PROGRESSIVE HOMES LTD. V. LOMBARD GENERAL INSURANCE CO. OF CANADA

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I. INTRODUCTION

The unanimous judicial decision[1] of the Supreme Court of Canada in *Progressive Homes Ltd. v. Lombard General Insurance Co. of Canada*[2] arose from widely publicized facts in Vancouver that came to be known as the "leaky condos" problem. The decision in *Progressive* resolves divergent appellate judicial holdings, in British Columbia on one hand[3] and Ontario[4] and Saskatchewan[5] on the other hand, on the issue of an insurer's duty to defend its insured general contractor in the ensuing litigation under commercial general liability (CGL) policies in cases of defective construction workmanship.

The Supreme Court formulated a national approach for construction deficiency claims under CGL policies.[6] It chose the wider approach used in Ontario, holding that these policies may cover claims against insured general contractors for defective subcontractor work and give rise to the consequential duty to defend these claims. It represents an important judicial development concerning the scope of CGL insurance policies as they apply to construction projects.

This comment describes and critically analyzes this decision, and argues that it may not go as far to clarify the uncertainty around duty to defend as expected.

II. FACTS

Progressive Homes Ltd. (Progressive) was engaged by the British Columbia Housing Management Commission (the Commission) to serve as general contractor for the construction of four residential condominium buildings under a provincial government program for affordable housing. After construction was complete in late 2004 and early 2005, the Commission sued Progressive in four separate actions, one for each housing unit, claiming breach of contract and negligence, alleging construction shortcomings in framing, stucco, windows, flashings, venting, and roofs, which allowed moisture penetration in the

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1 Chief Justice McLachlin and Justices Binnie, LeBel, Deschamps, Fish, Abella, Charron, Rothstein, and Cromwell. The decision was authored by Justice Rothstein.

2 2010 SCC 33, [2010] 2 SCR 245 [*Progressive*].

3 One might speculate on the possibility that the prevalence and essential dominance of leaky condo litigation in the province itself disproportionately shaped the British Columbia law on this part of the commercial general liability policy interpretation to exclude coverage for the defective work of the insured.

4 See *Bridgewood Building Corp (Riverfield) v Lombard General Insurance Co of Canada* (2006), 79 OR (3d) 494 (CA). Bridgewood, a housing developer, built homes with defective concrete supplied by a subcontractor. The Ontario Court of Appeal held that the exclusion still permitted coverage to subcontractor-caused damage.

5 See *Westridge Construction Ltd v Zurich Insurance Co*, 2005 SKCA 81, 269 Sask R 1.

6 Provinces frequently diverge in their approaches to legal issues but it is rare in Canadian insurance law for Canadian provinces to diverge as clearly, widely, and for so long as has been the case with the interpretation of identical provisions of a commonly used insurance policy, such as the CGL policy.

building envelopes to cause significant water damage, rot, and deterioration in each of the buildings. The substandard work at issue had been completed by Progressive's subcontractors.[7]

Progressive relied upon several CGL "occurrence" insurance policies it held with the insurer Lombard General Insurance Company of Canada (Lombard). These policies called upon Lombard to defend and indemnify Progressive when Progressive faced liability for damages due to property damage from an occurrence or accident.[8] Lombard began to defend Progressive in these lawsuits, but later reversed course and withdrew when it believed that it had no coverage obligations in this case. The Supreme Court of Canada attributed this at least partly to the intervening *Swagger Construction Ltd. v. ING Insurance Co. of Canada* decision of the British Columbia Supreme Court, which threw doubt on the duty to defend under similar insurance policies.[9]

Progressive applied for a declaration that Lombard was under a legal duty to defend the four actions brought against Progressive.[10] Lombard's position was that Progressive had built and delivered a wholly faulty, non-complying product in breach of its contract with the Commission, which could not be properly characterized as property damage occasioned by an occurrence or accident. This was the only issue before the Supreme Court of Canada.[11] All courts hearing the case took the same approach — to compare the pleadings and insurance policies to determine whether it was possible the claims were insured, in particular whether the faulty construction in this case constituted an "accident."

III. DISPOSITION IN THE LOWER COURTS

The motions judge, Justice Cohen of the Supreme Court of British Columbia found no duty to defend, reasoning that these were "simply claim[s] for the cost of remediating parts of the unified whole and not 'property damage.'"[12] A majority of the British Columbia Court of Appeal agreed, on the basis of "the underlying assumption that insurance is designed to provide for fortuitous contingent risk"[13] and damage arising out of faulty workmanship was not fortuitous. Subcontractor defaults might be covered by the CGL policies, such as damage caused by defective mechanical installation, but that was not the case here. While the pleadings alleged failure of critical components of the buildings, these were not sufficiently "distinct" or isolated accidents and fortuities to be embraced by the insurance coverage. The

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7 The facts of the case are set out in *Progressive*, *supra* note 2 at paras 2-5.

8 The relevant texts and contents of the pleadings are set out below in conjunction with the reasoning of the Supreme Court of Canada.

9 2005 BCSC 1269, 47 BCLR (4th) 75 [*Swagger*]. See also, *GCAN Insurance Co v Concord Pacific Group*, 2007 BCSC 241, 60 CLR (3d) 251 [*GCAN*]. In *GCAN*, the insured contractor sought coverage for construction that led to water ingress resulting in damage to the structural components of the wall assemblies and deterioration of the interior finishes of the building. The Court found no duty to defend, partly because the defective construction was not an "accident."

10 *Supra* note 2 at para 5.

11 *Ibid* at para 18.

12 2007 BCSC 439, 71 BCLR (4th) 113 at para 57. Together with the *Swagger* and *GCAN* decisions, *Progressive* created a trilogy of same-result cases, all three of which were against general contractors relating to "leaky condos." Each held that CGL insurers did not owe general contractors a "duty to defend" when the only damage claimed related to the precise work the insureds were contracted to perform.

