Subrogation: Getting It Right, Right From The Start

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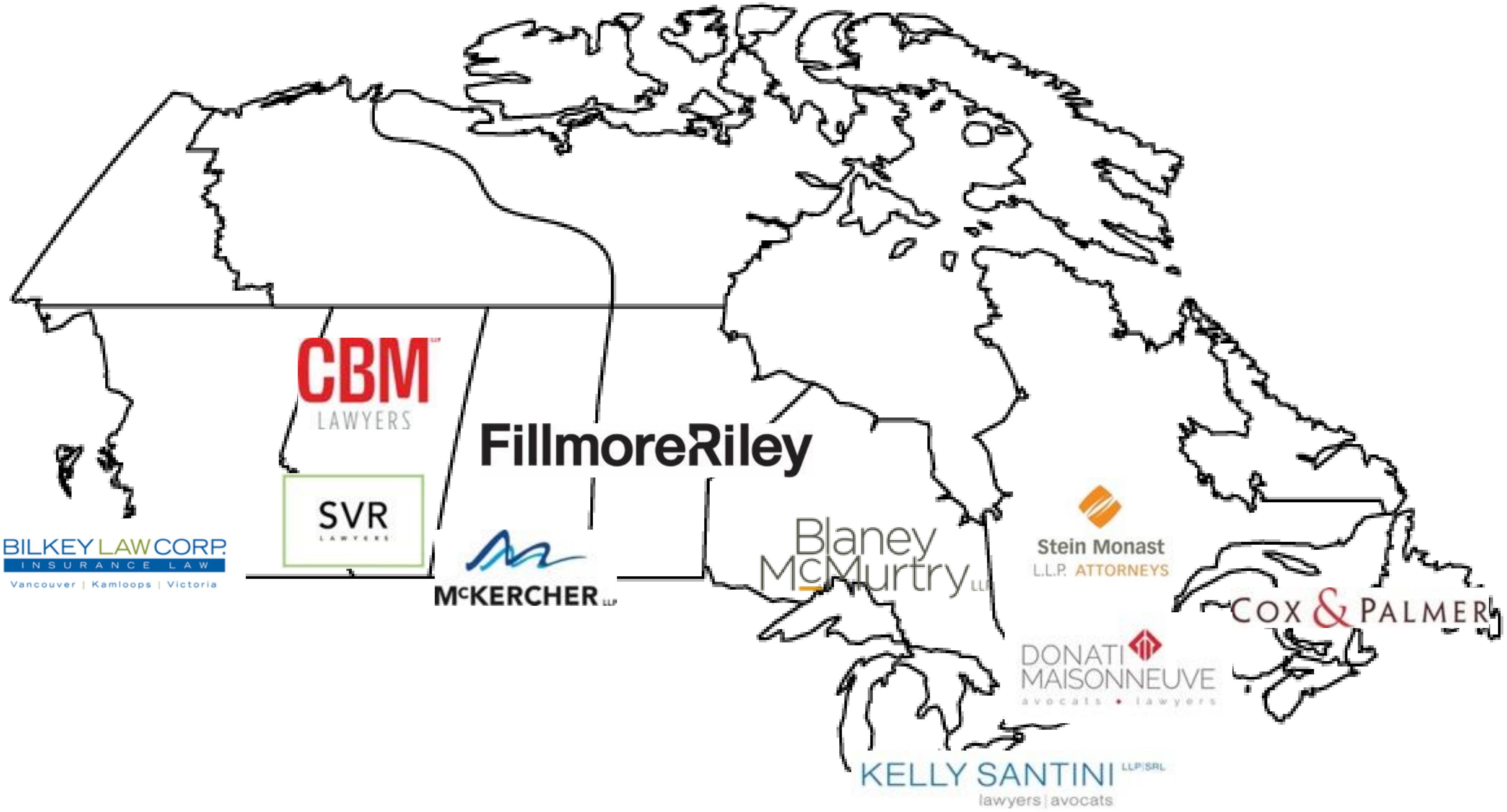

