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INSURANCE LAW NEWSLETTER

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Editor's Remarks

It is our pleasure to send this second edition of our Insurance Law Newsletter.

In this edition, you will find an article dealing with the importance of insurance clauses in leases and other contracts. Also, there is an analysis of a recent decision from the Court of Appeal that deals with the extent of insurance coverage for an additional insured party.

We take advantage of this occasion to remind our clients that we offer training sessions that are recognized by the Chambre de l'assurance de dommages and the Quebec Bar on matters of interest for insurance law and civil liability. Please do not hesitate to contact us for more information on these sessions.

Finally, we would like to wish you a healthy, happy and prosperous year 2012.

M^tre Paul A. Melançon

The importance of insurance clauses in leases and other agreements

M^tre Bertrand Paiement

Whether it is an undertaking to obtain specific insurance coverage (*Agnew-Surpass Shoe Stores Limited v. Cummer-Yonge Investments Ltd* [1976] 2 S.C.R. 221), a clause whereby a tenant is to pay the costs of the insurance obtained by the owner (*Ross Southward Tire Ltd v. Pyrotech Products Ltd,* [1976] 2 S.C.R. 35), or a simple undertaking on the part of an owner to insure a rented building (*T. Eaton Company Ltd v. Smith* [1978] 2 S.C.R. 749), the exonerating effect of clauses of this nature, as decided in this trilogy of judgments rendered 35 years ago by the Supreme Court of Canada, still remains strangely obscure in Quebec.

And this, despite the fact that the Quebec Court of Appeal[1] gave it an enthusiastic approval in a judgment rendered in terms that could not be clearer:

> *[TRANSLATION] "**Whether the undertaking is express or implied**, the result as I understand it must be the same. One must infer that through its undertaking **the owner intended to protect the tenant** with insurance."*
>
> *"If this involvement with respect to the payment of the premium under the owner's implicit obligation to insure the building against the risk of fire does not make the tenant a true co-insured, **it at least declares the parties' intention to provide a protection benefiting both landlord and tenant**."*
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> *(Our emphasis)*

While M[tre] Rousseau-Houle (who was subsequently appointed a Justice of the Superior Court and, later, of the Court of Appeal) was quick to follow suit when she wrote ("Les récents développements dans le droit de la vente et du louage de choses au Québec", 1985 R.D.U.S. 310, p. 415):

> *[TRANSLATION] "In this respect, the recognition by our tribunals of the exonerating effect of clauses whereby an owner undertakes to obtain insurance or the tenant to pay insurance premiums could appear to be a specific question limited to the circumstances of each case. On the contrary, we believe that case law has established a general principle that the tenant who, under the provisions of its lease, pays for insurance or for the owner's guarantee that it will obtain insurance,* ***must benefit from this insurance coverage. This principle appears not only equitable, but reflects the current state of commercial relations****.",*

it is disappointing, to say the least, that a monograph as important as *La Responsabilité Civile*[2] remains mute on the subject.

Although Justice Danielle Grenier applied this principle in a judgment rendered in 1994, she clearly made it understood that she was reticent to do so. This excerpt expresses at length the resistance of civilist reasoning against these notions:

> *[TRANSLATION] "Respectfully, the tribunal does not share Justice Laskin's viewpoint expressed in this judgment. A tenant who shares the cost of common expenses, such as taxes and insurance premiums, pays only his rent. The landlord and the tenant reach an agreement beforehand in order to avoid the fluctuation of these costs leading to a constant renegotiation of the lease's terms. How can one conclude, in the absence of an explicit clause, that a stipulation of this nature exonerates the tenant from civil liability in the event of a fire?* ***The solution retained appears to draw its inspiration from equity and rests upon objectives that are hardly reconcilable with the principles of civil liability.*** *This said, and considering the abundance of subsequent case law developed by the Court of Appeal in the same respect,* ***the tribunal must adopt this position****." (p. 15)*
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> *(Our emphasis)*[3]

Because the judgements that have refused to apply this principle are always justified upon "*an opposing intention*" emanating from other clauses in the contract that contradict an intention to renounce to a right of action, it is imperative to scrutinize each and every contract provision to determine whether one or several of them:

- Express an opposing intention;
- Address the circumstances at issue.

This attentive analysis must not be limited to leases (generating the majority of the judgments dealing with this question) but must be generalized so as to include any situation or agreement (even if it is simply a verbal agreement) susceptible to contain clauses of this nature.

Of examples cited in case law, we would mention the following:

1 Residential lease agreements[4];

2 Declarations of co-ownership[5];

3 Construction contracts[6].

Furthermore, one must not forget to look for clauses whereby one of the contractual parties undertakes to have the other named a co-insured in the insurance policy[7] or even clauses providing that the insurer will renounce to subrogation[8] against the other contracting party.