13 2009 BCCA 129, 90 BCLR (4th) 297 at para 69, Ryan JA (Kirkpatrick JA concurring) [*Progressive (BCCA)*].

dissenter, Justice Huddart, was of the view that property damage as defined in the policy could include damage to the physical structure of the buildings, and that subcontractor work was not specifically excluded.[14]

IV. THE SUPREME COURT OF CANADA DECISION

The Supreme Court of Canada allowed the appeal and found a duty to defend on the part of Lombard.[15]

The essentially identical sets of pleadings in the actions against Progressive were examined to determine if there was "a possibility" of the claims coming within the insurance coverage. The pleadings alleged Progressive's negligence in the construction of these buildings and breach of contract that led to massive water damage, specifically:

DEFECTS

29. As a result of the breaches of contract by Progressive and the negligence of the Defendants and others, and all of them, the Development has sustained since the date of construction and continues to sustain defects and ongoing damage including the following:

(a) water leaking through the exterior walls;

(b) improper and incomplete installation and construction of framing, stucco walls, vinyl siding, windows, sheathing paper, flashings, ventilation, walkway membranes, flashing membranes, eaves troughs, downspouts, gutters, drains, balcony decks, pedestrian walkways, railings, roofs, and patio doors;

(c) insufficient venting and drainage of wall systems;

(d) inadequate exhaust ventilation system;

(e) water leaking through the windows;

(f) improper use of caulking;

(g) poorly assembled and installed windows;

(h) deterioration of the building components resulting from water ingress and infiltration

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14 For critical analyses of the British Columbia Court of Appeal decision, see Ariel DeJong & Miranda Lam, "Same Policy, Same Insured, Different Coverage: BC Court of Appeal Takes One Step Forward and Two Steps Back in Progressive Homes," (2009) 18:8 Canadian Corporate Counsel 116; Kerry A Short & Douglas G Morrison, "*Progressive Homes* versus *Bridgewood*: A B.C. Perspective on the Battle for Coverage in Construction Claims under Comprehensive General Liability Insurance Policies" (2010) Journal of the Canadian College of Construction Lawyers 71; Donald CI Lucky, "Construction Defects and Completed Operations Liability Insurance: What the Supreme Court of Canada Ought to Decide in *Progressive Homes Ltd. v. Lombard General Insurance Co. of Canada*" (2010) Journal of the Canadian College of Construction Lawyers 93.

15 *Progressive*, *supra* note 2 at paras 70, 72.

all of which are collectively referred to as the "Defects" and were caused by the Defendants and all of which constitute further breaches of the terms of the agreements referenced above.

30. As a reasonably foreseeable consequence of Defects and particulars outlined above, significant portions of the Development have suffered since the date of construction and continue to suffer considerable moisture penetration, resultant rot and infestation which has caused the Development to be unsafe and hazardous and to pose a substantial physical danger to the health and safety of the occupants.

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DAMAGES

33. As a result of the Defects and of the negligence and breaches of contract by the Defendants the Plaintiffs have suffered damages including but not limited to the following:

(a) inspection and professional advice concerning the Defects;

(b) cost to date of remedial work, both permanent and temporary;

(c) cost of relocation and alternate housing of tenants during remediation work and other tenant expenses;

(d) diminution in value of the Development; and

(e) expense, inconvenience and hardship caused by the construction and design deficiencies and their repair.[16]

Progressive pointed out that any deficient construction was carried out by subcontractors, but turned to its CGL policies that were in effect at the material times. Progressive was insured for property damage caused by an accident:

COVERAGE B — Property Damage Liability

To pay on behalf of the Insured all sums which the Insured shall become legally obligated to pay as damages because of property damage caused by accident.[17]

"Accident" was defined in the policies:

"Accident" includes continuous or repeated exposure to conditions which result in property damage neither expected nor intended from the standpoint of the Insured.[18]

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16 *Ibid* at para 6.
17 *Ibid* at para 8.
18 *Ibid* at para 11. In later policies, "occurrence" is used and defined as "an accident, including continuous or repeated exposure to substantially the same general harmful conditions" (*ibid*).

"Property damage" was defined in the policies:

> "Property damage" means (1) physical injury to or destruction of tangible property which occurs during the policy period, including the loss of use thereof at any time resulting therefrom, or (2) loss of use of tangible property which has not been physically injured or destroyed provided such loss of use is caused by an accident occurring during the policy period.[19]

Lombard's duty to defend Progressive was set out with the mandate that the Insurer shall:

> (1) *defend in the name and on behalf of the Insured and at the cost of the Insurer any civil action which may at any time be brought against the Insured on account of such bodily injury or property damage* but the Insurer shall have the right to make such investigation, negotiation and settlement of any claim as may be deemed expedient by the Insurer.[20]

The Court briefly summarized its jurisprudence on an insurer's duty to defend:

> An insurer is required to defend a claim where the facts alleged in the pleadings, if proven to be true, would require the insurer to indemnify the insured for the claim.… It is irrelevant whether the allegations in the pleadings can be proven in evidence. That is to say, the duty to defend is not dependent on the insured actually being liable and the insurer actually being required to indemnify. What is required is the mere possibility that a claim falls within the insurance policy. Where it is clear that the claim falls outside the policy, either because it does not come within the initial grant of coverage or is excluded by an exclusion clause, there will be no duty to defend.[21]

The plaintiff's "labels" in the pleadings will not be determinative.[22] No formulaic terms will decide the issue; rather "the true nature or the substance of the claim" will govern.[23]

Justice Rothstein moved to highlight some applicable general principles of insurance policy interpretation.[24] Clear, unambiguous language will be read in the context of the contract as a whole. In the face of ambiguity, regular rules of contract interpretation apply. These include regard for the reasonable expectations of the parties and consistency across similar insurance policies, while spurning interpretations that lead to unrealistic results and those not in the contemplation of the parties at the time the policy was entered into. When these approaches do not resolve ambiguity in the insurance contract, *contra proferentem* will

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19 *Ibid* at para 10.

20 *Ibid* at para 9 [emphasis added in SCC decision].

21 *Ibid* at para 19, citing *Nichols v American Home Assurance Co*, [1990] 1 SCR 801 at 810-11 [*Nichols*]; *Monenco Ltd v Commonwealth Insurance Co*, 2001 SCC 49, [2001] 2 SCR 699 at paras 28-29 [*Monenco*]; *Jesuit Fathers of Upper Canada v Guardian Insurance Co of Canada*, 2006 SCC 21, [2006] 1 SCR 744 at paras 54-55 [*Jesuit Fathers*].

22 *Progressive, ibid* at para 20, citing *Non-Marine Underwriters, Lloyd's of London v Scalera*, 2000 SCC 24, [2000] 1 SCR 551 at paras 79, 81 [*Scalera*].

23 *Progressive, ibid*, citing *Scalera, ibid* at para 79; *Monenco*, *supra* note 21 at para 35; *Nichols*, *supra* note 21 at 810.

24 *Progressive, ibid* at para 21, citing *Co-operators Life Insurance Co v Gibbens*, 2009 SCC 59, [2009] 3 SCR 605 at paras 20-28 [*Gibbens*]; *Jesuit Fathers*, *supra* note 21 at paras 27-30; *Scalera*, *ibid* at paras 67-71; *Brissette Estate v Westbury Life Insurance Co*, [1992] 3 SCR 87 at 92-93; *Consolidated-Bathurst Export Ltd v Mutual Boiler and Machinery Insurance Co*, [1980] 1 SCR 888 at 899-902 [*Consolidated-Bathurst*].

be applied against the insurer,[25] although coverage provisions will be construed broadly, and exclusion clauses narrowly.[26] CGL policies will be interpreted in the order of: coverage, exclusions, and then exceptions.