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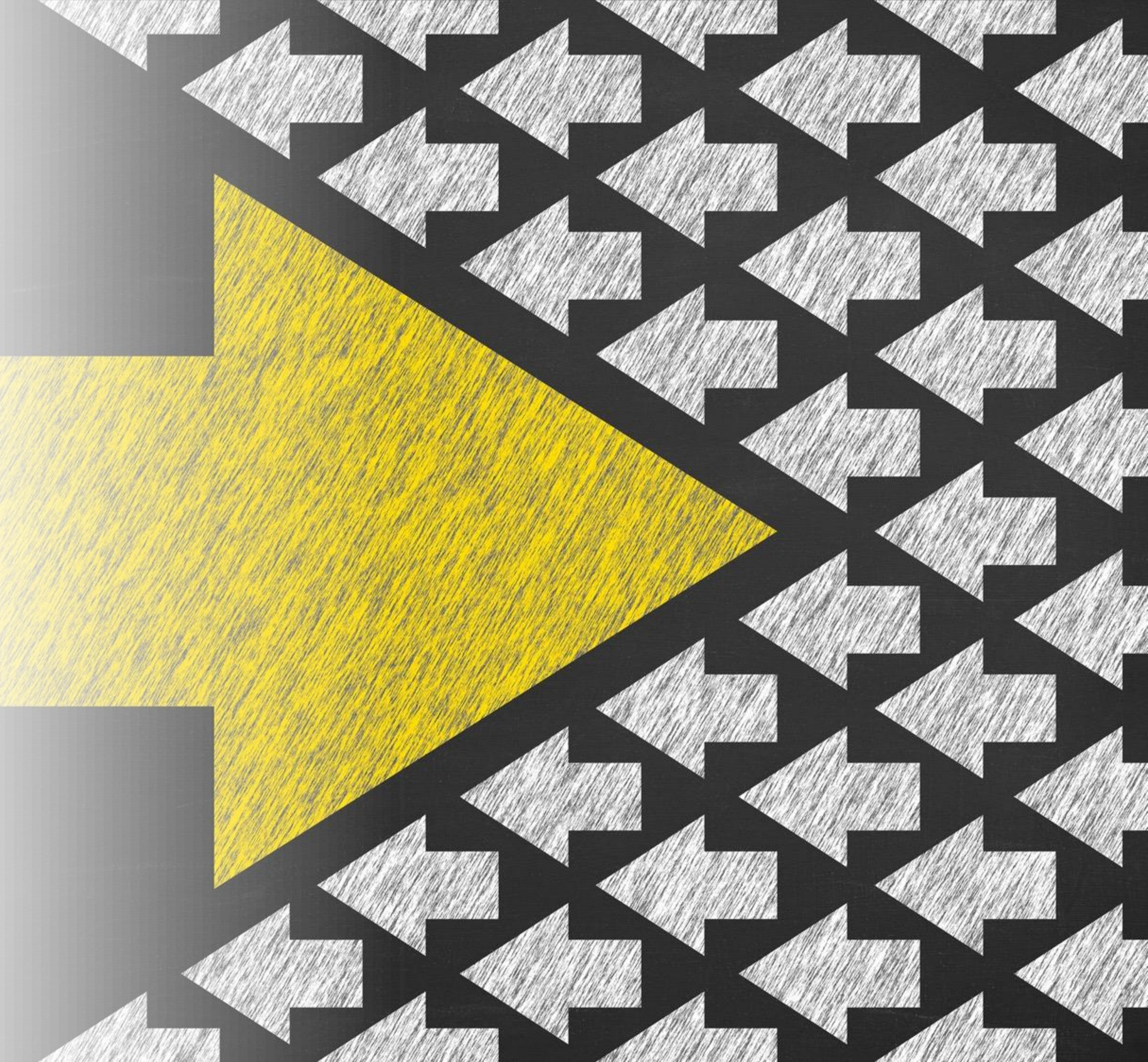
Today’s Panel

The Anti-Subrogation Rule & Covenants to Insure



Presented by: Claire Dowden, Cox & Palmer (St. John's, NL)

The Anti-Subrogation Rule

- The basic premise of the anti-subrogation rule is that "… subrogation cannot be obtained against the insured himself."

