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Duty to Defend Construction Deficiency Claim: SCC

Canadian liability insurers and those drafting their policies should pay careful attention to the Supreme Court's ruling in *Progressive Homes Ltd. v. Lombard General Insurance Co. of Canada*, 2010 SCC 33, which overturned both lower courts to find that Lombard had a duty to defend a construction deficiency claim against its insured. The court applies the general principles of insurance policy interpretation (outlined at paras. 19-25) to the Lombard contracts, and concludes that the claims in the pleadings fall within the initial grant of coverage for "property damage" caused by an "accident." Whether defective workmanship is an accident is a case-specific determination according to the court and the answer "will depend both on the circumstances of the defective workmanship alleged in the pleadings and the way in which "accident" is defined in the policy." (para. 46) As noted in the following commentaries on the decision, this expansive reading should serve as a warning to underwriters to review their insuring agreements.

- *The SCC Schools Insurance Company on Insurance Policy Drafting in Progressive Homes Ltd. v. Lombard General Insurance Co. of Canada* by Christine Kellowan, posted October 6, 2010 on The Court
- Blaney McMurtry Insurance Bulletin (http://www.blaney.com/resources/contentfiles/blaney/Resources/newsletterissue/insurance-observer-september-2010/pdf/insurancebulletin_sept10.pdf)
- *The Progressive Homes Decision: A New Era or More of the Same*, Harper Grey LLP (<http://www.harpergrey.com/assets/attachments/SCC%20Decsion%20re%20Progressive%20Homes%20-%20A%20Preliminary%20Analysis.pdf>)

Avoiding Multiplicity of Proceedings Trumps Timely Resolution: MBCA

The Court of Appeal has overturned last February's Court of Queen's Bench decision in *Kostic v. Merrill Lynch Canada Inc.*, 2010 MBCA 81, finding that in denying the defendant's motion to strike Kostic's fee indemnity action the motions judge overemphasized the need for timely resolution of Rule 20A actions and did not sufficiently address the prejudice resulting from overlapping proceedings. Given that Kostic's conduct as an employee remained a central issue in the main action, the court found the potential for conflicting rulings to be real. The appeal court set aside the order dismissing the motion to stay and issued an order to stay the fee

indemnity action pending the outcome or consolidation of the main actions.

Absurd Interpretation Avoided: MBCA

In [Gurvey v. Manitoba Public Insurance](#), 2010 MBCA 86 the Court of Appeal considers the interpretation of the words "an employee's contribution" in s.10(6) of the *Determination of Income and Employment (Universal Bodily Injury Compensation) Regulation*. The effect of the section is to exclude certain CPP contributions from the net income figure for benefit calculations. The court rejects the self-employed applicant's argument that on the plain meaning of the section MPIC can deduct only those CPP contributions he made as an employee, and not those he contributed as his own employer. Since the legislature clearly did not intend to exclude an entire class of accident victims (self-employed persons) from the CPP deduction provision, the legislation must be construed to avoid that result.

Court's Focus Circumscribed Under Rule 49.09: MBQB

The court must be careful not to "slide into an unconscious or indirect assessment of the merits of the original cause of action" in considering a motion under Rule 49.09 for judgment based on the terms of an accepted offer to settle where the other party fails to comply with the terms of the accepted offer. As noted in [Sparco Holdings Inc. et al. v. Willdamerle Holdings Ltd.](#), 2010 MBQB 203,

where a settlement agreement is found to be in existence, a court need not and in most cases should not engage in an examination of the terms of the settlement agreement respecting their fairness or otherwise. Neither should a court permit or participate in an inquiry into the conduct of counsel except where an examination of counsel's conduct would be probative respecting the more specific and relevant allegation suggesting that counsel (with the knowledge of opposing counsel) acted without binding authority. (para.25)

Dispute Resolution Webinar

Presenter Sam Imperati advises mediators on how to manage an impasse in mediation in the BC CLE webinar [Ethical and practice questions for mediators](#). The hour long presentation, posted September 2010 on Practice Points, is available for downloading at no cost.

Upcoming CPD Programs: LSM

[Writing to Win: Results-Oriented Writing for Busy Solicitors](#) and [Speaking to Win](#) - The Law Society is pleased to have nationally acclaimed lecturer and writer Steven Stark present these two programs on October 20, 2010. Registrants can attend either the morning or afternoon program, or register for both at a discount.

[Affidavits, Expungements & Case Conferences](#) - Join chair The Honourable Mr. Justice Michael Thomson and presenters Master Carol Sharp and Lawrence Pinsky at the next Bench & Beer Series program for junior lawyers, to be held October 28, 2010 from 5:00-7:00 p.m. at the Law Society classroom. [Register](#) soon to confirm your spot.

CBA/MBA Programs

Learn how to plan your next Federal Court case in the MBA program [Recent Changes to Practices, Procedures and Rules of the Federal Court of Canada](#) to be held October 19, 2010, from 12:00 noon - 2:00 p.m. in the Law Society classroom. Presenters The Hon. Justice Roger T. Hughes, Federal Court of Canada and John A. Myers will discuss discovery, motions for summary judgment, practice direction on costs, case management, expert conferencing (hot tubing), electronic filing and model orders.

Upcoming programs in the new online [CBA Skilled Lawyer Series - Litigation Stream](#) include [Writing for Litigators](#), November 9, 2010; [Preparing Clients for Discovery and Trial](#), December 7, 2010; [Conducting and Defending a Discovery](#), February 7, 2011; and [Excelling at Motion Argument](#), March 1, 2011.

Remedies From Dollars to Sense? - 2010 Isaac Pitblado Lectures

The [2010 Isaac Pitblado Lectures](#) will explore developments in the law of remedies in both the traditional courts and administrative bodies. Keynote speakers include The Hon. Mr. Justice Cromwell of the Supreme Court of Canada, Dame Hazel Genn, Faculty of Laws, University College, London, and Professors John

McCamus, Kent Roach and Gerald Heckman. The lectures will be held November 26 and 27 at the Fort Garry Hotel.

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