The initial onus was on the insured, Progressive, to prove the pleadings embraced the initial grant of coverage. Lombard had argued that "property damage," as defined in the policy, did not happen here because damage did not start from another part of the same building. This drew upon the Court's earlier distinction between property damage and pure economic loss in tort law, where a building is indivisible into its component parts.[27] Stated in the affirmative, insured "property damage" must implicate third party property.

Justice Rothstein disagreed with Lombard's interpretation of "property damage" because the policy did not specifically limit damage to third party property in this way. Nor did the plain and ordinary meaning of "property damage" impose such limits. Moreover, for the "work performed" exclusion to be meaningful, it would have to apply to the insured's performance. Accordingly, insured "property damage" includes damage to *any* tangible property. Since the pleadings alleged "property damage" via "deterioration of the building components resulting from water ingress and infiltration," they disclosed a possibility that the claim may be insured, giving rise to Lombard's duty to defend.

Progressive then had to show this property damage was caused by an accident, defined as including "continuous or repeated exposure to conditions which result in property damage neither expected nor intended." Progressive argued the plain meaning of "accident" included negligence. Naturally, Lombard disagreed, saying faulty workmanship leading to a defective building is not an accident.[28] After all, insurance provides for fortuitous contingent risk. CGL policies are not performance bonds.

The Court listed three reasons why negligent construction craft could come within the insurance law definition of "accident." Every case will be decided on the basis of what is alleged in the pleadings and how "accident" is defined in the policy. For example, in one case, negligent repair of a machine (a crane) was characterized as an accident.[29] Furthermore, fortuity is already part of the definition of "accident" because insureds must show damage was "neither expected nor intended from the standpoint of the Insured."[30] Justice Rothstein

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25 *Progressive*, *ibid* at para 24, citing *Gibbens*, *ibid* at para 25; *Scalera*, *ibid* at para 70; *Consolidated-Bathurst*, *ibid* at 899-901.

26 *Progressive*, *ibid*, citing *Jesuit Fathers*, *supra* note 21 at para 28.

27 *Progressive*, *ibid* at para 34. See *Winnipeg Condominium Corporation No 36 v Bird Construction Co*, [1995] 1 SCR 85 [*Winnipeg Condominium*]; *Bird Construction Co v Allstate Insurance Co of Canada*, [1996] 7 WWR 609 (Man CA).

28 *Progressive*, *ibid* at para 45, citing *Celestica v ACE INA Insurance* (2003), 229 DLR (4th) 392 (Ont CA) [*Celestica*]; *Erie Concrete Products Ltd v Canadian General Insurance Co*, [1969] 2 OR 372 (HCJ) [*Erie Concrete*]; *Harbour Machine Ltd v Guardian Insurance Co of Canada* (1985), 60 BCLR 360 (CA) [*Harbour Machine*]; *Supercrete Precast Ltd v Kansa General Insurance Co* (1990), 45 CCLI 248 (BCSC) [*Supercrete*].

29 *Canadian Indemnity Co v Walkem Machinery & Equipment Ltd*, [1976] 1 SCR 309 at 315 [*Canadian Indemnity*], where the Court stated: "That a mishap might have been avoided by the exercise of greater care and diligence does not automatically take it out of the range of accident. Expressed another way, 'negligence' and 'accident' as here used are not mutually exclusive terms. They may co-exist."

30 *Progressive*, *supra* note 2 at para 47, citing *Gibbens*, *supra* note 24 at para 22; *Martin v American International Assurance Life Co*, 2003 SCC 16, [2003] 1 SCR 158 at para 20; *Canadian Indemnity*, *supra* note 29 at 315-16; originating in *Fenton v J Thorley & Co, Ltd*, [1903] AC 443 at 448.

summarized, "[w]hen an event is unlooked for, unexpected or not intended by the insured, it is fortuitous."[31] Finally, the Court found that because the CGL policy only came into effect once work was completed, it could not be considered the same as a performance bond.[32]

Once the Court concluded that the claims were within the initial grant of coverage, the burden shifted to Lombard to prove a "clear and unambiguous" exclusion,[33] specifically the "work performed" exclusion that denies coverage for damage to the insured's own completed work. This analytical task was complicated by three different versions of the CGL policy in effect here. In the end, the Court found sufficient ambiguity in the "work performed" exclusion to say Lombard had failed to discharge this burden.[34]

The original "work performed" exclusion encompassed "*property damage to work performed by or on behalf of the Named Insured* arising out of the work or any portion thereof, or out of materials, parts or equipment furnished in connection therewith."[35] It was later replaced by an Endorsement to refer to "*work performed by the Named Insured*," an exclusion which the Court described as "work performed *by* the insured" instead of "work performed *on behalf of* the insured."[36] The exclusion applied only to Progressive's own work, not subcontractor work. Moreover, *contra proferentem* would cast a narrow interpretation on the "work performed" exclusion and this result supports the reasonable expectations of the parties who appear to have themselves separated out subcontractor coverage. Mere reference to subcontractors in the pleadings, present here, invokes the duty to defend.

Lombard's position seemed stronger with the second version of the CGL policy that defined the exclusion as "[w]ork or operations performed by you [Progressive] or on your behalf."[37] Subcontractor work and negligence would be excluded under this policy. However, Justice Rothstein found that the exclusion only extended to *defects*, not property damage, because that version "expressly contemplates the division of the insured's work into its component parts by the use of the phrase 'that particular part of your work'"[38] Accordingly, adding these words to the exclusion limited the exclusion so that there would be no coverage only for repairing defective components. A possibility of coverage under this policy invokes the duty to defend, although actual coverage, if any, will need to be later established at trial.[39]

The third version of the policy was seen as a combination of the first and second versions.[40] Since a possibility of coverage was present under both of those policies, it followed that there was a possibility of coverage also under this hybrid version.[41] In the end,

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31 *Progressive*, *ibid*.
32 *Ibid* at para 48.
33 *Ibid* at para 51, citing *Nichols*, *supra* note 21 at 808.
34 *Progressive*, *ibid* at para 54.
35 *Ibid* at para 55 [emphasis in original].
36 *Ibid* at paras 55-56 [emphasis in original].
37 *Ibid* at para 59.
38 *Ibid* at para 62.
39 *Lombard General Insurance v Canadian Surety Company*, 2012 BCSC 526, 15 CLR (4th) 109 [*Lombard*], where the British Columbia Supreme Court analyzed and applied the "particular part" restriction within the typical CGL policy faulty work exclusion. The Court followed the Supreme Court of Canada's *Progressive* analysis. Could the hot water system be divided into component parts?
40 *Progressive*, *supra* note 2 at para 68.
41 *Ibid* at para 69.

the "work performed" exclusions in each policy version did not clearly exclude the claims alleged in the pleadings, leaving a possibility of coverage and the legal duty to defend.[42]

