price and Century Co. Insurance Co. Ltd.*, [1939] 4 All E.R. 601 (KB)

13 *Morrow v. Lancashire Insurance Co.*, [1899] O.J. No. 19 at 381

14 *Supra*, note 11 at 150

15 *Supra*, note 6 at 583

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coverage does not overlap. However, variations in the several policies as to the extent of liability do not necessarily vary the risk. The Supreme Court decision in *Derksen* also bears on this requirement. However, clearly the coverage afforded under a liability policy does not overlap with that under a property policy.[16]

E. Policies Must be Valid Contracts of Insurance in Effect at Time of Loss

In order to constitute overlapping or "double" insurance, a policy must be valid and effective at the time of the loss , and all policies must provide the same level of coverage (i.e. primary or excess), such that they will all respond to the same portion of the loss.[17]

If the same level of coverage is provided, all that is required is payment of the premium.[18] While is not necessary for a policy to have actually been issued (an interim receipt or binder will suffice[19]), overlapping coverage will remain in place until it is formally cancelled; and a mere intention to abandon one of the other policies of insurance will not be sufficient to invalidate the coverage.[20] In fact, the "other insurance" may even be voidable so long as it remained valid as of the date of the loss. Note, however, that an insurer may entirely avoid any obligations which it might otherwise have had to contribute by obtaining a declaration that its policy was void *ab initio*.

In addition to the traditional forms of other insurance, certain non-traditional compensation schemes (such as government crop insurance[21] or a mortgage forgiveness plan[22]) have been held to constitute valid "other insurance".

F. Policies Must Not Contain Provisions Which Exclude Them From Coverage

The last requirement is that none of the insurance policies contain provisions which exclude them from coverage and thereby eliminate the overlap. The most common of these provisions if the "other insurance" clause, which generally contains wording to the effect that if the insured has other insurance, the policy becomes either void, or more frequently, an excess policy. The types of such clauses vary significantly, in terms of their wording and effect.

Other types of provisions that can operate to exclude a policy from contribution are standard exclusion clauses, which eliminate the overlap by excluding the loss from coverage under one of the policies, or the coverage provisions of "claims made" policies (see *St. Paul Fire*

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16 *Lumberman's Underwriting Alliance & AXA Pacific Insurance Co.*, (2006) 39 C.C.L.I. (4th) 248 (B.C.S.C.)

17 *Manufacturers Life Insurance Co. v. Canadian General Insurance Co.*, [1989] ILR 1-2394 (BCSC)

18 *Equitable Fire & Accident Office Limited v. Hong*, [1907] AC 96 (PC)

19 *Greet v. Citizens' Insurance Co.* (1879), 5 O.A.R. 596, *Hatton v. The Beacon Insurance Co.* (1858), U.C.Q.B. 316 (C.A.), *Manitoba Insurance,infra*, and *Mason v. The Andes Insurance Co.*, [1873] C.P. 37

20 *Manitoba Insurance Co. v. Whitla*, (1903) Can. S.C. 191

21 *George A. Demeyere Tobacco Farms Ltd. v. Continental Insurance Co.* (1984), 9 D.L.R. (4th) 734 (Ont.S.C.), affirmed (1986) 25 D.L.R. (4th) 480 (C.A.)

22 *State Farm Fire and Casualty Company v. New Brunswick Housing Corporation* (1982), 141 DLR (3d) 12 (NBCA)

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and Marine Insurance Co. v. *Guardian Insurance Co. of Canada*[23], and *Reid Crowther & Partners Limited* v. *Simcoe & Erie General Insurance Company*[24]). Breach of a condition under one policy, prior to the loss in question, may also eliminate what would otherwise be an overlap in coverage.[25]

As noted, however, the *Derksen* decision on concurrent causation has eroded the effect of cause-based exclusions (ex. "ownership, use or occupation of a motor vehicle"), thereby increasing the frequency of coverage overlaps.

V. "OTHER INSURANCE" CLAUSES

Many insurance policies contain provisions which are expressly intended by the insurers to govern contribution between and among carriers in the event of overlapping coverage. These are what have been referred to above as "other insurance" clauses, and purport to determine which insurer is to contribute towards a given loss and to what extent, in the event that "other insurance" exists.

"Other insurance" clauses, may be usefully categorized as follows:

A. "*Pro Rata*" Clauses

The purpose of a "*pro rata*" clause is to ensure that, if there is other insurance for a loss, then each of the policies will only contribute a rateable proportion. Some such clauses will provide for contribution by reference to the limits of the policies, and others on the basis of equal sharing up to the lowest limit. Some will provide for the use of alternative methods of apportionment, in different circumstances. Still others will not specify any basis for contribution, whether by policy limits or equal shares. There is still some uncertainty as to whether contribution is by "limits" or "equal shares to limits", in the case of an unspecified *pro rata* clause, although the decision in *Family* v. *Lombard* has somewhat reduced this uncertainty.

B. "Excess" Clauses

The purpose of an "excess" clause is, in effect, to designate the other insurance as providing "primary" coverage, with the policy containing the clause being "excess" in nature. So-called "super" excess clauses are intended to ensure that the policy in question provides coverage which is excess to all other insurance, including what might otherwise be considered as

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23 [1982] I.L.R. 763 (Ont.S.C.), affirmed (1983) 2 C.C.L.I. 275 (C.A.)

24 [1990] I.L.R. 1-2642 (Man.Q.B.), over-turned on appeal [1992] I.L.R. 1-2703 (Man.C.A.), and appeal to Supreme Court of Canada dismissed [1993] I.L.R. 1-2914 (S.C.C.)

25 *Burton v. The Gore District Mutual Fire Insurance Co.*, [1865] C.R. 156, *Clarke*, *supra* note 11, *Dempster v. Co-operative Fire & Casualty Co.* (1980), 70 A.P.R. 252 (N.B.Q.B.), *Industrial Development Bank v. Fayad* (1976), 71 D.L.R. (3d) 152 (Alta. C.A.), *J.S. MacMillan Fisheries Ltd. v. Sovereign General Insurance Co.*, [1994] B.C.J. No. 428 (S.C.), *Jutras v. Sun Alliance Insurance Co.* (1983), 4 C.C.L.I. 184 (N.B.Q.B.), *Morrow v. The Lancashire Insurance Co.* (1898), 2 O.R. 377 (Q.B.), affirmed (1898) 2 O.A.R. 173 (C.A.), *Nichols v. Scottish Union and National Insurance Co.*, (1885) 2 T.L.R. 190, and *North British & Mercantile*, *supra*, note 6

"true" excess policies (see, ex. *Trenton Cold Storage Ltd.* v. *St. Paul Fire & Marine Insurance* [26]).

