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DAMAGE INSURANCE

TO WHAT EXTENT ARE INSURERS REQUIRED TO COVER PREMISES WHERE CRIMINAL ACTIVITIES ARE CONDUCTED?

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In a recent decision by the Court of Appeal of Québec, the Honourable Jacques Chamberland, J.C.A. reviewed the application of exclusion clauses contained in a home insurance policy in the context of criminal activities[1].

THE FACTS

The Appellant, *Union canadienne compagnie d'assurance* insured the building of respondent, Mrs. Lise Houle and her spouse, Christian Alexandre. The latter was growing cannabis in the insured building. In fact, the residence (the kitchen and possibly the basement) was used for germinating the cannabis seeds while the garage was used for growing the seedlings after they were planted. This was unknown to Mrs. Houle, who never went into the garage as she was disabled.

A fire caused by the electrical installations used for growing cannabis occurred on August 8, 2006 and damaged both the residence and the garage.

EXCLUSIONS

The insurer relied on the two following exclusions to deny coverage to its insured:

> [translation]
>
> "16. In addition to the exclusions set out elsewhere in this contract, WE DO NOT COVER:
> (…)
> The constructions:
> (…)
> Occupied by the **INSURED** and used for illegal or criminal activities.
>
> 21. The **LOSSES** caused by the criminal acts (…) of an **INSURED**."

THE JUDGMENT IN THE FIRST INSTANCE

In the first instance, judge Sophie Picard first examined exclusion clause 16. She concluded that in the absence of the words "in whole or in part", as was the case in the decision *Promutuel Bagot* v. *Lévesque*[2], this exclusion only applied to constructions of which "a substantial part" is used for criminal activities. Therefore, she was of the view that the garage was excluded, but not the residential building, which was only used in part for growing marijuana.

The judge also concluded that exclusion clause 21 applied to Mr. Alexandre, who was producing cannabis, but not to Mrs. Houle, who was completely unaware of these activities.

THE JUDGMENT OF THE COURT OF APPEAL

The Court of Appeal examined exclusion clause 16, first referring to article 2402 par. 1 C.C.Q., which provides that an insurer may be released from its obligations in the events that a breach of the law constitutes a criminal act:

> « **2402.** In non-marine insurance, any general clause whereby the insurer is released from his obligations if the law is violated is deemed not written, unless the violation is an indictable offence. (…)»

The Court noted that the clause of the policy provided for an exclusion for the "constructions" and not the "insured premises", used for illegal activities. Accordingly, this clause had to be analyzed in relation to each of the constructions and not the insured premises as a whole, as the Appellant was maintaining.

However, contrary to the trial judge, the Court of Appeal was of the view that it was wrong to tie the application of the exclusion clause to the extent the building was used for criminal activities.

> [translation]
>
> " [26] In my view, the occupation of a construction by the insured and its use for illegal activities are sufficient to conclude that this construction is not insured, regardless of whether all or only part of the construction is used."

Despite the fact that the words "in whole or in part" are absent from the wording of the clause, it remains that it is not necessary for the insurer to demonstrate that a "substantial part" of the construction has been used for criminal activities.

The Court of Appeal therefore concluded that the issue to be decided was whether the construction had been used for criminal activities, without it being necessary to determine the degree of such use. In the circumstances, since both the residence and the garage were used for criminal activities, both constructions were excluded from insurance coverage.

In view of this conclusion, the Court deemed it unnecessary to review exclusion clause 21.

CONCLUSION

We note that the very wording of the various clauses is particularly important when analyzing insurance policies. In the case under review, the absence of the words "in whole or in part" resulted in a debate before the Court of Appeal.

This case also raises the issue of knowledge by an insured of an illegal use of the premises when examining the exclusion. The Court of Appeal does not specifically deal with this issue in the case under review. However, the Superior Court, examining a similar exclusion, came to the conclusion that the use for criminal purposes by a third party cannot be used against an insured where the insured does not have specific control over such use for criminal purposes[3]. However, the clause examined in that decision did not provide that the premises had to be occupied by the insured, as was the case in the *Union canadienne* v. *Houle decision*. It will be interesting to see whether the Court of Appeal will eventually deal with this specific issue.

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[1] *L'Union canadienne compagnie d'assurance* v. *Houle*, 2013 QCCA 677.
[2] EYB 2011-28493 (C.A.).
[3] *Lévesque* v. *Compagnie d'assurance Desjardins*, 2013 QCCS 1552.