


# Take Five

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OnPoint Legal Research  
t. 604-879-4280  
[www.onpointlaw.com](http://www.onpointlaw.com)

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*Concord Pacific Group Inc. v. Temple Insurance Company, 2010 BCCA 275*

Areas of Law: Contracts; Insurance

Under Appeal: Justice Gray

The appellant obtained project delay insurance from the respondent insurer for a construction project. Due to a typographical error, the contract did not indicate the scheduled completion date, but did indicate the expiry date of the contract as April 15, 2002. Prior contracts of the same nature between the same parties always included the expiry date and completion date as the same date. The appellant sued to recover losses incurred due to delay in completion as of November 2001. Both parties sought rectification of the contract and a summary trial was conducted. The trial judge concluded that both parties intended the scheduled completion date to match the expiry date, April 15, 2002, and rectified the instrument to reflect such a mutual intention.

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**Held: Appeal dismissed**

The Court considered an amended endorsement sent from the appellant's insurance broker to the respondent prior to litigation that indicated an intended completion date matching the expiry date of the contract, rather than the earlier date argued by the appellant. The Court found that the broker, as agent of the appellant, had the authority to enter the contract, and the intention of the agent was relevant in considering the intention of the appellant for the purpose of rectification. The Court also disagreed with the appellant's submission that s.12 of the *Insurance Act* barred rectification because it stated that amendments to insurance contracts that prejudice the insured party are not permissible unless they are agreed to in writing by the insured. The Court concluded that rectification does not amend a contract, but rather alters the written instrument reflecting the agreement of the parties to accord with their mutual intentions. The purpose of s.12 is to prevent insured parties from being adversely affected by decisions of their brokers to amend the substance of the insurance contract without the insured's knowledge, which is not what occurred in this case.

Pursuant to the Rules of Court and Family Law Practice Directive #3, divorce applications proceeding by way of Rule 18A cannot be granted until a Registrar's certificate of pleadings has been filed. The parties in this case attended a judicial case conference on April 30, 2008, and the judge granted an order of divorce stating that the order was subject to the filing of a certificate of pleadings and would take effect on the 31st day after the certificate was filed. This condition was not included in the formal order prepared by the parties and signed by the Registrar. On July 9 of that year, the Registrar signed a certificate of pleadings, and two days later stamped the certificate as entered. The husband died on July 22, 2008, and at issue was whether the divorce occurred prior to his death. The chambers judge determined that the filing of the certificate was a necessary condition precedent to the order of divorce, and as such, the divorce would have been effective the 31st day after July 9th when the certificate of pleadings was signed by the Registrar. Therefore, the parties were still married at the time of the husband's death.

*Morgan (Estate) v. Morgan, 2010 BCCA 299*  
Area of Law: Family; Divorce Orders



Held: Appeal dismissed.

The Court agreed with the chambers judge that the order of divorce would have been effective on May 31 but for the condition which required the certificate of pleadings to be filed. Because of the condition in the order, the 31-day period stipulated in the order did not begin to run until July 9th. The Court rejected the estate's argument that the condition was merely procedural or administrative. Although some evidence indicated that counsel for the husband had sent a draft certificate of pleadings to the Registrar earlier than July 9th, the chambers judge was entitled to deference in her factual finding that the Registrar's certificate was not stamped until July 9th. The Court stated that, in any event, even if a draft certificate was in the Registrar's office or some other location, the condition was not fulfilled until the certificate was stamped on July 9th, because without the Registrar's stamp, the document did not constitute a "Registrar's certificate of pleadings" as required by both the order and the governing regulations. In response to policy arguments made by the husband's estate, the Court concluded that the requirement of a Registrar's certificate was not merely procedural or administrative, and was required in order to ensure divorces were not effective until all outstanding issues between divorcing parties were resolved.

## *Parsons v. Coast Capital Savings Credit Union*, 2010 BCCA 311

Areas of Law: Class Proceedings

Under Appeal: Justice Garson

The appellant was a representative plaintiff in a class proceeding against the respondent. The matter settled subject to approval by the Supreme Court. The proposed settlement scheme contemplated a payment of \$10,000 to the appellant for her role as a representative plaintiff. The judge below approved all aspects of the settlement but for this payment, noting that the plaintiff had not

contributed anything special to the proceeding above and beyond what was required of her under the *Class Proceedings Act* (the "Act"), and provided no evidence in affidavit form of her contributions of time or energy to the case. The judge stated that compensation for a

representative plaintiff on a *quantum meruit* basis often occurs, and does not require an "extraordinary" effort on the part of the representative plaintiff, but some evidence of a special contribution is required to justify such compensation.



Held: Appeal allowed.