C. "Escape" Clauses

The purpose of an "escape" clause is quite different from that of *pro rata* or excess provisions. It purports not merely to limit liability, but to completely avoid the obligation to contribute, whether as primary or excess coverage, in the event of other insurance. As with "excess" provisions, there can be "super" clauses which seek to avoid contribution if there is any other insurance, be it primary or excess. Escape clauses can be thought of as exclusion clauses which eliminate coverage in the event that other insurance exists.

D. Excess Escape

Another category of clause, which can be considered a variant of the "escape" clause,[27] but that some of the American cases discuss separately,[28] is the "excess escape" clause, which is a hybrid of its two namesakes. There are at least two types of such clause, one of which is an alternative "escape" or "excess" clause, and the other of which would never entirely avoid liability. The latter clause would simply ensure that the coverage provided is not merely excess, but is further limited to the difference between the policy limits between it and the other coverage provided. In other words, the second type of "excess escape" clause seeks to ensure that any contribution is both on an excess basis, and for an amount less than the policy's own limits.

E. Tailor-Made Policies

A number of the cases considered "tailor-made" other insurance clauses.[29] See, for example, *Grewal* v. *Mutual of Omaha Insurance Co.*[30] The *contra proferentem* rule has tended to limit the effect of such clauses.

VI. SHARING THE OBLIGATION TO INDEMNIFY

Until recently, some Canadian courts have looked beyond the policies themselves to determine the intention of the parties with respect to allocation and contribution. However, in the Family case, the Supreme Court of Canada held against admitting extrinsic evidence, and decided the case based on the wordings of the two clauses alone.

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26 [2001] O.J. No. 1835 (C.A.)

27 Baldwin & Midkiff, at pp. 17-18

28 see for example *Liberty Mutual insurance Co. v. Harbor Insurance Co.*, 603 A.2d (R.I. 1992)

29 for example, *Demeyere v. Continental Insurance Co.*, note 20, *Pacific Employers Insurance Co. v. Lloyd's* (1990), 43 C.C.L.I. 305 (B.C.S.C.), aff'd (1990) 45 C.C.L.I. 42 (C.A.), and *Tinmouth v. La Groupe Desjardins, Assurances Generales* (1986), 19 C.C.L.I. 268 (Ont.H.C.), aff'd (1988) 64 O.R. (2d) 352 (C.A.)

30 (1988), 31 C.C.L.I. 221 (B.C.S.C.), aff'd (1989) 37 C.C.L.I. 239 (C.A.)

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A. Reconciling "Other Insurance" Clauses

The most common fact patterns involving "other insurance" clauses are as follows:

1. none of the policies contain "other" insurance clauses;

2. one policy contains such a clause, but the others do not;

3. all of the policies contain similar clauses (i.e. "excess" versus "excess"; etc.); and

4. the policies contain different clauses (i.e. "*pro rata*" versus "excess"; etc.).

1. No "Other Insurance" Clauses

The general rule in the United States is that, where none of the overlapping policies contain "other" insurance clauses, any loss should be shared according to the "maximum liability" or "by limits" method, in the proportion that the limit of liability under each policy bears to the aggregate limits of all of the available coverage.[31] In Canada, while such cases will result in *pro rata* contribution, this will be according to the "independent liability" or "equal shares to limits" methods.[32]

2. One Policy With Clause And Others Without

The American rule in these cases is that the other insurance clause will be given effect to where one policy contains such a clause and the others do not.[33] The law is much the same in Canada, although there have been a number of cases where the effect of an other insurance clause was avoided by finding that the parties to one of the policies did not intend there to be "double" insurance. This is in addition to cases where the clauses were held, on their terms, not to be effective.

3. Similar Clauses In Each Policy

Where primary policies contain similar other insurance clauses, the general rule in the United States is that the clauses cancel each other out and the policies contribute rateably, and usually according to the maximum liability method.[34] However, there is some divergence from this rule, in both the American and Canadian cases, depending on whether the clauses in question are *pro rata*, excess or escape.

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31 Baldwin and Midkiff , p. 21

32 *Supra* note 5 at para. 43

33 Baldwin and Midkiff, pp. 21-2

34 Baldwin & Midkiff, pp-22-6

Pro Rata vs. Pro-Rata

The leading Commonwealth case on similar *pro rata* clauses is *Commercial Union Insurance Co. v. Hayden*[35] where the English Court of Appeal held that where there were two unspecified clauses (i.e. that did not provide for apportionment either by limits or in equal shares), the policies should contribute in equal shares to the first policy limits to be reached (the "independent liability" or "equal shares" method). This case was followed by the Supreme Court of Canada in *Family*.[36]

One pre-*Family* case involving similar *pro rata* clauses was resolved by quite a different finding, namely, that the insured did not intend to have more than one insurance policy at any given time. See *Tinmouth v. La Groupe Desjardins, Assurances Generales*.[37] However, the same may no longer be good law, in light of *Family*.

Excess vs. Excess

Where each policy contains an excess clause, the general rule is that the competing clauses cancel each other out, resulting in a *pro rata* contribution. See *Family*, *Dominion of Canada General Insurance Co. v. Wawanesa Mutual Insurance Co.*[38] and *Evans v. Maritime Medical Care Inc.*[39]

However, there have been at least a half dozen other Canadian decisions of significance on this point, which were resolved either at the trial or appellate level on the basis that the parties did not intend the insurance policies to overlap. Some of these are now of questionable authority, post-*Family*.

The *St. Paul* Decisions

The first of these cases is *St. Paul Fire and Marine Insurance Co. v. Guardian Insurance Co. of Canada*[40] which involved professional liability coverage for a law firm. The periods of the St. Paul and Guardian policies overlapped at the time when the claims first came to the attention of the insureds.

The terms of both policies extended coverage to professional services, such as those in question, which were performed prior to the effective date of the insurance. Both policies were written on a claims-made basis, and each policy included both coverage provisions and an "excess" clause. However, the wording of the two clauses were not identical.

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35 [1977] Q.B. 804 (C.A.)

36 *Supra* note 5 at para. 42

37 *Tinmouth, supra* note 28

38 (1985), 16 C.C.L.I. 69 (B.C.S.C)

39 (1991), 6 C.C.L.I. (2d) 101 (N.S.S.C.), reversed on appeal (1991) 6 C.C.L.I. (2d) 112 (C.A.)

40 [1982] I.L.R. 763 (Ont.S.C.), affirmed (1983) 2 C.C.L.I. 275 (C.A.)

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The Ontario Court of Appeal noted the agreement of counsel that this was not a case of "double insurance" or "overlapping coverage" since the "other insurance" clauses in the policies were not identical. The Guardian policy provided that its coverage was only excess if the other "valid and collectible insurance" was not excess. The St. Paul policy specifically provided that its coverage, with respect to a prior professional services, was excess. The Court therefore held that St. Paul was liable under its policy to the limit of the coverage provided by it, and Guardian was liable for any excess amount (up to its policy limit) over and above "any other valid and collectible insurance", being that provided by the St. Paul policy.