  Commonwealth Construction Co. v. Imperial Oil Ltd., [1976] S.C.J. No. 115

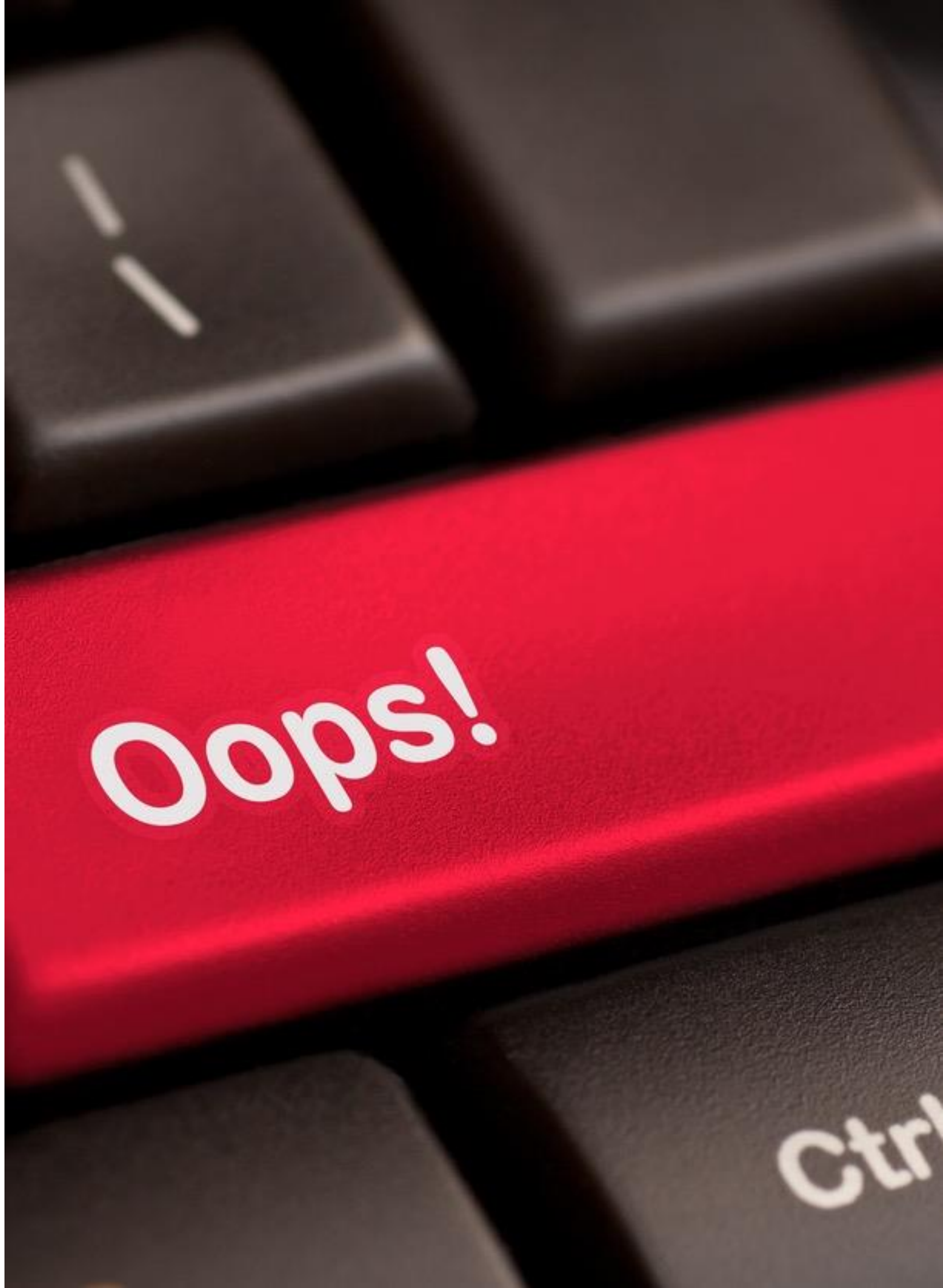
- Reasoning:
  - "The most basic policy reason to bar subrogation against one of the insured is that the insurer has contracted to take onto itself the very risk, taking it from the very insured. The policy of insurance is one of indemnity, and so the co-insured should be indemnified against all his losses, including the subrogated claim."

