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Editor's Remarks

Lapointe Rosenstein Marchand Melançon (LRMM) is proud to provide you with this first issue of our insurance law newsletter. Our goal is to bring interesting legal questions to our clients' attention in the areas of insurance law and civil liability.

This first number includes an analysis of the modifications and issues arising from the Insurance Bureau of Canada's new Commercial General Liability Policy form. Furthermore, this number features an analysis of the Court of Appeal's recent judgment in the matter of Promutuel Bagot v. Lévesque in which the application of damage insurance policy's criminal acts exclusion was at issue.

We would appreciate your comments and suggestions with respect to subjects of interest for future newsletters.

Me Paul A. Melançon

The IBC's new Commercial General Liability Policy form (Part 1)

Me Ruth Veilleux

In the autumn of 2005, the Insurance Bureau of Canada (hereinafter "IBC") introduced a new standard form, IBC 2100 03-2005(r) to the market. Commercial General Liability policies (hereinafter "CGL" policies) are the insurance policies most commonly used in the commercial sector. They aim to satisfy corporate needs and insure companies for damages caused to third parties that arise in the course of their business operations.

Insurance companies have no obligation to adopt the IBC approved form and a variety of forms are available on the market. Although each insurance company's policy may differ, the majority of insurers simply use the IBC issued form, or include minor modifications. This demonstrates the importance of the IBC approved form.

The IBC, founded in 1964, is the Canadian equivalent of the American Insurance Services Office (hereinafter "ISO"). IBC's CGL forms are inspired by those first adopted by the ISO. The first CGL policy form appeared in the United States in 1940. In response to American legal disputes putting these policies to the test, many revisions have since taken place.

In 1987, the IBC adopted the standard form known as form 2100, a "clear language" insurance policy. This standard form provides the foundation for the new CGL form 2100 03-2005(r), which maintains the structure and "clear language" of its predecessor.

It was in 2002, almost 20 years after the approval of the first CGL form, that the IBC mandated a committee to update the form. Even though the IBC had published several riders since 1986, it was the first in-depth revision of the form. Numerous factors provide insight into the motivation behind this endeavour.

First, the previous form had become obsolete. Indeed, in order to respond to changes in the Canadian context, insurance companies had integrated new exclusions to former policies: abuse, asbestos, spores and mushrooms, electronic data, and terrorism. Some considered that the policy, which had to become coherent as a whole, had become a patchwork of exclusions. Insurance policy holder needs had also changed over the course of the last few years. Insured parties needed greater coverage in certain areas. The revision's goal was admittedly meeting these new requirements.

Moreover, case law interpretation over the past few years had gone against insurers expectations. The 2005 revision was geared to overturn the courts' tendency to extend the coverage period as, for example, occurred in the matter of *Alie v. Bertrand* (2002), O.J. N° 4697. In this judgment, the Ontario Court of Appeal ruled that the wording of the insurance policy provided that coverage could exist, even if damages had partially occurred prior to the starting date of the insurance policy. This interpretation of the insurance policy's coverage grant meant that insurers bore the risk of continuous damages caused to a third party by the insured, notwithstanding that these damages could have occurred before the insurance entered into force. This problem is known as the "long tail" risk.

The reform was finalized in March 2005 with the adoption of IBC's 2100 03-2005(r) form, aiming to promote stability on the insurance market and clarify the parties' intentions with respect to coverage. Twenty three (23) major modifications appear in the new form changing the wording of coverage grants, exclusions, exceptions to exclusions as well as definitions among other things. Such changes will therefore modify, in certain situations, the conditions for the insurance policy's application and the extent of the coverage.

Subsequent to the publication of the French IBC 2100 (03-2005R) form, IBC mandated a sub-committee to review it in its entirety in order to ensure the consistency of vocabulary, expressions and layout with other IBC French forms. Accordingly, the IBC 2100 (11.2007) form replaced the 2005 version. However, these modifications did not affect the fundamental elements of the document, and aimed only to correct certain terminology, replacing terms with those generally recognized and used in the areas of insurance and general civil liability in insurance contracts.

In 2008, additional modifications were integrated into the CGL French and English Forms. The first consisted of an exception to the "use of automobile" exclusion that applies only to the provinces and territories in which the loading and unloading of a vehicle is excluded from automobile insurance. The second modification added an exception to the "spores and mushrooms" exclusion in order to cover products destined to be ingested by humans or animals or to be applied topically on humans or animals.

Finally, in February 2010, four (4) new modifications were brought to coverage D of the CGL form regarding tenant liability, common exclusions to coverages A, B, C and D, Chapter II-Who is an insured, and lastly, general provision 13 relating to cancellation (IBC's 2100 (02.2010) form).

At the time of submitting our publication for printing, we learned that a new version of the IBC 2100 form integrating changes to the "Damage to your work" exclusion will be published by the IBC in the following days.

The interpretation of this new form is of exceptional importance. Indeed, it is the interpretation of the changes, restrictive or not, that will establish the extent to which the CGL policy will apply. It is important to note that no significant Canadian case law exists with respect to the interpretation to be applied to this new form.

"Criminal Act" Exclusion: *Promutuel Bagot* v. *Lévesque*, 2011 QCCA 80

M^e^ Louis P. Brien

The Facts: The respondent (Lévesque) while walking through a corn field found cannabis plants (marijuana) and picked up about ten, brought them home and dried them out. Fifteen days later, a fire caused by a short-circuit spread through her house and destroyed it. The appellant (Promutuel Bagot) refused to pay the indemnity of $129,558.02 to which the respondent would have been entitled, invoking an exclusion clause applicable to certain goods insured that reads as follows: *"there are certain goods that we do not cover in any case: a) buildings: ii) Occupied by the insured, used in whole or in part, for illegal or criminal activities"*.

The Decision: The trial judge accepted the respondent's request declaring that there was no proof for the proposition that she had trafficked or that she had the "definitive" intention to traffic drugs.

On appeal, the trial judge's decision was reversed, the honourable judges Beauregard and Morin declaring that the respondent had cut the plants and put them in the freezer, she was in possession of a significant quantity of cannabis and had tried to sell it to 4 or 5 people. These acts in and of themselves constitute possession of drugs for the purpose of trafficking.

There was thus a palpable and overriding error in the trial court judge's findings as there was possession of marijuana for the purpose of trafficking.

The Court of Appeal then judged that, even though trafficking, which is in and of itself a criminal act, was not the cause of the fire in this case, the respondent still cannot benefit from the indemnity under her insurance. In fact, having marijuana in her house and making use of certain materials for the cultivation of cannabis means that the house itself, is used for criminal activities. Furthermore, even if the appellant did not use all of the house for the criminal activity, the simple act of using a part of the building is enough for the exclusion to apply. Lastly, even if the respondent was not condemned or sued by a criminal court, the insurer can prove the criminal activity on the balance of probabilities.

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