The reasoning of the Ontario Courts in the *St. Paul* decision is flawed in at least two respects. First, there **was** "overlapping coverage". Second, and more significantly, the intention of the parties could, and should have been ascertained from the wording of the other insurance clauses themselves. Both of the clauses referred to "other valid and collectible insurance". However, the Guardian policy provided that it "shall apply only as excess insurance" in the event that the other policy provides "insurance **other than** excess insurance" (emphasis added). As such, the two clauses ought to have been reconciled on the basis that since the St. Paul coverage did purport to be "excess", the Guardian "excess" clause was never engaged, and that policy ought to have remained primary.

Healy v. Prefontaine

The decision of the Alberta Court of Queen's Bench in *Healy v. Prefontaine*,[41] is perhaps less questionable than *St. Paul*, but may also have been implicitly overruled by *Family*. In *Healy*, the parties each owned a condominium. The plaintiff sued for damage to his property resulting from water which leaked into his unit from that owned by the defendant. Guardian was the liability insurer for the strata corporation of which both Healy and Prefontaine were members. Prefontaine had liability coverage with Laurentian Pacific. The by-laws of the strata corporation required the board to obtain and maintain public liability insurance insuring both the board and the owners, such as Healy and Prefontaine.

The Court held that Guardian was the primary insurer, and referring to both the *Seagate Hotel Ltd. v. Simcoe & Erie General Insurance Co.*[42] and its reference to Couch's text,[43] held that the intent of the insurers, ostensibly as manifested by the terms of the policies which they had issued, was controlling. It was noted that in such cases, the Court is not asked to interpret a contract made between the appellant and the respondent companies, but two contracts of insurance, one between the appellant and the insured and the second between the respondent and the insured.

While the result in *Healy* may be correct, it is noteworthy that, having cited Couch for the proposition that it is the intent of the insurers which controls, the Court referred firstly to the intention of the insured strata corporation, and only secondly to that of the two

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41 (1989), 43 C.C.L.I. 117 (Alta.Q.B.)

42 [1980] I.L.R. 1-1286 (B.C.S.C.), affirmed [1982] I.L.R. 1-1470 (C.A.)

43 *Ibid.* at 119-20

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insurers. This is only one of a number of instances in which a Canadian court has referred to the intention of the insured in order to determine the rights of their insurers to contribution. Fortunately, this issue has been put to rest by the Supreme Court's decision in *Family*,[44] in which the B.C. Court of Appeal had fallen into such error.

The Decisions in *Simcoe & Erie v. Kansa* and *McGeough*

Simcoe & Erie General Insurance Co. v. Kansa General Insurance Company[45] involved overlapping liability policies. Pursuant to a contract with Canadian Pacific and others, B.C. Rail obtained professional liability insurance in the amount of $5 million from Simcoe & Erie and excess insurance from Zurich for an additional $20 million. Canadian Pacific had its own insurance with Kansa. Both policies contained excess other insurance clauses. A loss occurred, and Simcoe & Erie sought contribution from Kansa. The trial Court held that Simcoe & Erie's policy provided primary coverage.

The B.C. Court of Appeal took a very different view, holding that the liability of the insurers is to be determined by the intent of the two insurers as revealed by the content of the policies issued by them, and that the intent of the insured is not relevant[46]. This intent was that each would provide primary insurance. The excess clauses therefore cancelled each other out. Simcoe & Erie has now been cited with approval by the Supreme Court of Canada in *Family*,[47] and followed by the New Brunswick Court of Appeal.[48]

A mere 8 days before the BC Court of Appeal's ruling in *Simcoe & Erie v. Kansa*, a different panel of the Court did the same thing in *McGeough v. Stay 'N Save Motors Inns Inc.*[49] In that case, the plaintiff slipped and fell in a motel parking lot, while on her way to a restaurant. The motel had a liability policy, as did the restaurant (naming the motel as an additional insured). Each policy contained an "excess" "other insurance" clause.

The Court of Appeal expressly followed *Seagate Hotel* and concluded that the "other insurance" clauses in the two policies were irreconcilable, each purporting to be excess to the other, and therefore cancelled each other out.[50]

Canadian Indemnity Co. v. Security National Insurance Co.

The last of these cases involved three insurers.[51] The insured, Mr. Braybrook owned a sailboat and a boat trailer, and drove a company car. The Saskatchewan Government

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44 *Supra* note 5 at para. 17

45 (1992), 40 C.C.L.I. (2d) 142 (B.C.S.C.), reversed [on] appeal (1994) 26 C.C.L.I. 135 (C.A.)

46 *Ibid.* at 145-6

47 *Supra* note 5

48 *Guardian Insurance Co. of* [Canada] *v. New Hampshire Insurance Co.*, [1999] ILR 1-3681

49 (1993), 17 C.C.L.I. (2d) 261 (B.C.S.C.), reversed (1994) 25 C.C.L.I. (2d) 165 (C.A.)

50 *Supra* note 41 at 176-7

51 [1994] W.W.R. 539 (Sask. Q.B.)

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Insurance Office ("SGI") provided him liability coverage as a driver, to the basic limit of $200,000. Canadian Indemnity provided excess insurance for the car, to Braybrook as the driver, and his employer, as the owner, in the amount of $1 million. Security National provided Braybrook with liability coverage, pursuant to a policy of group insurance, with limits of $200,000. The Security National policy excluded coverage with respect to automobiles or trailers. The SGI and Canadian Indemnity policies expressly included coverage "arising from the ownership, use or operation of the vehicle". By statute, SGI's liability was to be determined "as if no other insurance was in effect". The Canadian Indemnity and Security National policies each included a form of "excess" "other insurance" clause.

Mr. Braybrook decided to load the sailboat onto the trailer from a nearby beach, where there were power lines. He drove the car, pulling the trailer and sailboat to level ground. The mast struck one of the overhead lines, killing Braybrook and severely injuring his friend. The friend extracted a $325,000 settlement from Braybrook's estate. Of this SGI paid the basic $200,000 liability coverage limits and Canadian Indemnity paid the balance. Those two insurers then sued Security National for contribution.

The Court held that Security National should not be required to contribute.[52] While the requirement for overlap in perils insured was not specifically referred to, this is likely what led the Court to the conclusion it came to.

Escape vs. Escape

Similarly to the cancelling out of excess clauses, escape clauses have also been held to cancel each other out, resulting in *pro rata* contribution. See, for example, *Weddell v. Road Transport and General Insurance Co. Ltd.*,[53] an often cited decision of the English Court of King's Bench.