    Condominium Corp. No. 9813678 v. Statesman Corp., 2007 ABCA 216

Limitations of Anti-Subrogation Rule

- Limited to negligent, not intentional, acts:
  - “The law is well settled that the insurer has no subrogation rights against an insured. In other words, it cannot sue any of its insured for losses paid out under the same policy, no matter how negligent they were in causing the loss (barring arson or other deliberate cause).”

    Condominium Corporation No. 9813678 v Statesman Corporation, 2007 ABCA 216



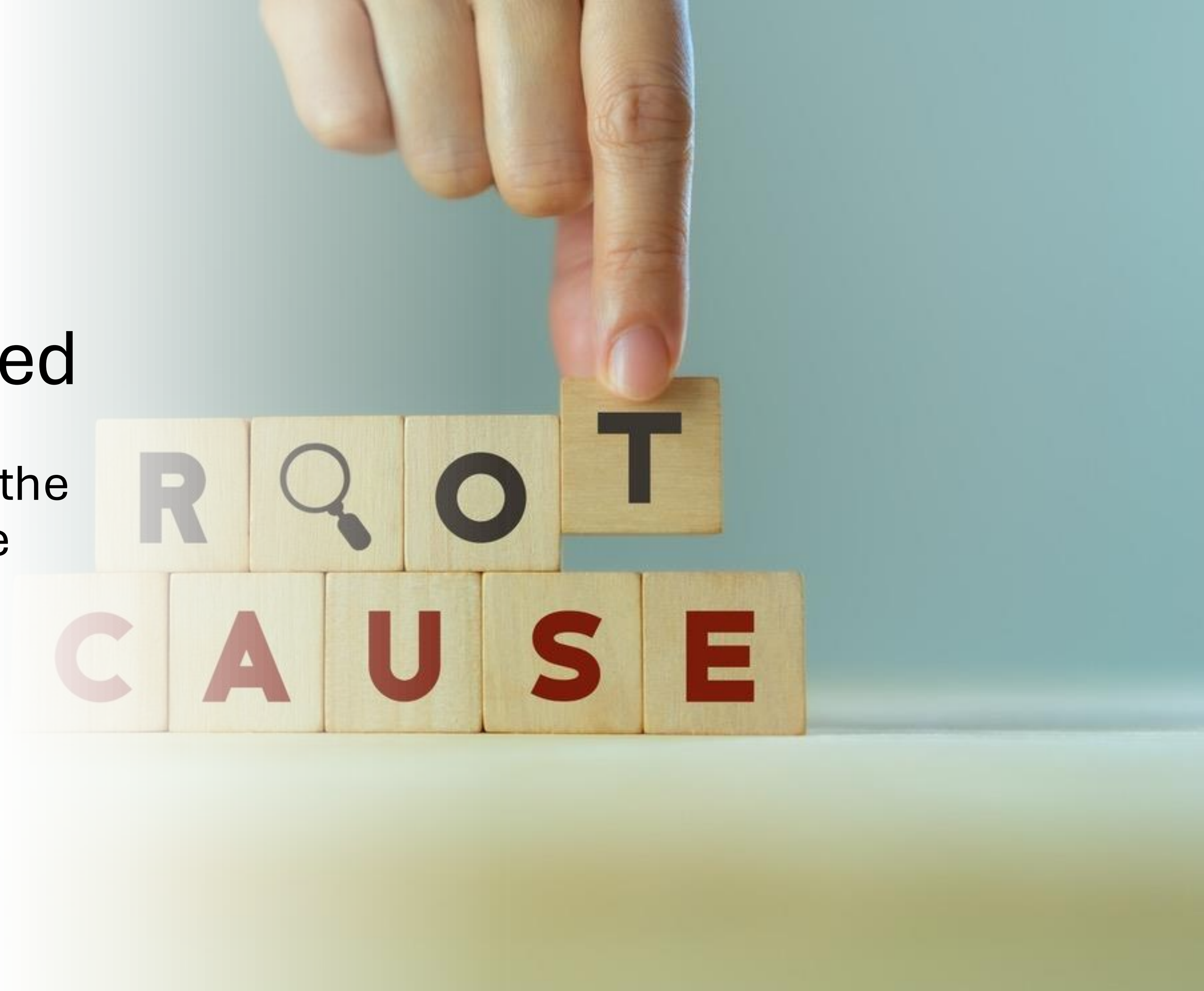
The Anti-Subrogation Rule in Practice

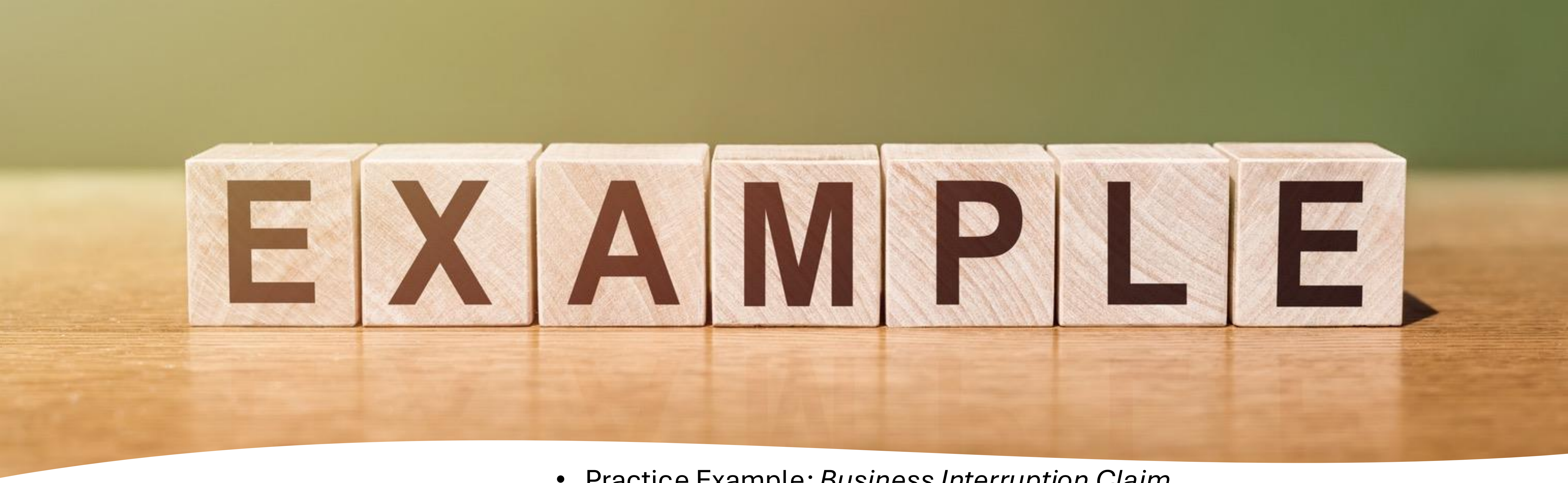
The anti-subrogation rule typically arises in three scenarios, being:

1. Where the projected Defendant is a named insured;
2. Where the projected Defendant covenanted to insure the Plaintiff; and
3. Where the underlying policy expressly waives subrogation and the projected Defendant is deemed an "unnamed insured."