V. CRITICAL ANALYSIS OF THE SUPREME COURT OF CANADA DECISION

CGL policies comprise the most common form of commercial insurance across Canada.[43] This alone renders this judicial decision of the Supreme Court of Canada highly significant, but it is made even more compelling by the Court's expansive view of coverage under these policies, which re-characterized accidental property damage. The decision represents a broad coup for insureds in construction projects as long-closed doors to claims and coverages have been flung open.[44] The Court in *Progressive* discarded several CGL insurer arguments that have long been accepted practice in the lower courts. By taking a new interpretive approach to "property damage," "accident," and "occurrence," as well as the scope of "work performed" exclusions in CGL policies, the Court has crafted the new leading decision to give full effect to insurers' duties to defend under CGL policies in the construction industry. Whether the Supreme Court succeeded in bringing about more clarity is debatable. Given the importance of this decision, there has been surprisingly little commentary on it,[45] and virtually none that is critical.[46]

A. PRIMACY OF THE INSURANCE CONTRACT INTERPRETATION APPROACH

The Court considered this ultimately a contract interpretation question, although the contract is a standard form that has long been in wide use in Canada in the industry of insuring construction projects. The CGL policy is a commonly used contract form and defective construction is not a new outcome; in some ways it is remarkable that this duty to defend issue had not been well established in the law long before now. The Supreme Court of Canada made some startling interpretations of well-known insurance terms and concepts, while also claiming to work within established principles of interpretation and not develop any of them further.[47] The Court in *Progressive* arguably paid less heed to established insurance contract principles than it envisioned in *Jesuit Fathers* a mere four years earlier:

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42 Legal counsel for Progressive, Gordon Hilliker, has commented that "the policy provisions in question … were specifically drafted by the Insurance Services Office in the USA to cover this very risk. This is plainly stated in bulletins issued by the ISO and the National Underwriters Association describing the purpose of the coverage. Lombard adopted the US wording and sold the policies in Canada," in response to Christine Kellowan, "The SCC Schools Insurance Company on Insurance Policy Drafting in *Progressive Homes Ltd. v. Lombard General Insurance Co. of Canada*" (6 October 2010) online: The Court <http://www.thecourt.ca/2010/10/06/ the-scc-schools-insurance-company-on-insurance-policy-drafting-in-progressive-homes-ltd-v-lombard-general-insurance-co-of-canada/> [Hilliker, Comment].

43 See generally, Mark G Lichty & Marcus B Snowden, *Annotated Commercial General Liability Policy*, loose-leaf (updated February 2010) (Aurora, Ont: Canada Law Book, 1997).

44 See Michael J Bailey, *Alberta Insurance Law & Commentary* (Markham: LexisNexis, 2007).

45 See Glen Boswall, "Construction Deficiency Claims and the CGL Policy: From *A.R.G.* Through *Progressive* and all the Confusion in Between – Part One," (2011) 29:1 Can J Ins L 1; Glen Boswall, "Construction Deficiency Claims and the CGL Policy: From *A.R.G.* Through *Progressive* and all the Confusion in Between – Part Two," (2011) 29:2 Can J Ins L 13; Judy van Rhijn, "Progressive Homes Clarifies Question of Duty to Defend" (January 2011) 22:1 Law Times 11.

46 John A Vamplew, "The evolving interpretation of the CGL policy: Thoughts on *Progressive Homes*," *CBA Underwritings* (August 2011), online: Canadian Bar Association <http://www.cba.org/cba/newsletters-sections/2011/printHTML.aspx?Docid=45851#article4>.

47 See *Progressive*, *supra* note 2 at para 21: "Principles of insurance policy interpretation have been canvassed by this Court many times and I do not intend to give a comprehensive review here."

> Insurance policies form a special category of contracts. As with all contracts, the terms of the policy must be examined, in light of the surrounding circumstances, in order to determine the intent of the parties and the scope of their understanding. Nevertheless, through its long history, insurance law has given rise to a number of principles specific to the interpretation of insurance policies … They apply only where there is an ambiguity in the terms of the policy.[48]

This decision might be dismissed (and if insurers rewrite the CGL policy as a response, it will be dismissed) as merely a one-off case scenario involving specific language over several different policies. Much turned on the specific wording of the policies and endorsements in this case. The *Progressive* decision does not substantively add to, or change, any interpretive principles. However, it does overturn insurance orthodoxy and represents a clear approach to interpret coverage broadly and to limit exclusions strictly.

Plain and ordinary meaning is rarely such a simple matter in practice and "support[ing] the reasonable expectations of the [contracting] parties"[49] is likewise a fickle thing, as the judges who decided the case differently at all three levels have demonstrated. Plain language and the reasonable expectations of the parties are fluid concepts and can obscure even an unintentional indulgence of a subtle point of view in favour of one or another of the parties to the contractual relationship.[50] As it turned out, the Court managed to hold Lombard to a duty to defend in all four actions, although they were covered by different policies.

Progressive will now guide the interpretation of insurance policy definitions of "property damage," "accident," "occurrence," and the "work performed" exclusion.

B. THE MEANING OF "PROPERTY DAMAGE"

Traditionally, construction insurers have instinctively sought to deny coverage under CGL policies on two different grounds. First, insurers have historically taken the position that insurable damage must be against third party property, not the contractor's own property. Second, insurers have refused to cover defective things installed by contractors because to do so would effectively convert the CGL policy into a performance bond. Both of these insurer positions were rejected by the Supreme Court in *Progressive*.

The main argument, both logical and predictable, of the *Progressive* insurer was that insurable "property damage" does not result from damage to one part of the building arising from another part of the same building.[51] Rather, insured "property damage" would be limited to damaged third party property. The insurer's position was a reasonable one and likely informed the drafting of the policy definitions and exclusions. The Court's interpretation might be expected to give effect to the parties' reasonable expectations.

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48 *Jesuit Fathers*, *supra* note 21 at para 27.

49 *Progressive*, *supra* note 2 at para 57.

50 Justice Rothstein chose to employ some odd, confusing negatives in his plain language interpretative analysis. For example, "rules of construction are applied to resolve ambiguity. They do not operate to create ambiguity where there is none in the first place" (*ibid* at para 23); "Exclusions do not create coverage" (at para 27); and "Exceptions also do not create coverage" (at para 28).

51 *Ibid* at para 31.

Lombard's position arose from a distinction between property damage and pure economic loss set out in the Supreme Court of Canada's earlier decision in *Winnipeg Condominium*. In that case, a large section of exterior cladding fell from the side of the building to the ground. The owners alleged negligence by the original general contractor, subcontractor, and architect. The Court concluded that this loss was not "property damage" but rather it was a recoverable form of economic loss, rejecting the notion of a building as a "complex structure" made up of a number of divisible components.[52] Since the Supreme Court in *Winnipeg Condominium* found that damage to other parts of the same building was not property damage, the insurer Lombard reasoned that property damage only occurs when third party property is affected. It seemed clear that unless there had actually been personal injury or damage to *other* property, the cost of repairing or replacing defective work was considered pure economic loss rather than damage to property.[53] On this basis, the *Progressive* insurer argued that "property damage" does not include damage to the insured's own work which, when a building is the subject of the claim, should be considered as an inseparable unity.