4. Dissimilar Clauses

The "majority" approach to dissimilar other insurance clauses in the United States is to attempt to reconcile them in order to give effect to the intent of the parties. Indeed, this approach has now been universally adopted in Canada, following the decisions in *Family* and *Canadian Universities' Reciprocal Insurance v. Halwell Mutual Insurance Co.*[54]

The result of this rule will vary depending upon whether the conflict is between *pro rata* and excess, *pro rata* and escape, and excess and escape clauses.

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52 *Ibid.* at 601

53 [1932] 2 K.B. 563

54 (2002) 62 OR (3d) 313 (CA)

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(a) "Pro rata" vs. "Excess"

When dealing with a pro-rata clause versus an excess clause, the excess clause prevails, in that the policy with the *pro rata* clause is primary and responds first.[55]

(b) "*Pro rata*" vs. "Escape"

The general rule provides that an escape clause takes precedence over a *pro rata* clause, such that the *pro rata* policy is deemed primary and the escape clause does not contribute.[56] See *National Employer's Mutual General Insurance Association Ltd.*,[57] and *Demeyere Tobacco Farms Ltd. v. Continental Insurance Co.*[58]

(c) "Excess" vs. "Escape"

The United States approach is that excess clauses generally prevail, such that the policy with the escape clause is deemed to be primary.

An example of the Canadian approach can be found in *Manitoba Public Insurance Corp. v. Scottish & York Insurance Co.*,[59] where the Manitoba Court of Queen's Bench held that the "null and void" wording of the defendant's escape clause operated to make the plaintiff's coverage primary. See also *Evans v. Maritime Medical Care*.[60]

A good recent example of a Canadian court applying *Family v. Lombard* to three policies and their various "other insurance" clauses is the Ontario trial decision in *McKenzie v. Dominion of Canada*.[61]

Summary of The Law as it Presently Stands

The Supreme Court of Canada's decision in *Family* has essentially settled the law in terms of competing "excess" clauses, and has gone a long way towards establishing a set of principles governing competing "other insurance" clauses of all types.

A useful summary of the principles to be derived from that case can be found in the Ontario Court of Appeal's decision in *Canadian Universities' Reciprocal Insurance v. Halwell Mutual Insurance Co.* where the Court held as follows:[62]

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55 Baldwin & Midkiff, p. 27; and *McKenzie v. Dominion*, infra note 61

56 Baldwin & Midkiff, p. 28

57 [1980] 2 Lloyd's Rep. 149 (C.A.)

58 *Supra* note 20

59 (1991) 5 C.C.L.I. (2d) 22 (Man.Q.B.)

60 *Supra* note 38

61 2006 Can. L.I.I. 29820 (Ont. S.C.)

62 *Supra* note 53 at para. 35

> I summarize the result of the Family Insurance Corp. v. Lombard Canada Ltd. decision as setting out three propositions which form the basis of interpreting and applying "other insurance" clauses contained in two applicable insurance policies:
>
> 1 If the two clauses are irreconcilable and effectively cancel each other out, then both insurers are liable and must share the obligation rateably as between themselves.
>
> 2. However, if the two clauses can be read as working together so that they do not effectively cancel each other out, then the policies apply as they are stated with one primary and the other either excess or excluded as the case may be.
>
> 3. In interpreting the policies, one determines the intent of each insurer by an examination of the policy language and not by otherwise attempting to determine the subjective intentions of the insurers.

In *Family*, the British Columbia Court of Appeal had given effect to the "excess" intentions of the group equestrian insurer, but not the insured's homeowner's policy. The Supreme Court held that evidence of underwriting intentions was inadmissible, and gave equal weight to the contractually expressed intentions only, of the two insurers.

B. Who Pays How Much

The majority of American jurisdictions prefer the "maximum liability" or "liability by limits" rule of apportionment, in which the liability of the respective insurers is shared in proportion to the total coverage provided.[63] In Canada, the Supreme Court has determined that where liability is less than the lowest policy limit, the respective insurers should pay in equal shares,[64] at least unless the competing clauses can be reconciled with respect to the method of sharing.

An alternative view, which has been highly criticized and rejected by the majority of jurisdictions which have considered it, is that the loss should be apportioned based upon premiums received.

Notwithstanding the Supreme Court of Canada's determination of this issue, there has been support in Canada, for all three alternative approaches set out above. This will involve assessing differences as between conflicting policies with or without *pro rata* clauses, and concerning property as opposed to liability risks, as well as completely or only partially concurrent subject matters. However, the two major methods should first be explained in greater detail.

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63 Baldwin and Midkiff, at p. 26

64 *Supra* note 5 at paras. 42-43

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The Two Major Methods

The formulae which Brown and Menezes suggest for calculating each insurer's share according to the two main approaches are as follows:[65]

Maximum Liability:

Amount of the insurer's liability/Total of all policy limits x amount of loss (to limit of policy)

Independent Liability:

Insurer's Liability if no other policy/total of amounts of liability of each insurer if each was only insurer x amount of loss

1. Maximum Liability - By Limits

While there are authorities and texts suggesting that the "maximum liability" is the preferred method in North America, this is not so in Canada (although it is in the United States). In *Commercial Union Assurance Co. Ltd. v. Hayden*, the Court preferred the independent liability method over maximum liability,[66] and in *Family* the Supreme Court of Canada agreed.[67]

The two differences between the fact patterns which we will consider, in an attempt to ascertain whether there remains room for the independent liability, or even premium-based methods, are whether the policies insure property or liability risks and whether the coverage they provide is concurrent or non-concurrent.

(a) Property vs. Liability Policies

Property policies usually pro-rate by limits (i.e. according to the maximum liability approach), and the Court in *Hayden* questioned whether the same apportionment rules should govern property and liability insurance, and suggested a form of "reasonable expectations" analysis in selecting independent over maximum liability.[68]

Generally speaking it should be presumed that, although the independent liability method is favoured in the context of liability insurance, property coverage will be apportioned according to the maximum liability method (subject to the Insurance Bureau of Canada's "Agreement on Guiding Principles"[69]).

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65 Brown, Craig and Menezes, Julio, Insurance Law in Canada (2nd Ed.) at p. 345

66 *Supra* note 34 at 815-6

67 *Supra* note 5 at paras. 42-42. See also *Dominion v. Wawanesa* (BCSC), *Milos Equipment Ltd. v. Insurance Corporation of Ireland* (BCCA), *McGeough* (BCCA)and *Simcoe & Erie v. Kansa* (BCCA)

68 *Supra* note 34 at 814-5

69 Discussed infra, p. 23

(b) Concurrent vs. Non-Concurrent Policies

As noted, overlapping policies may be "concurrent or "non-concurrent" with respect to either or both their subject matter and the risks or perils insured. That is, the policies may overlap, without being identical.

