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Thomas Heintzman specializes in commercial litigation and is counsel at McCarthy Tétrault in Toronto. His practice focuses on litigation, arbitration and mediation relating to corporate disputes, shareholder's rights, securities law, broadcasting/telecommunications and class actions.

He has been counsel in many important actions, arbitrations, and appeals before all levels of courts in many Canadian provinces as well as the Supreme Court of Canada.

Thomas Heintzman is the author of Goldsmith & Heintzman on Building Contracts, 4th Edition which provides an analysis of the law of contracts as it applies to building contracts in Canada.

Goldsmith & Heintzman on Building Contracts has been cited in 182 judicial decisions including the two leading Supreme Court of Canada decisions on the law of tendering:

A Contentious Insurance Issue – The Scope of the Duty to Defend Under a CGL Policy

Today we will examine a recent decision of the Supreme Court of Canada relating to **Insurance Law** and the insurer's **Duty to Defend** in the context of construction projects: *Progressive Homes Ltd. v. Lombard General Insurance Co. of Canada*.
This case provided the Supreme Court with an opportunity to consider a contentious issue in Canadian insurance law, namely, an insurer's duty to defend under a Commercial General Liability (CGL) policy issued to a building contractor.

In the construction industry, insurers have denied coverage to owners and contractors under CGL policies on two grounds. First, insurers have insisted that the damage must be to the property of a third party, not the property installed by the contractor. Second, insurers have asserted that the defective property installed by the contractor cannot be covered since that would allegedly convert a CGL policy into a performance bond. Both of these contentions by the insurer were rejected by the Supreme Court.

The CGL policies in question covered "property damage" caused by an "accident". The Supreme Court held that the ordinary meaning of "property damage" includes damage to any property and is not limited to damage to third-party property. Therefore, damage to one part of a building arising from another part of the same building could be included in the definition. An

"accident" could arise if an event causes property damage and is not expected nor intended by the insured. An "accident" need not be a sudden event and arise from continuous or repeated exposure to conditions.

The Supreme Court concluded that whether defective workmanship is an accident will depend on the ultimate facts proven at trial. At the pleadings stage, however, if the allegations of defective workmanship arguably involve "property damage" and bring the circumstances with the definition of "accident" in the policy, then a duty to defend will arise.

The Court rejected the insurer's argument that "property damage" must be limited to property of a third party and therefore could not include damage caused by other parts of the same building. That argument, it said, would leave little or no meaning for the "work performed" exclusion. The Supreme Court rejected lower court authority to the contrary in some provinces. It held that the plain and ordinary meaning of "property damage" did not limit that damage to third party property, noting that other provincial courts had arrived at that conclusion.

The Supreme Court was prepared to find that it was open to argument that the definition of "property damage" could include defective property. The Court also said that it may be arguable that defective property could be covered under "loss of use", another category of "property damage." The Court noted that under a second version of the policies, coverage for defects was specifically excluded and that such an exclusion would be redundant if the insurer's argument was correct.

Finally, the Supreme Court rejected the argument that interpreting "accident" to include defective workmanship would convert a CGL policy into a performance bond. It disagreed with the insurer's argument that "faulty workmanship is *never* an accident" and also disagreed with the B.C. Court of Appeal's holding that interpreting the policy in this fashion "offends the assumption that insurance provides for fortuitous contingent risk." Fortuity, it said, "is built into the definition of 'accident' itself as the insured is required to show that the damage was neither expected nor intended from the standpoint of the Insured…… When the event is unlooked for, unexpected or not intended by the insured, it is fortuitous. This is a requirement of coverage; therefore, it cannot be said that this offends any basic assumption of insurance law."

As in any duty to defend case, this decision is not a definite determination of coverage, as the facts proven at trial may well fall within or outside the coverage. In particular, the "work performed" exclusion might apply, depending on which policy applied. However, the Supreme Court did hold that the claim against the contractor was not unambiguously outside the basic coverage nor was it unambiguously inside the "work performed" exclusion.

This decision is significant because the Supreme Court swept away several of the arguments of CGL insurers that have met with success in lower courts. It demonstrated a willingness to give full effect to the insurer's duty to defend under a CGL policy in the construction field.

Insurance Law-Duty to Defend: *Progressive Homes Ltd. v. Lombard General Insurance Co. of Canada*, 2010 SCC 33, [2010] 2 S.C.R.245.