Progressive therefore revisited the "complex structure" theory in Canadian coverage litigation. Whole stand alone buildings, such as condominium towers, represent the insured's work. An insured should not be able to successfully claim for the cost of damage to one part of its work product caused by another part of the same product any more than a subsequent food spill in a refrigerator makes for a defectively manufactured refrigerator. The *Progressive* Court disagreed with or distinguished that concept in this case — it is difficult to know which — merely by choosing to apply insurance contract interpretation principles over tort principles.[54] Once tort was discarded as the framework in which to view this damage and contract interpretation became the focus, the Court found no reason why the plain and ordinary meaning of "property damage" would be limited to damage to another person's property, despite this having been the practice for decades. The Supreme Court concluded that "property damage" should not be limited to third party property where the definition in the policies did not impose such a restriction.[55] Accordingly, now where damage is attributed to a severable portion of an insured's work, such as windows, doors, or roofs, the insured would also be covered for the defence of, if not the liability for, consequential damages to the rest of the structure.[56] Basically, CGL policies are triggered by the damage resulting from a negligent act, and not by the negligent act itself. Repairs to defective parts will not be the insurer's liability but, when allegations are made that the defects led to property damage, a duty to defend is triggered.

The Supreme Court went further, unexpectedly and in *obiter*, to point out that defective property, even where a defect renders the property completely useless, could also be insured "property damage."[57] Justice Rothstein suggested the words "property damage" may obtain an even more expansive interpretation than that claimed by the insured in the case before

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52 The theory was postulated in *obiter* by Lord Bridge in *D & F Estates Ltd v Church Commissioners for England*, [1988] 2 All ER 992 at 1006-1007 (HL).

53 *Privest Properties Ltd v Foundation Co of Canada Ltd* (1991), 57 BCLR (2d) 88 (SC).

54 *Supra* note 2 at paras 35-36.

55 *Ibid* at para 36.

56 The Court's reasoning on this point might be extended to first party property insurance claims where equivalent concepts apply, such as whether damage migrating from one area of a building to another comprises fortuitous property damage.

57 *Progressive*, *supra* note 2 at paras 38-40.

him.[58] This gratuitous interpretation, which presumably was not argued in the appeal, seems at odds with fidelity to specific contract language at play in this case. The Supreme Court of Canada appeared to indulge in creating distinctions that could be invoked to enhance the insurer's legal duty to defend, even resorting to lesser known American sources as support.[59] If anything, it appears to be another signal to commercial insurers of a new expansive approach to coverages that are not constrained by specific policy language.[60] It is hard to envision how the commercial insurer could have prevailed before this Court on the basis of the operation of plain language and *contra proferentum* principles.

C. "ACCIDENT" AND "OCCURRENCE"

The CGL policies in *Progressive* were occurrence policies, as they covered "property damage" caused by "occurrences" or "accidents."[61] Another major area of critical analysis is the characterization of this defective workmanship as an "accident" in the "sudden and fortuitous" sense of a discrete and identifiable event.[62] One might consider the meaning of "accident" from the perspective of each party to the insurance contract. From the insurer's point of view, a structurally unsound building is like a bad soup or a boring novel — a poorly constructed product, not an "accident" or "occurrence" on the part of the builder. From the perspective of the insured, presumably anything part or whole that is "neither expected nor intended," which sweeping application seems ready made for third party subcontractor-type claims, would be covered. If Progressive was constructing and delivering the buildings themselves, its own negligent construction could not be said to be "neither expected nor intended," but rather negligence and contract breach due to bad construction.

Shoddy, negligent performance strains the plain meaning of "accident" or "occurrence" in the contexts of, at least, suddenness, fortuity, and finite event.[63] For sure, these common features of "accident" could have been made part of the definition and the limp phrase "neither expected nor intended" deleted or further contextualized, but to ascribe ongoing negligent performance to the meaning of "accident" is neither plain meaning nor faithful to the expectations of the parties and insurance industry practice.[64] It seems unnatural to think of negligence and incompetence as accidental in the insurance sense.[65] For example, precisely when did the "accident" take place in the defective construction of a large building?

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58 *Ibid* at para 39: "While this point was not contested and nothing turns on it in this appeal, it is not obvious to me that defective property cannot also be 'property damage.'"

59 *Ibid* at para 48, citing Lee R Russ & Thomas F Segalla, *Couch on Insurance 3d*, loose-leaf (updated June 2010), 3d ed (Eagan, Minn: West, 2004), vol 11. See also at para 63, citing Patrick J Wielinski, "CGL Coverage for Defective Workmanship: Current (and Ongoing) Issues" (Paper delivered at the 16th Annual Construction Law Conference, State Bar of Texas, Dallas, Texas, 7 March 2003) [unpublished].

60 Curiously, Justice Rothstein, distinguished defects from property damage with respect to the last policy analyzed in the case: *Progressive*, *ibid* at paras 66-70.

61 *Ibid* at para 29. See also paras 11, 43.

62 For a discussion of accident and fortuity generally, see Craig Brown, *Insurance Law in Canada*, 7th student ed (Toronto: Carswell, 2010) at 8.4.

63 See *Progressive (BCCA)*, *supra* note 13 at para 69. Justice Ryan, writing for the majority of the Court, concluded that interpreting the word "accident" to cover faulty workmanship "flies in the face of the underlying assumption that insurance is designed to provide for fortuitous contingent risk."

64 *Progressive*, *supra* note 2 at para 45, citing *Celestica*, *supra* note 28; *Erie Concrete*, *supra* note 28; *Harbour Machine*, *supra* note 28; *Supercrete*, *supra* note 28.

65 The *Progressive* Court stated *ibid* at para 49: "'Accident' should be given the plain meaning prescribed to it in the policies and should apply when an event causes property damage neither expected nor intended by the insured. According to the definition, the accident need not be a sudden event. An accident can result from continuous or repeated exposure to conditions."