It has been suggested that the "by limits" method applies to concurrent policies, being, policies which cover the same subject matter,[70]although *McCausland v. Quebec Fire Insurance Co.*,[71] and *Trustees v. Western Assurance*,[72] each concerned non-concurrent policies, and also applied the maximum liability method. Further, *Eacrett v. Gore District Mutual Fire Insurance Co.*,[73] by contrast, involved concurrent coverage.

As pointed out by Ivamy, in effect, apportionment in non-concurrent cases is very difficult, and that there is no settled practice, let alone law.

A further issue that can arise is where there is one policy, "subject to average". In such cases, the guiding principle is found in *Bloomfield v. London Mutual Fire Insurance Co.*,[74] which essentially states that where a general policy contributes with special policies, the general policy should be distributed in proportion to the loss in each part. Unfortunately, the decision in *Family* does not address the proper approach in this type of case.

2. "Independent Liability" - By Equal Shares To Limits

Notwithstanding the above, the independent liability or equal shares to limits method still applies to contribution between property insurance policies. In these cases, whether coverage is concurrent or not will not effect the apportionment rule which applies in a given case.

3. Premium-Based Methods

None of the Canadian or Commonwealth decisions have apportioned claims costs according to any formulae based directly upon the amounts of premiums paid. The Court in *Hayden* noted that the difference in premiums paid between a primary policy with a low limit and one with a higher limit, as the risk underwritten is inversely proportional to the size of the claim. In other words, the bulk of the premium for each policy was designed to cover the same risk, and as a result, both insurers accepted the same level of risk up to the lower of the limits. The equitable result would be an equal division of liability up to the lower limit; with the burden

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70 Brown and Menezes at p. 345

71 [1894] O.J. No. 144

72 [1866] O.J. No. 36

73 (1903), 6 O.L.R. 592 (Ont. C.A.)

74 (1905), 29 Que.S.C. 143

of meeting that part of the claim above the lower limit would fall upon the insurer who had accepted the higher limit.[75]

C. Between Primary and Excess/Umbrella Insurers

In addition to primary policies of the type discussed above, some insureds also carry true excess (i.e. not merely primary policies with excess "other insurance" clauses) or "umbrella" coverage, sometimes in more than one layer. Generally speaking, the hallmark of an excess policy is that the coverage which it provides is conditional upon the existence of a specified minimum primary limits (*Trenton Cold Storage Ltd. v. St. Paul Fire and Marine Insurance Co.*[76]), but otherwise has the same scope as such primary policy. Per *Trenton*, a primary insurer cannot compel a true excess policy to share its obligation to indemnify, simply by including an excess "other insurance" clause in its wording. In a subsequent case, *Lombard General Insurance Co. v. CGU Insurance Co. of Canada*,[77] the Ontario Court of Appeal applied its own decision in *Trenton*.

Umbrella policies are similar, in that they provide additional, excess limits, but also coverage not provided by the other policy. Therefore, they will respond as primary, or 'drop down', and provide coverage from the first dollar, if the loss is excluded under the primary policy.

But what if the primary insurer becomes insolvent, or the insured breaches conditions of the primary policy. Should the excess or umbrella policy then drop down, and provide primary coverage? According to *Plaza Fiberglass Manufacturing Ltd. v. Cardinal Insurance Co.*,[78] and *Insurance Corp. of British Columbia v. Swiss Reinsurance Co. Canada*,[79] respectively, the answer is 'no', in both scenarios.

VII. SHARING THE DUTY TO DEFEND

There have been a significant number of Canadian cases in which one insured has attempted to shift the obligation to defend a claim to another carrier. In such cases, the result will depend on whether the issue arises as between two primary carriers, or a primary and an excess carrier.

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75 Supra note 34 at 822

76 *Supra* note 25

77 [2004] O.J. No. 2269 (C.A.)

78 [1994] O.J. No. 1023 (C.A.)

79 [2003] B.C.J. No. 1405 (S.C.)

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A. Among Primary Insurers

Four different methods of apportionment exist in this regard.[80] The first of these, is "by limits", and conforms with the majority view on sharing the burden of indemnity. The second is "equal shares", the rationale for which is that, as the duties to defend and indemnify are separate, there is no basis for tying the obligation to defend to the policy limits, and therefore, each insurer has the same independent duty. The third and fourth approaches seem best suited to progressive injury cases. One of these is to apportion based upon the amount of time that each insurer was on the risk during the period in which the defence obligations was "triggered". This approach has been used in asbestos cases and, more recently, leaky condominium cases. The other one requires the insurer which issued the policy effected at the beginning of the triggered period to defend until its limits are exhausted. Then the next insurer in time would take over. However, this is on an interim basis only, as the approach allows for re-allocation once the liability proceedings have been concluded.

1. Interim Orders

In a number of cases, insurers have sought to avoid the initial costs of defending claims by seeking interim orders with respect to the carriage, and funding of the defence. Generally speaking, the more steps an insurer has taken in defending a claim, the less likely it is that a court will shift this obligation to another carrier. However, if an application with respect to defence obligations is brought at an early stage, it is the insurer with the most at risk, in terms of coverage and policy limits, which will generally be ordered to defend. We will see that these observations apply equally to disputes between primary and excess insurers as well.

However, in *Canadian Indemnity Co. v. The Royal Insurance Co. of Canada*[81] the Ontario Court refused to make an order prior to the resolution of the liability proceedings. In *Station Square Developments Inc. v. Amako Construction Ltd.*,[82] the BC Supreme Court similarly refused to make the order sought, on the basis that the claim fell largely, if not entirely, within one of the policies, there was "no rational basis" upon which to order either that the other insurer take over the defence or that it contribute to costs as they were incurred.[83]

In *Prudential Assurance Co. Ltd. v. Manitoba Public Insurance Corp.*[84] the Manitoba Court of Appeal ordered that the two insurers appoint counsel together, or if they could not agree, the insured could do so at the insurers' expense. In *General Accident Assurance Co. of Canada v. The Ontario Provincial Police Force*,[85] the Ontario High Court determined that the defence costs to be borne equally, subject to the right of either insurer to apply for a different apportionment after the liability trial.

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80 Baldwin and Midkiff , pp. 61-4

81 [1993] I.L.R. 1-2958 (Alta.Q.B.)

82 (1989), 40 C.C.L.I. 292 (B.C.S.C.)

83 Ibid. at 298-9

84 [1976] I.L.R. 1-771 (Man.Q.B.)

85 [1988] O.J. No. 291

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2. Final Orders

In *Ecclesiastical Insurance Office plc v. Sun Alliance Insurance Co.*[86] and *Wawanesa Mutual Insurance Co. v. Commercial Union Assurance Co.*,[87] the Courts ordered that defence costs be apportioned equally between the overlapping insurers. In *Alie v. Bertrand & Frere Construction Co. Ltd.*,[88] the Ontario Court of Appeal used a "time on risk" method, as did the British Columbia Court of Appeal in *Surrey v. General Accident*.[89]

B. Between Primary and Excess Insurers

The traditional view in the United States is not to require excess insurers to contribute to the primary carrier's defence obligations.[90] However, some of the California cases have ordered contribution in circumstances where the amount of the claims exceed the primary coverage. The Canadian cases reflect this latter approach.

