

Reconciling "Excess" Clauses and Duty to Contribute

The Supreme Court of Canada decision in *FAMILY INSURANCE v LOMBARD CANADA* provides clarification for the Canadian approach to interpretation of "other insurance" clauses in liability policies, which typically stipulate that the insurance being provided will become "excess" if there is any other valid insurance available to the insured to respond to a loss. Characterising them as exercises in "hair-splitting" and "semantic microscopy", The Court has rejected use of broad analysis of the policies and the surrounding circumstances, as is done in some American jurisdictions, where the Courts attempt to decide on the "total policy insuring intent" of each of the insurers. Instead, the Supreme Court of Canada has emphasised that the preliminary determination should be whether the specific "other insurance" clauses in question are capable of being reconciled to arrive at a clear determination as to which policy is "primary". If not, the insurers are assumed to have a joint obligation in equity to provide primary coverage to the insured, and although consideration must be given to any "sharing of contribution" provisions defined in the policies, all remaining issues over division of responsibility amongst the insurers are to be decided with over-riding consideration given to equitable sharing of the joint obligation.

Text of [FAMILY INSURANCE](#) decision, courtesy of LexUM

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