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The Court ordered compensation in the amount of \$3,500 to the representative plaintiff to be paid as a disbursement out of the settlement fund. Payment from the settlement fund rather than out of counsel fees reflects the restitutionary principle that the beneficiaries of a benefit, the class members, ought to compensate the person who created their benefit. The Court observed that, although there was no evidence before the judge below detailing her contributions, the representative plaintiff fulfilled her obligations, exposed herself to a costs award in the event the claim was unsuccessful, attended an examination for discovery and provided instructions to counsel on the steps in the litigation and the settlement procedure. As a result, modest compensation to the representative plaintiff from the class members was consistent with the restitutionary principles of quantum meruit. The amount of compensation, at \$3,500, was consistent with compensation provided to other representative plaintiffs in similar actions in the province. The Court stated that competent service by a representative plaintiff as well as a positive outcome in the case for all class members is sufficient to justify some compensation for the representative plaintiff. In approving such compensation, the supervising judge ought to consider the amount of compensation to ensure it is not disproportionate to the benefit received by the other class members, the effort expended, and risks assumed by the representative plaintiff.

*Actton Transport Ltd. v. British Columbia (Employment Standards)*, 2010 BCCA 272

Areas of Law: Employment; Constitutional  
Under Appeal: Justice Rice

Four garbage truck drivers complained to the Employment Standards Branch that they had not been properly compensated for overtime work. The drivers drove trucks for Super Save, a company that operates within the province but is related to the appellant company Actton, which, though based in BC, operates interprovincially. Although the drivers use Super Save trucks and receive their orders from Super Save, they are actually paid by Actton. The Employment Standards Director found that it was both “difficult if not impossible” and unnecessary to decide which of Actton or Super Save employed the drivers as the two companies were associated. Under section 95 of the Employment Standards Act, the companies were jointly and severally liable for the compensation claimed by the drivers. On review by the Employment Standards Tribunal, this finding was affirmed. Actton alleged bias on the part of the Director, which was rejected by the Tribunal. Actton applied for judicial review of the Tribunal’s decisions, both on the division of powers issue and the issue of bias and natural justice. The reviewing judge, on consent of the parties, undertook a de novo hearing on issue of the division of powers and received fresh evidence. He determined that the employees were provincially regulated, and as such, it was futile to consider the allegations of bias alleged by Actton because no meaningful remedy could result.

Held: Appeal dismissed

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ENTIRE JUDGMENT](#)

The Court strongly disagreed with the decision of the reviewing judge to undertake a de novo hearing on a matter of judicial review, essentially usurping the function of the administrative tribunal. Despite the irregularity, the Court reviewed the decision of the review judge on the standard of correctness for questions of law and reasonableness for determinations of fact. The Court agreed with the determination of the reviewing judge that the activities of Super Save were disconnected from the interprovincial activities of Actton, and that Actton’s supply of labour to Super Save was not connected to its other interprovincial trucking activities. The Court rejected Actton’s argument that imposing two different labour standards regimes on its business would be too confusing, and stated that Actton’s business decision to operate both intraprovincially and interprovincially meant that it had to comply with both regimes. Such a result is not uncommon, and the Court relied on Supreme Court jurisprudence where the same issue was considered. The only way to bring other parts of their business under federal jurisdiction was if these other parts were vital or essential to the federal undertaking itself – and the provision of labour to another company operating solely within the province was insufficient to meet this strict test.



## *Innes v. Bui, 2010 BCCA 322*

Areas of Law: Torts; Civil Procedure

The parties were in a motor vehicle accident. The insurer, ICBC, concluded that the respondent was solely responsible for the accident and removed her “safe driver discount”. The respondent was dissatisfied with this determination and brought an action in small claims court for the value of the discount. She erroneously named the appellant as the defendant in the action and later

amended the pleadings to name ICBC as the defendant. The small claims judge found against the respondent. Prior to the small claims action being heard, the appellant commenced an action against the respondent in the Superior Court for damages resulting from personal injuries she sustained in the accident. The respondent’s statement of defence did not include a defence of res judicata. The appellant brought a motion

for summary determination of damages, stating that the issue of liability had previously been determined and was therefore res judicata. In response, the respondent brought a motion that the entire action be dismissed on the ground of res judicata because the small claims judge had heard and decided the issues. The chambers judge granted the respondent’s motion to dismiss the action.

Held: Appeal allowed.

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The Court first noted that the chambers judge ought to have required both parties to seek leave to amend their pleadings to include the defence of res judicata before pronouncing on the motions. The Court then set out the conditions required for a successful defence of res judicata. Where the defence is issue estoppel, the party must show that the same question has been decided, the decision was final, and the parties to the prior decision are the same as those in the proceedings where estoppel is raised. The requirements for cause of action estoppel are the same as issue estoppel, with two additional requirements: that the cause of action in the prior action is not separate and distinct, and that the basis of the cause of action and the subsequent action was or could have been argued in the prior action if the parties had exercised reasonable diligence. The Court found that the chambers judge erroneously concluded that the small claims judge determined the issue of liability between the parties, and therefore, the first requirement of issue estoppel was not established. The Court also found that the chambers judge erroneously found cause of action estoppel because the cause of action before the small claims judge was whether ICBC had improperly raised the respondent’s insurance premium, not the issue of liability as between the two parties.