1. Interim Orders

As noted immediately above, once an insurer has taken significant steps to defend a case, it will be very difficult to shift this obligation to another carrier. See, for example, *Dominion of Canada General Insurance Co. v. Allstate Insurance Co. of Canada*[91] and *Kapsalakis v. Lorenz*.[92] In *Economical Mutual Insurance Co. v. I.C.B.C.*,[93] the Alberta Court of Queen's Bench stated that it seemed reasonable that the insurer with the greater risk of loss be entitled to defend, whether that insurer ended up being the primary or the excess.[94] Similarly, in *Broadhurst & Ball v. American Home Assurance Co.*,[95] the primary insurer was defending complex claims against lawyers which clearly had the potential to exceed their policy limits. In these circumstances, the Ontario Court of Appeal held that the excess insurers should fund an equal share of the defence costs.

2. Final Orders

The leading case in this country on excess insurers' duty to defend, and one of the few cases which actually apportioned this obligation, is *Canadian Indemnity Co. v. Simcoe &*

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86 (1993), 17 C.C.L.I. (2d) 66 (N.B.Q.B. - T.D.)

87 [1994] 10 W.W.R. 701 (Man. Q.B.)

88 [2002] O.J. No. 4697 at para. 240

89 [1996] B.C.J. No. 849

90 Baldwin & Midkiff pp. 65-8

91 (1989), 68 O.R. (2d) 149 (H.C.)

92 [1977] I.L.R. 1-903 (Ont. S.C.)

93 (1986), 18 C.C.L.I. 134 (Alta. Q.B.)

94 *Ibid.* at 142

95 [1990] O.J. No. 2317 (C.A.), leave to appeal to S.C.C. refused (1991), 79 D.L.R. (4th) vi

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Erie General Insurance Co.[96] In that case, the insured the Court held that as a general rule, when two or more insurance companies are at risk on a claim, the amount of which is unascertained at the time of commencement of the action, then the companies should be equally liable for the costs of defending the action.[97] The *Canadian Indemnity* case was followed by the Ontario Court of Appeal in *Broadhurst & Ball v. American Home Assurance Co.*,[98] where a 50-50 apportionment was also ordered.[99]

See, however, *Riddoch v. Anderson*,[100] where a much different approach was taken.[101] Finally, in *Pacific Employers Insurance Co. v. Non-Marine Underwriters, Lloyds of London*,[102] the BC Court of Appeal held that the excess insurer, based on a contra proferentem interpretation of the primary policy, was not obliged to share in the defence costs.[103]

Ten years after *Broadhurst & Ball*, to the surprise of many, the Ontario Court of Appeal came to the same conclusion in the notorious, 'crumbling concrete' case, *Alie v. Bertrand & Frere Construction Company Limited*.[104] The difference between this case and *Broadhurst & Ball* being that the court in *Alie* made a final order, after trial. The key to the latter case would seem to have been the 'follow form' wording of the excess policies which, with one exception (Guardian, which was not ordered to pay defence costs), did not expressly exclude any duty to defend. Moreover, the Court based its decision on broad principles of equity and fairness. Although not entirely consistent with the Ontario Court of Appeal's prior reasons in *Trenton*, and subsequent decision in *Lombard v. CGU*, *Broadhurst & Ball* and *Alie* clearly open the door to excess co-funding of otherwise unlimited defence obligations under primary policies.

It is also somewhat difficult to reconcile that approach with the decision in *Boreal Insurance Inc. v. Lafarge Canada Inc.*,[105] that once the limits under a primary policy have been exhausted, then its duty to defend also ceases. While sensible enough on its own, one might ask why then should an excess insurer be required to share the defence costs before primary limits are exhausted. However, it must be emphasized that, as always, every insurance coverage case turns on the precise policy wordings in question.

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96 (1979), 98 D.L.R. (3d) 70 (N.S.S.C.), aff'd (1979) 103 D.L.R. (3d) 485 (C.A.)

97 p. 76 D.L.R., as cited at p. 48 D.L.R (C.A.)

98 (1988), 32 C.C.L.I. 102 (Ont.H.C.) and (1988) 33 C.C.L.I. 16 (Ont.H.C.), reversed on appeal, (1990) 4 C.C.L.I. (2d) (C.A.)

99 *Ibid.* at 106

100 [1991] O.J. No. 2667 (Ont. C.J. - Gen. Div.), December 22, 1991

101 *Ibid.* at 3-4

102 (1990), 43 C.C.L.I. 305 (B.C.S.C.), affirmed (1990) 45 C.C.L.I. 42 (C.A.)

103 *Ibid.* at 47

104 [2002] O.J. No. 4697 (C.A.), leave to appeal to S.C.C. refused, [2003] S.C.C.A. No. 48

105 [2004] O.J. No. 1571 (S.C.J.)

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In *ING Insurance Company of Canada v. Federated Insurance Company of Canada*,[106] however, the excess insurer was not notified in a timely manner, and the Ontario Court of Appeal therefore declined to order that it contribute to defence costs.

VIII. THE STATUTES - FIRE AND AUTOMOBILE INSURANCE

The near uniform Provincial *Insurance Acts*, regulate contribution, *inter alia*, with respect to fire, automobile and marine insurance (the latter will not be addressed).

A. Fire Insurance

Section 221 of the B.C. *Insurance Act*, and the equivalent statutory conditions in other Provinces,[107] create a code with respect to over-lapping coverage for fire insurance. As noted by Brown and Menezes, the effect of this statutory regime is essentially as follows:[108]

1. an insured may only claim from each insurer a pro-rated amount of the loss. The apportionment of a loss must take into account any deductible, co-insurance or average clauses, as well as clauses limiting recovery to a specified percentage of the value at the time of the loss.[109] Further, subsections (4) and (5) describe methods for computing deductibles into the appropriate formula.[110]

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106 [2005] O.J. No. 1718 (C.A.)

107 For example, Section 237 in Alberta, Section 130 in Saskatchewan, Section 144 in Manitoba and Section 127 in Ontario

108 *Supra* note 51 at 351-5

109 section 222 provides as follows:

> A contract containing:
>
> (a) a deductible clause;
>
> (b) a co-insurance, average or similar clause; or
>
> (c) a clause limiting recovery by the insured to a specified percentage of the value of any property insured at the time of loss, whether or not that clause is condition or unconditional...