The concept of "accident" might be expected to be well defined and understood by now because that term has for a long time been used in insurance contracts. Only one year prior to *Progressive*, in *Gibbens*, the Supreme Court conceded:

> A century and a half of insurance litigation has failed to produce a bright line definition of the word "accident". Insurers have consistently declined to attempt to define the term in their policies. It has been left to the courts to interpret it, and the courts have found the analysis to pose, as an American court put it, "one of the more philosophically complex simple questions."[66]

In *Gibbens*, the insured became paralyzed from a known but rare condition associated with herpes which he contracted after unprotected sex with several women. The unanimous Supreme Court overturned the two lower courts in British Columbia by finding that this paralysis was not an "accident." An illness or disease acquired in the natural course of events could never be an "accident" merely because its onset was an "unlooked-for mishap," unexpected, or externally introduced. Justice Binnie wrote:

> The bubonic plague was transmitted by fleas. Malaria is transmitted by mosquitoes. In ordinary speech, we would not say that the bubonic plague was the result of a pandemic of accidents, or that the inhabitants of warm climates are particularly "accident prone" to contracting malaria. It cannot be correct that passengers sitting in an airliner who catch the SARS virus through the externality of the plane's air circulation system, or riders on a bus who catch "swine flu" from an infected fellow passenger, or people who contract any number of infectious diseases because of a failure to wash hands in disinfectant, or to smack a circling mosquito, have valid claims under an accident policy.[67]

Since herpes naturally flows "in the ordinary course" from unprotected sexual activity, and this paralysis naturally flows from herpes, the paralysis was found not to constitute an insured "accident." The Supreme Court did not want to convert accident insurance policies into comprehensive health policies.[68] Courts must consider the entire chain of events that culminate in the loss. In *Gibbens*, the injury occurred due to a disease contracted in the "ordinary course of events," and not due to an accident.

However, in *Progressive* the Supreme Court seems to add more confusion than clarity to the meaning of the term. The Court's definition of "accident" in *Progressive* seems to undermine the interpretation of that insurance concept embraced by the *Gibbens* Court which disclaimed "ordinary course of events" outcomes as "accidents." The Supreme Court has added to the bewilderment of the legal meaning of insurable "accident" or "occurrence" in Canada. Indeed, in *Progressive* it could only refer to a single 34-year-old case that did not deal with building construction in support of its interpretation and application.[69] To invoke and contextually adapt the words of Justice Binnie in *Gibbens*, "such a conclusion [of the meaning of 'accident' adopted in *Progressive*] stretch[es] the boundaries of an accident policy beyond the snapping point and convert[s] it into a comprehensive insurance policy for

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66 *Supra* note 24 at para 16, citing *Fegan v State Mutual Life Assurance Co of America*, 945 F Supp 396 (DNH 1996) at 399.

67 *Gibbens*, *ibid* at para 64.

68 Jean-Francois Michaud & Jamie Macdonald, "Supreme Court of Canada Revisits Notion of Accident in Insurance Law" (2010) 28:2 Can J Ins L 22.

69 *Canadian Indemnity*, *supra* note 29 at 315-17. The Court found that the negligent repair of a crane comprised an "accident."

[construction performance deficiencies] contrary to the expressed intent of the parties and their reasonable expectations."[70]

The Court chose to seize on the most elastic, coverage-friendly part of the definition of "accident" in the policy, rather than the plain and dominant meaning of the concept and term itself.[71] After *Progressive*, while it will depend on the policy wording in each case, it will be more likely that loss arising in the "ordinary course of events" from negligent construction will be characterized as accidental, while complications arising from the "ordinary course of events" from diseases contracted from known risky behaviour will not be accidental.

Ironically, the plain and ordinary meaning of "accident" would be more restrictive without this particular attempt to define it. Such is the hazard of too much express definition in such policies. Commercial insurers unhappy with this interpretation of "accident" or "occurrence" can remove this broad language. They could also clearly and unambiguously stipulate construction negligence as an exclusion to coverage.

The Court succeeded in embedding considerable uncertainty into these claims, once the duty to defend is ascertained. This leaves much to be determined on a case by case basis at trial, for example, "whether defective workmanship is an accident is necessarily a case-specific determination"[72] and wholly fact specific.

D. "EXCLUSIONS" AND "EXCEPTIONS TO EXCLUSIONS"

The "property damage" alleged in most insurance litigation cases requires application of exclusions to coverage, and exceptions to exclusions to coverage. The common exclusion to coverage is a "work performed" or "own work" exclusion, for which the parties' reasonable expectations are relatively easy to discern. The CGL policy was never intended to provide a guarantee for contractors' negligent construction. Essentially, the insurer does not want to cover an insured's own work performed, but a common exception to this exclusion is the "subcontractor exception." It is an often-heard mantra that exclusions are not ever intended to create coverage (indeed they exist to deny it). Likewise, exceptions to exclusions cannot establish coverage where the initial grant of coverage did not do so. Exceptions bring an otherwise excluded claim back within coverage where the claim fell within the initial grant of coverage in the first place.

The Court's interpretation of the "work performed" exclusion offers another major basis for criticism. Do CGL policies compel an insurer to defend an insured where the defective workmanship being claimed arises out of the insured's "own work"? Lombard, the insurer in *Progressive*, ostensibly never expected to lose its case on the "property damage" and "accident" issues, or felt sufficiently strong about the exclusion issue that it scarcely dealt

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70 *Supra* note 24 at para 65.

71 See *Progressive, supra* note 2 at para 43. "Accident" was defined in the policy: "'Accident' includes continuous or repeated exposure to conditions which result in property damage neither expected nor intended from the standpoint of the Insured."

72 *Ibid* at para 46.

with the exclusion (and exceptions thereto) of coverage in the appeal.[73] Insurers in Canada have generally rested on the "work performed" exclusion in their CGL policies that they were not intended to defend or indemnify contractors for their own defective workmanship. The law on that question was thought to be settled in that it was widely understood that CGL policies were not intended to defend or provide coverage to an insured for defects in their own work.

Again, in *Progressive* the Supreme Court refined words, drew distinctions, made assumptions, and applied presumptions that all operated against the insurer, even in the face of both a reasonably clear, plain, and ordinary meaning and manifest intention in the contract. Hence, in the exclusion, the parties' mere act of replacing "your work" with the phrase "that particular part of your work" was seen as enough to shift from coverage exclusion to coverage inclusion:

> Much like the first version of the policy, this version of the "work performed" exclusion was a specific endorsement which amended the standard version of the exclusion. The phrase "that particular part of your work" replaced the phrase "your work". The presumption must be that this change in language represents a change in meaning. Lombard has not provided any contrary rationale for the change in language.[74]

Adding the four words ("that particular part of") to the exclusion served to delete coverage on defective components. Overriding the general thrust and intent of this exclusion, the Court extracted a presumption to convert an exclusion into an inclusion, on the dubious basis that any longitudinal change in contract language, however minor and equivocal, ought to mandate a change in meaning. One might find it easier to defend this approach if there was evidence that the parties ordinarily address their minds to such minutae and gestures. It may be preferable to consign such an interpretive presumption that effectively reverses the meaning of the concept of "exclusion" to instances where the sequential change in language was meaningful. The standard of strict precision and the presumptions applicable in criminal law interpretation ought not to be weighed against insurers in cases where both parties are commercial entities.