Projected Defendant a Named Insured

- Goes to the root of the rule: cannot pursue insured himself





- Practice Example*: Business Interruption Claim*

Projected Defendant Covenanted to Insure

- Robbery with backhoe – business interruption
- Failure to follow provisions of lease re: timeline for repairs, BUT lease required that tenant add landlord as additional insured
- Claim denied
- Lease provision precludes recovery as against landlord, BUT risk that intention to delay could permit recovery

Subrogation Waiver/Unnamed Insured

- Case Study: *Duri Homes Ltd v Quest Coatings Ltd*
- **Facts**
  - The insurer for Duri brought a subrogated action against Quest, who was hired by the property owner and not contracted by Duri directly, to recover amounts paid to repair damage from a fire to a home Duri was constructing
  - The fire occurred after Quest and its subcontractor performed painting and staining work on the home
  - A lower court dismissed the action against Quest, finding that because Quest was an unnamed insured under Duri's builder's risk insurance policy, it was entitled to exercise the subrogation waiver contained within that policy

Duri Homes Ltd v Quest Coatings Ltd Cont’d

Policy stated:

- “The insurer(s), upon making any payment or assuming liability therefore under this Policy, shall be subrogated to all rights of recover [sic] of the Insured against others and may bring action in the name of the Insured to enforce such rights, except that… all rights of subrogation are hereby waived against any corporation, firm, individual, or other interest with respect to which insurance is provided by this Policy.”

Duri Homes Ltd v Quest Coatings Ltd Cont'd

- Held that a party not named in the underlying policy seeking to rely on the anti-subrogation rule must establish that:
  1. The party is an unnamed insured under the policy; and
  2. The party has an insurable interest capable of supporting the policy.
- In determining that Quest was an unnamed insured, the Court considered clause 1 of the policy which insured:
  - (a) property in course of construction, installation, reconstruction or repair
    - (i) owned by the Insured;
    - (ii) ***owned by others***, provided that the value of such property is included in the amount insured;

    all to enter into and form ***part of the completed project*** including expendable materials and supplies not otherwise excluded, ***necessary to complete the project*** described in Clause 5;

Key Takeaways

- The anti-subrogation rule should be top of mind when both making and defending a subrogation claim
  - If pursuing, make sure subrogation actually available
  - If defending, look to policy for complete defence
- Even if the policy does not name a party, the anti-subrogation rule might still apply if that party (a) is an unnamed insured; and (b) has an insurable interest in the subject property

Strategy from the Plaintiff side of thing

(Dos and don'ts, fun facts and true stories)

Presented by Vincent Messier, Donati Maisonneuve, Montreal

How to maintain a good relationship with the insured and why it is important

Clear communication about the involvement of the insured in a future claim

Keep the insured informed of important developments, if applicable

Allows you to keep the insured contact information updated

Analysis of the cause of the loss and the importance to keep evidence

In Doubt?	Do not get rid of any potential evidence (better safe than sorry)
Other Parties	Inform and involve other parties of analysis done by experts
Destructive Analysis	Make sure all parties are correctly informed before proceeding with destructive expert analysis

Documentation and testimony from witnesses other than the insured / consideration to written statements (if needed)

If possible, a written statement from potential witnesses could be helpful and important down the line

Allows to preserve and document potential witnesses' versions of the facts in litigation, which may be crucial

Allow witnesses to refresh their memories during the litigation process that can sometimes be lengthy

Communications with the other parties in matters involving multiple parties

- Important to identify all the relevant parties and their involvement
- Asking for the parties' insurance policy (when, how to ask and how to justify it)
- Allows effective communication with all the parties, the identification of all relevant parties and allows to avoid potential significant delays (particularly in files involving allegations regarding a manufacturing defect)

Notice of potential liability / Formal Notice / Claims Notice

allows discussions between parties and computation of interests (in Quebec, at least)

When to send a Notice of potential liability and when to send a Formal Notice

What to include in notices sent to other parties and what level of detail is needed