110 these subsections provide as follows:

> Subsection 221(4):
>
> Nothing in subsection (1) affects the operation of any deductible clause, and
>
> (a) where one contract contains a deductible, the *pro rata* proportion of the insurer under that contract shall be first ascertained without regard to the clause and then the clause shall be applied only to affect the amount of recovery under that contract; and
>
> (b) where more than one contract contains a deductible, the *pro rata* proportion of the insurers under those contracts shall be first ascertained without regard to the deductible clauses, and then the highest deductible shall be pro rated among the insurers with deductibles, and these pro rated amounts shall effect the amount of recovery under those contracts.
>
> Subsection 221(5):
>
> Nothing in subsection (4) shall be construed to have the effect of increasing the *pro rata* contribution of an insurer under a contract that is not subject to a deductible clause.

2. "excess" other insurance clauses are not effective;

3. "escape" clauses are effective, and are treated as a condition, the breach of which renders the policy unenforceable by an insured who violates that condition;[111] and

4. specific policies are primary.

But When Does The *Insurance Act* Apply?

It must be noted, however, that the application of the *Insurance Act* to what might previously have been considered as "fire insurance" has become limited. See, for example, *KP Pacific Holdings Ltd. v. Guardian Insurance Co. of Canada*,[112] and *Churchland v. Gore Mutual Insurance Co.*,[113]two recent decisions of the Supreme Court of Canada which restrict the statutory conditions to true policies of fire insurance, rather than multi-peril policies covering fire as one of a number of risks. These cases confirm the earlier decisions of the B.C. Court of Appeal in *Dressew Supply Ltd. v. Laurentian Pacific Insurance Co.*[114] and *Mindell v. Canadian Northern Shield Insurance Co.*[115] As a result, far fewer insurance policies will be considered as fire insurance, and the application of the code established by the *Insurance Acts* may accordingly be limited.

B. Automobile Insurance

The context of motor vehicle liability also provides a uniform code for apportioning liability claims under automobile insurance policies, collision and "no-fault" coverage.[116] The following principles can be gleaned from the statutory provisions:

1. If the loss is covered by automobile insurance and also a nuclear energy hazard liability contract, the latter is deemed primary and the former excess, and liable only to the statutory minimum coverage for such insurance.[117]

2 If both policies are automobile insurance and one is an owner's policy then for liability involving an automobile owned by the named insured, the owner's policy is primary.[118]

3. Subject to the first two rules, if the same named insured has more than one automobile insurance policy with respect to his interest in the same subject

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111 *State Farm v. New Brunswick Housing*, [1982] N.B.J. No. 362 at p. 1075

112 [2003] 1 S.C.R. 433, 2003 SCC 25

113 [2003] 1 S.C.R. 445, 2003 SCC 26

114 (1991), 3 C.C.L.I. (2d) 286 (B.C.C.A.)

115 (1991), 3 C.C.L.I. (2d) 286 (B.C.C.A.)

116 Brown and Menezes, pp. 355-61

117 see B.C. s. 249; Alberta, s. 318; Saskatchewan, s. 208; Manitoba, s. 255; and Ontario s. 223

118 see B.C., s. 270(1); Alberta, s. 335(1); Saskatchewan, s. 224(1); Manitoba, s. 272(1); and Ontario, s. 241(1)

matter, each insurer is only liable for a *pro rata* contribution according to the independent liability method.[119]

4. Where there is a dispute between insurers under automobile liability policies as to which should undertake the defence, the insured or any insurer may apply to the court for directions.[120]

5. If an injured third party seeks recourse directly against an insurer under the *Act*, the insurer may seek contribution, subject to the above rules with respect to primary, access or *pro rata* considerations. An exception might be under the direct recourse provisions of the *Insurance Act*, which may not give one insurer a direct cause of action against the other. Note, however, that the lack of a statutory claim is no bar to the equitable right of contribution.

C. Gaps In The Statutory Regimes

In cases where one policy is governed by the *Act*, but others are not, the statutory regime will not govern any contribution dispute between them. See *General Accident v. O.P.P.*[121]

IX. AGREEMENTS BETWEEN INSURERS

A. The Agreement on Guiding Principles - Property Insurance

Most Canadian property insurers are subscribers to the *Agreement on Guiding Principles*,[122] and it is doubtless in large measure due to the existence of the *Agreement* (as well as the statutory regimes described above) that there have been so few contribution cases in this country. In general terms, to the extent that property policies include any other insurance, excess or contribution clauses, the same are inoperative to the extent that they conflict with the rules in the *Agreement*.

B. Specific Agreements

From time to time, individual insurers will enter into defence or liability sharing agreements with one another. See, for example, *Manitoba Public Insurance Corp. v. Co-operators General Insurance Co.*,[123] where an agreement to apportion a loss by limits was upheld by the Manitoba Court of Queen's Bench. In addition, many insurers which frequently find themselves involved in "leaky condo" actions in British Columbia have developed protocols for

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119 see B.C. s. 249(2); Alberta, s. 318(2); Saskatchewan, s. 208(2); Manitoba, s. 255(2); and Ontario, s. 223(2)

120 see B.C., s. 251; Alberta, s. 319; Saskatchewan, s. 208; Manitoba, s. 256; and Ontario, s. 225

121 *Supra* note 79 at 186

122 Insurance Bureau of Canada, Agreement of Guiding Principles (Property Insurance), 1984

123 (1991), 5 C.C.L.I. (2d) 22 (Man.Q.B.)

sharing defence and indemnity costs. These agreements usually involve a sharing formula based on each insurer's time on the risk.

X. PROCEDURAL AND EVIDENTIARY ISSUES

A. Procedure

It is now well established that that contribution disputes should be brought before the courts in the names of the insurers, and not the insureds, as would be the case with a subrogated claim. See, for example, the B.C. Court of Appeal's recent decision in *Pacific Forest Products Ltd. v. AXA Pacific Insurance Co.*[124]

B. Evidence

While extrinsic or parol evidence will be admitted in some cases, this is only so to the extent that the intention of the insurers (not the insureds) cannot be ascertained by sole reference to the policies. See *Family*. However, a comment from one of the Judges of the English Court of Appeal who heard the *Hayden* case suggests that the courts may be interested in hearing more evidence of the practice in the insurance industry with respect to contribution.[125]

Another evidentiary issue, which will most often arise in the context of long-tail claims, concerns proof of coverage under missing policies. This has been considered in a series of sexual abuse cases, involving often decades old events, including *Catholic Children's Aid Society of Hamilton-Wentworth v. Dominion of Canada General Insurance Co.*,[126] *Navy League of Canada v. Citadel General Assurance Co.*, [127] *W.-V.(T.) v. W.(K.R.J.)*,[128] *E.M. v. Reed*,[129] and *Synod of the Diocese of Edmonton v. Lombard General Insurance Company of Canada*.[130] These cases establish that both the existence and terms of missing policies may be proven by secondary evidence, according to a simple balance of probabilities. That is, based on documents such as cover notes and samples of standard form wordings, and testimony of insurance brokers or other witnesses, a court may be satisfied it was more likely than not that a policy did exist, and extended coverage for the acts or omissions, loss and damage in question.