This is but one more example of how one might suspect the Court was inclined to find duty to defend coverage here. The Supreme Court's view that an insured's "work" can be divided into component parts when the language in the "works performed" exclusion uses the phrase "that particular part of the insured's work" could lead to anomalous results. The Court said there might be coverage for the non-defective components of the insured's own work when such language is used. One could imagine a scenario, for example, where a general contractor builds a home with poorly installed roofing. If the "work performed" exclusion excludes only "that particular part" of the insured's work that is defective, the insurer may be liable to repair all of the damage to the home except the defective roof. Canadian courts would not have found coverage here prior to *Progressive*.

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73 *Ibid* at para 53: "Lombard's primary submissions in this appeal were with respect to the proper construction of 'property damage' and 'accident.' Its submissions on the work performed exclusion are very brief."

74 *Ibid* at para 64.

The Court declared that "[t]he primary interpretive principle is that when the language of the policy is unambiguous, the court should give effect to clear language, reading the contract as a whole."[75] It is not obvious that the policy language itself was ambiguous. The Court may have, as any court is capable of doing, created an ambiguity not from the language but from a change in the language. In the end, this may have interfered with the desired objective of "reading the contract as a whole."

The same outcome ensued with regard to whether or not subcontractor work was covered by the exceptions to the exclusions. Coverage for work completed by subcontractors seems to be the only clear purpose of upgrading to the Broad Form Extension. By dropping the words, "on behalf of,"[76] clause (Z) excluded coverage performed by the insured but not work performed by subcontractors. The insurer and insured must be meticulously deliberative and precise about subcontractor coverages in the future. They should also be careful to watch the changes they make to such policies over time. The Supreme Court interpreted these changes against the insurer in each instance under the clear and unambiguous test.[77]

E. THE INSURER DUTY TO DEFEND

According to the Supreme Court in *Nichols*, "normally the duty to defend arises only with respect to claims which, if proven, would fall within the scope of coverage provided by the policy."[78] Insurers resist financing and conducting the defence where they have no liability to indemnify,[79] but the duty arises independently of actual liability.[80] *Progressive* has not changed or even clarified the contractual insurance duty of insurers to defend claims. All that is required "is the mere possibility that a claim falls within the insurance policy."[81] This duty to defend has not been rendered more simple by this decision, but given the Court's broad interpretative approach to numerous aspects of coverage, it is safe to say that more CGL insurers should be prepared to defend more claims.

At the early stages of a construction deficiency claim, an insurer will properly be required to defend those claims which possibly result in coverage. These claims are often historical claims brought years later, and are not inexpensive claims to defend. The insurer's analysis of its duty to defend is not *a fortiori* a decision on coverage or indemnity, but it will continue to have a strong correlation. To the extent that an insured's duty to defend is undergirded by

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75 *Ibid* at para 22 citing *Scalera*, *supra* note 22 at para 71.

76 See *Progressive*, *ibid* at para 55-56.

77 See Hilliker, Comment, *supra* note 42. As to the incentive effect of this decision to encourage more deficient construction workmanship, Hilliker points out that only completed work with latent, subsequent damage will be covered:

> I do not accept that the availability of this insurance will reduce the incentive of contractors to do quality work. The coverage provisions under consideration apply only to property damage that occurs after the project has been completed. Under the modern construction regime this means that the work has been inspected by the owner's representative and by the approving authority and has been accepted. Any patent deficiencies will have been noted and corrected at the general contractor's expense. The insurance protects the parties against the fortuitous risk that a latent defect will lead to property damage during the period of coverage, which is usually 1 to 3 years after completion of the project. Typically the cost of repairing the defect falls to the contractor and only the resultant property damage is covered.

78 *Supra* note 21 at 811.

79 There is no reason why defence insurance could not be de-coupled from indemnity insurance.

80 See generally, Gary F Zimmermann, "Interpreting the Duty to Defend" in *Insurance Update* (Edmonton: Legal Education Society of Alberta, 2007).

81 *Progressive*, *supra* note 2 at para 19.

and coupled with its duty to indemnify, the Court in *Progressive* has enlarged the scope of coverage under CGL policies. On the other hand, future developments may show that the Supreme Court decision in *Progressive* has set the duty to defend beyond the corresponding duty to indemnify.

F. INTERPRETATION OF THE PLEADINGS

Not only is contract interpretation involved in the determination of the duty to defend, but interpretation of pleadings as well. At this threshold, likelihood of proof of even one of the allegations is not necessary.[82] Form and "labels" used by the plaintiff will give way to "the true nature or the substance of the claim"[83] in determining whether the claims fall within the scope of coverage.

However, "the true nature or the substance of the claim" is usually obvious in a construction deficiency case. Surely that cannot, on its own, be the test for coverage and duty to defend. Most pleadings allege broadly what are insured losses. This stage of the analysis as to whether a duty to defend arises — "a possibility" in a "nature or substance of the claim" without any requirement of proof — is so vague as to be a virtually uncontested determination, much like duty of care is viewed in personal injury negligence actions today in Canada. This starkly compares to the standards of reading clear and unambiguous exclusions narrowly,[84] shifting burdens of proof and interpretative presumptions.

Justice Rothstein set out the relevant portions of the pleadings and confidently concluded, "[t]he pleadings indicate the involvement of subcontractors … which is sufficient to trigger the duty to defend."[85] Yet the word "subcontractor" was not actually found in the pleadings. The Court accepted the phrase, "negligence of the Defendants and others," as clearly and specifically implicating the work of the subcontractors.[86]

While the breadth of the pleadings will be scrutinized to determine whether the insurer's duty to defend is triggered under a CGL policy, the Supreme Court of Canada itself was not overly exacting of the pleadings in this case. Justice Rothstein seemed willing to interpret the pleadings very generously, even when "the true nature and substance of the claim" test is applied. It is hard to imagine, given the broad sweep of allegations generally found in statements of claim, that a claim would not invoke in some way the insurer's duty to defend.

This decision will do nothing to discourage "shotgun" style pleadings, drafted in broad language, because it remains in the plaintiff's interest to do that. If the defendant does not have the financial means to defend or settle, the plaintiff will be attracted to broad statement of claim language to bring the claim into the policy and a financial backstop into the litigation. Numerous, broad claims will increase the chances of insurers facing a duty to defend in defective building construction lawsuits and, in practical terms, to settle and

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82 *Ibid*: "It is irrelevant whether the allegations in the pleadings can be proven in evidence."
83 *Ibid* at para 20.
84 *Ibid* at para 51, citing *Nichols*, *supra* note 21 at 808.
85 *Progressive*, *ibid* at para 58.
86 *Ibid*.

indemnify. Since recoverability is no less important than liability,[87] obtaining an insured judgment is much preferable to winning damages against a judgment-proof defendant operating within an under-capitalized company or otherwise unable to satisfy the judgment.[88] On the other hand, plaintiffs can draft the statement of claim in such a way as to defeat an insurance claim and the insurer's defense, forcing the defendant to mount and pay for its own defence and into settlement.