Delays and following up with the parties regarding their position

Evaluation of the chances of success of the claim

- When to evaluate the chances of success of a claim
- What to consider when evaluating the chances of success of a claim (legal arguments, arguments brought up by the other parties, depreciation, etc…)
- If in doubt, consult a lawyer regarding potential legal arguments or arguments raised by the other parties (Defendants)

Consideration to early settlement possibilities

- When to consider a settlement prior to litigation
- Can you initiate settlement discussion as the Plaintiff ? What should be considered
- Tips and tricks to facilitate effective settlement discussions

Presented by
Michael Zacharias,
Fillmore Riley LLP,
Winnipeg

It’s all about recovery

- We have discussed bars to recovery (covenants to insure and waivers), and handling strategies that may help or hinder the subrogation process. This section will deal with recovery itself.
- Regardless of the strength of your subrogated claim, you cannot recover if the target does not have means.
- Identifying recovery issues early on can assist a subrogating insurer to decide whether to abandon a claim or continue to pursue recovery, and if the latter, how best to proceed.

Does the target have insurance?

Determining whether a potential defendant has liability insurance is a significant factor in deciding whether to pursue a subrogated action.

Unfortunately, outside of the litigation process, it is usually not possible to compel a potential defendant to disclose their liability insurance policy.

As such, a polite request for this information may be the best chance of receiving it early on. You can alternatively suggest the potential defendant put their insurer on notice and have them contact you.

If the target's insurer is unknown or does not engage?

There are still options, albeit later in the process, should the target's insurer not engage or should the target fail to involve them. Across Canada, the applicable insurance legislation will generally include a provision like section 127 of *The Insurance Act* of Manitoba, below:

"***Right of injured third party against insurer***

127(1) Where a person incurs a liability for injury or damage to the person or property of another, and is insured against such liability, and fails to satisfy a judgment awarding damages against him in respect of his liability, and an execution against him in respect thereof is returned unsatisfied, the person entitled to the damages may recover by action against the insurer the amount of the judgment up to the face value of the policy, but subject to the same equities as the insurer would have if the judgment had been satisfied."

Across Canada, courts have held that section 127 and its counterparts give rise to a cause of action which would allows a plaintiff (and thus a subrogating insurer) to seek indemnity directly from the target/defendant's insurer, albeit after a judgment goes uncollected on. If the conditions are met, it takes the form of a coverage application with the target's insurer.

Not ideal, but a potential path to recovery.

If there is no insurance?

Not automatically the end of the line.

Among other things, there are:

Asset Checks: search public property registries and business records to see what the target owns.

Credit Checks: Look for past judgments or pending insolvencies. Suing a bankrupt company rarely leads to a payout.

The point is that the prospect of recovery – economic recovery – should be considered early and be informed.

Competing Claims

A subrogated recovery can also be compromised where there are multiple competing claims against one defendant who does not have sufficient liability insurance policy limits to satisfy all claims.

First past the post?

The principle of "first past the post" suggests that the first claimant to obtain a judgment against a defendant will be the first to recover on that judgment, and any subsequent claimants could be at risk of the defendant no longer having sufficient policy limits to pay the claim.

This "first past the post" approach was approved by a court in the case *Re: Aviva*, 2006 BCSC 1578 on the rationale that it encourages early settlement which lessens the burden on the courts and because it rewards those claimants who diligently move their claims forward.

This principle may not apply to all claims, or in your circumstances. For example, motor vehicle claims in some jurisdictions are statutorily required to be paid out pro rata and not first come, first served.

Nonetheless, court approval of “first past the post” is another reason to advance subrogated recovery efforts without (much) delay.

Key Takeaways on Recovery

In addition to assessing the merits of a potential claim, the prospects of recovery should be taken into account. In short:

1. Consider whether the target has insurance and give the insurer notice.
2. Consider means outside of insurance and investigate, as necessary.
3. Consider these things early on.


Questions?