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124 2003 BCCA 241

125 *Supra* note 34 at 821

126 [1998] O.J. No. 3720 (Gen. Div.)

127 [2003] O.J. No. 3193 (S.C.J.)

128 [1996] O.J. No. 2102 (S.C.J.)

129 [2000] O.J. No. 4791(S.C.J.), aff'd [2003] O.J. No. 1791 (C.A.), leave to appeal to S.C.C. refused, [2003] S.C.C.A. No. 334

130 [2004] A.J. No. 1287 (Q.B.)

XI. CONCLUSIONS

Certain observations and projections can be made with respect to both the state of the law and its future direction:

1. The rules for overlapping coverage are quite clear, the only troublesome issue being the requisite authority and knowledge of one person as to a policy which is being placed by another;

2. Most of the rules for reconciling "other insurance" clauses are also well understood:

   (a) where there is only one clause, it will be given effect to;

   (b) similar clauses will cancel each other out;

   (c) an "escape" clause will prevail over both a "*pro rata*" and an "excess" clause (although the latter rule is different in the United States, and may yet change here); and

   (d) "excess" clauses will prevail over "*pro rata*" clauses;

3. In the absence of a prescribed method, *pro rata* apportionment will be either:

   (a) "by equal shares to limits", with respect to liability claims; and

   (b) "by limits", for property losses (although this too could change); and

4. A "pragmatic" approach will be taken to the conduct of the defence, with the final apportionment of costs to be based upon the degree of risk which each insurer faced, whether primary or excess.

Moreover, with respect to the principle which underlies the Canadian approach to allocating and apportioning the obligation to indemnify, most of the uncertainty has now been resolved, thanks to the Supreme Court of Canada's decision in *Family*.

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Insurance claims and coverage disputes, as well as environmental and other commercial litigation and Alternative Dispute Resolution.

Profile

Neo Tuytel is a partner with Clark Wilson LLP. He is a member of the firm's Insurance, Business Litigation and ADR practice groups and the Chair of the Environmental Law practice group.

Mr. Tuytel obtained his LL.B. from The University of British Columbia in 1984 and was called to the bar in 1985. He was also accredited as a mediator in 1994.

Mr. Tuytel has appeared before all levels of court as well as administrative decision-makers in British Columbia. He was winning counsel before the Supreme Court of Canada in the landmark overlapping coverage case: *Family v. Lombard*, as well as various cases in the BC Court of Appeal. Mr. Tuytel also acts as a mediator.

Mr. Tuytel is a prolific author and speaker (see list of Publications & Presentations below).

Representative Work

Winning in the Supreme Court of Canada and setting a precedent in Canada and the Commonwealth for resolving disputes with respect to overlapping policies of liability insurance (*Family Insurance v. Lombard Canada*, 2002).

Successfully defending a subrogated claim for a warehouse fire, in the BC Court of Appeal, based on insurance covenants in a lease and the doctrine of "tort immunity" (*North Newton v. Alliance Woodcraft*, 2005).

Upholding a denial of coverage under an excess motor vehicle policy based on a new medical condition as a material change in risk (*Lucow v. Canadian Direct Insurance*, 2004*)*.

Enforcing liability insurance coverage on behalf of a developer for liability arising out of the collapse of a rail bed after completion of an industrial park construction project.

On behalf of wrap-up and CGL insurers, settling a $3 million building envelope claim directly with the owner-developer, for a fraction of the amount involved and with virtually no litigation costs.

Enforcing coverage against a CoC insurer for increased design and construction costs of an office building due to the failure of excavation shoring.

Defending former owners of contaminated sites against claims for clean-up costs and enforcing coverage under related liability insurance policies.

Obtaining the dismissal, without costs, of an infant brain injury claim against a ski rack manufacturer.

Orchestrating a precedent-setting, multi-party settlement of one of North America's worst pollution problems – the more than $75 million clean-up of acid rock drainage into Howe Sound from the historic Britannia mine.

Resisting coverage claims against an excess wrap-up E&O policy arising out of design defects in a $100 million pipeline project.

Enforcing coverage against CGL insurers and negotiating an omnibus agreement for the insurance-funded defence and settlement of several leaky building claims against a prominent real estate developer.

On behalf of a CGL insurer, obtaining substantial recovery under an overlapping wrap-up policy with respect to settlement of a leaky condo action.

Advising homeowners insurers with respect to coverage and settling directly with plaintiff's counsel a claim against one of several children and their parents for the destruction of a school by fire.

As coverage counsel, coordinating settlement on behalf of multiple defendant insureds, claims for traumatic injuries to a plaintiff motorist arising out of a rock being dropped from a highway overpass.

Both defending and prosecuting, and in all cases settling well before trial, errors and omissions claims against insurance brokers.

Memberships & Associations

Member, Law Society of British Columbia (1985)

Member, Canadian Bar Association (Insurance, Environmental, Civil Litigation and ADR subsections)

Contributing Editor, *Canadian Journal of Insurance Law*

Publications & Presentations

In addition to numerous shorter articles on insurance, as well as environmental and other commercial litigation-related topics, Mr. Tuytel has published the following major papers:

- *Insurance Coverage For Construction Deficiency Claims: Lessons From BC's Leaky Condo Wars* (updated 2007)
- *Who's on the Risk (and for How Much?): Allocating and Apportioning Indemnity and Defence Costs Among Insurers in Canada* (updated 2007)
- *Environmental Liability and Insurance Coverage in British Columbia* (updated 2006)
- *Design Professionals' Errors and Omissions Coverage* (updated 2004)
- *Sexual Misconduct Claims and Insurance Coverage* (1997)
- *Relief From Forfeiture Under Insurance Policies* (1995)
- *When a Denial is Not a Denial: Waiver, Estoppel and Confirmation of Causes of Action Under Insurance Policies* (updated 1995)
- *Agents' and Brokers' Liability* (updated 1994)
- *Awards of Costs for Exaggerated Claims* (1994)
- *Fraudulent Property Insurance Claims* (1993)
- *The Prospects for Asbestos and Other Toxic Tort Litigation in Canada* (1990).

Mr. Tuytel has also presented on these and other topics at numerous seminars under the auspices of the Insurance Institutes of British Columbia, Alberta and Ontario, the Insurance Brokers' Association of BC, the Credit Union Insurance Services Association, the Canadian Risk and Insurance Managers Society, the BC and Northern Alberta Risk and Insurance Managers Associations, the Continuing Legal Education Society of BC, the Canadian Institute, the Pacific Business and Law Institute and Insight Educational Services.