VI. CONCLUSION

Through the *Progressive* decision, the Supreme Court has clarified, if not changed, commercial general liability. It reinforced the centrality of the policy and the language used therein in assessing the duty to defend. It signaled that the interpretation of commercial insurance policies will focus on the explicit policy language and that the Court is no longer comfortable with assumptions and presumptions about coverage that are not expressly located in the policy language. Coverage provisions will be construed broadly, exclusion provisions will be construed narrowly, and exceptions to exclusions bring an otherwise excluded claim back into coverage. The policy will be interpreted in that order: coverage, exclusions, and exceptions,[89] although these clauses will be read together and understood as a coherent whole. The insured bears the onus to bring the claims within the initial grant of coverage,[90] but then the onus shifts to the insurer to restrict coverage through an exclusion clause.[91]

The insurer, Lombard, lost at every turn on every contract interpretation issue dealing with every variation of policy wording in effect in the case. General principles of law such as tort and *uberrimae fidei* will not substitute for, or displace, the language of the contract.[92] In what seems like an impossible burden on the insurer, the Court has sent the message to commercial insurers that these policies will be read to favour insureds. The unanimous decision confirms this approach for the foreseeable future.

Depending upon the specific wording of the CGL policy in effect, this interpretation broadens insureds' potential coverages from damage to and resulting from subcontractor work to all consequential damage from the insured's and subcontractor's defective work. There is now a possibility of insurance coverage under a CGL policy for defects in an insured's own work — not limited to damage caused to a third party's property — and for resulting damage. A standard form CGL insurer is now obliged to respond to all claims for remediating an insured's work damaged as a result of the insured's negligence, except that portion suffering from the defect. The determination of whether defective workmanship can be considered an "accident" is left to a case by case analysis at trial.

While coverage was found for Progressive in this case, it was done so under specific pleadings and policy language. Coverage for defence costs will still necessitate a case by

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87 Liability to pay is determined primarily by engineer or architect expert witness evidence.

88 See generally, Christopher Rhone, "Insurance Recovery" in *Insurance Act* (Edmonton: Legal Education Society of Alberta, 2008).

89 *Progressive*, *supra* note 2 at paras 26-28.

90 *Ibid* at para 29.

91 *Ibid* at para 51.

92 See generally, *Insurance Update* (Edmonton: Legal Education Society of Alberta, 2003).

case analysis. The Court did not fling open the floodgates completely. It reiterated that it decided the *Progressive* case only, with careful consideration to the specific allegations contained in the pleadings of the case and the wording of these policies. It left the impression that a different outcome might obtain in another case with other CGL policies, a different contractual history, and a different set of circumstances.

Several other matters, such as whether there is "property damage," will still be left to determination at trial, so a duty to defend does not automatically give rise to the duty to indemnify. A determination of which particular part of the work caused the damage and whether subcontractor work is covered will have to be made at trial, all of which will increase uncertainty and concern for insurers. Insurers using similar CGL policies will find it harder to simply deny coverage and decline to participate in litigation.

The decision highlights the importance of providing clear and comprehensive definitions of critical terms within insurance policies. The Court's instruction was clear: if insurers do not wish to cover particular kinds of damage, their policies must clearly express that intent. CGL insurers will want to review their policies and policy language in light of this decision to identify ambiguities and ensure that coverage and exclusions are expressed clearly. For example, to limit coverage ("accident") and broaden "work performed" exclusions or narrow exceptions (subcontractors), they must examine the policy language to address faulty design and workmanship. Underwriting insurers must be mindful of which policy version is to be offered to insureds, especially with reference to the extent to which the insured utilizes subcontractors.

As with all Supreme Court decisions, the true scope and effect of the *Progressive* decision will only be felt as lower courts across the country choose to embrace and apply it or to distinguish it on its facts. The Supreme Court made it clear that its decision was based on a close reading of the insurance policies issued to Progressive, leaving the option for other courts to view the ruling as somewhat specific to that case.

While *Progressive* deals only with a duty to defend, British Columbia courts are already applying, and extending, the decision to expand the scope of an insurer's duty to indemnify. The recent decision of the British Columbia Court of Appeal in *Bulldog Bag Ltd. v. AXA Pacific Insurance Co.*[93] appears to have increased the scope of coverage for defective work. In *Bulldog*, the insured manufactured and supplied plastic bags to be used for packaging manure. Defective ink degraded the labeling that was printed on the bags when brought into contact with moisture. The manure had to be removed from the defective bags and repackaged. The insurer, post-*Progressive*, did not even challenge the assertion that failure of the ink constituted an "accident."[94]

In *Lombard*,[95] decided in April 2012, the British Columbia Supreme Court analyzed and applied the "particular part" language within the standard CGL policy faulty work exclusion. The Court followed the *Progressive* analysis, asking if the hot water system be divided into

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93 2011 BCCA 178, 333 DLR (4th) 305 [*Bulldog*].
94 *Ibid* at para 25.
95 *Supra* note 39.

component parts. Unless the allegation in the pleadings is that the entirety of an insured's work is faulty, the particular part work exclusion will apply only to the defective components. Plaintiffs suing under current CGL policies will want to be more precise when alleging construction deficiencies, but broader when describing resulting damage.

The *Progressive* rules are also being applied in Quebec civil law, for example in *Lombard du Canada ltée c. Mont-Tremblant (Ville de)*.[96] In *Université de Montréal c. Desnoyers Mercure et Associés*,[97] decided only a few months after *Progressive* was released, the Quebec Superior Court followed its interpretive principles.[98]

Overall, the *Progressive* decision is good news for insureds with similar existing CGL policies, although these policies arguably were not designed for general contractor liability. The decision has greatly expanded the scope of when an insurer is obligated to provide a defence, and possibly indemnity, for a claim. While it will be much more difficult to avoid the duty to defend in construction defect claims, there may also be many more disputes going through trial to determine if there is a duty to indemnify. While this decision considers only the duty to defend and the possibility of indemnification, the decision's interpretative principles are not limited to the construction industry and may generally apply to all commercial insurance policies. The increased cost of insurance litigation defences and indemnity can be expected to be passed on to insureds in the form of higher premiums.

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96 2010 QCCA 1910, 2010 CarswellQue 11233. The Quebec Court of Appeal confirmed the applicability in Quebec civil law of the principles established in *Progressive*.

97 2011 QCCS 3564, 2011 CarswellQue 7444.

98 See also *Groupe Plombaction c Thetford Mines (Ville de)*, 2011 QCCS 2765, 2011 CarswellQue 5977.