In concluding, as this subject is likely to be developed in future case law, it is important to emphasize the problems caused by this last Court of Appeal judgment[8] which considers on the same footing the renunciation to a right of action emanating from an insurance clause, which in fact transfers a risk on an insurer's shoulders, even in instances of gross negligence , and the prohibition against exonerating clauses in cases of gross negligence codified in article 1474 C.C.Q.

In this matter, the challenges awaiting an insurance adjuster or a claims examiner add up to their otherwise already heavy day to day responsibilities.

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1. In a judgment that, indeed, despite its importance, was only reported by Jurisprudence *Express: Lewis Shoes Stores Inc.* v. *S.B.I. Holding Inc.*, J.E.84-616, C.A.M., July 24 1984, Beauregard J., Nichols J. and Moisan J. – ad hoc.
2. Éditions Yvon Blais Inc., 2007, Baudoin, Jean-louis et Deslauriers, Patrice.
3. *Cie. d'Assurance Guardian du Canada* v. *149667 Canada Inc.,* C.S.M. 500-05-016304-915, May 5, 1994, J.E.94-890.
4. *L'Union Canadienne, Cie d'Assurances* v. *Quintal* 2010 QCCA 921.
5. *9034-8988 Québec inc.* v. *Savard*, 2008 QCCQ 328; *Capitale (La), Assurances générales inc.* v. *177846 Canada inc.* 2008 QCCS 2377.
6. *Axa Assurances inc.* v. *Valko Électrique inc.*, 2007 QCCS 5449; CCDC forms.
7. *Commercial Union* v. *C.I.O. Holdings Ltd*, C.S.M. 500-05-035253-978.
8. *Inv. René St-Pierre inc.* v. *Zurich*, 2007 QCCA 1269.
9. One must not lose sight of the fact that, in insurance, only an intentional fault (2464 C.C.Q.) can relieve the insurer from its obligations.

The scope of insurance coverage for the additional insured

M^tre^ Antoine Melançon

Situations frequently arise in which an insured, wishing to enter into an agreement, is forced by the other contracting party not only to obtain and maintain liability insurance, but also to add the other party as an additional insured.

In the event of a loss, an insurer can then be faced with questions regarding the scope of the coverage. A situation of this nature was recently contemplated by the Court of Appeal in a judgment rendered on March 8, 2011[1], in the context of several appeals following a judgment[2] with respect to two (2) matters that were joined at trial (*Ville de Montréal* (hereinafter the "City") v. *CMS Entrepreneurs Généraux inc.* (hereinafter "CMS") and *Compagnie Canadienne d'assurance générales Lombard* (hereinafter "Lombard") *et autres*. The trial proceedings were instituted by Aviva Canada and 2753-0245 Québec inc. in one case, and by ING (now Intact) and 2969-5277 Québec inc. in the other. These matters originated from the same factual situation.

A snow-removal apparatus driven by an employee of CMS collided with a snow-covered fire hydrant, causing water damages to 2753-0245 Québec inc. and to 2969-5277 Québec inc., both operating businesses in proximity of the damaged hydrant. These corporations, as well as their respective insurers that paid indemnities, instituted proceedings against the City and CMS.

It is of note that CMS and the City had entered into a snow-removal agreement that contained a clause pursuant to which CMS was bound to hold the City harmless and take up its interest for any claim [TRANSLATION] "originating from the performance of or incidental to the present contract", as well as a clause pursuant to which CMS was required to subscribe to liability insurance with coverage extending to [TRANSLATION] "all works performed or to be performed under the agreement". Furthermore, Lombard had issued a rider on the insurance policy in favour of CMS attesting that the City benefited from insurance coverage with respect to the snow-removal agreement.

In this context, the City instituted proceedings in warranty against CMS and its insurer Lombard, claiming the coverage specified in the insurance contract.

At trial, the Superior Court, presided by Justice Derek Guthrie, condemned the City in the principal action, on the basis that it should have attached flags to the fire hydrants so that their presence would be identifiable, even when covered by snow. This conclusion was confirmed on appeal and solely the City was held liable.

As regards the City's action in warranty against CMS, the Superior Court concluded that the clause requiring the latter to hold the City harmless, was abusive. On this matter, it is of note that the Court of Appeal concluded that the damages claimed resulting from the sole fault of the City were not related to "the performance of or incidental to" the snow-removal agreement. Consequently, it was not necessary to render a judgment on the abusive nature of the clause, as it did not apply for this reason. The action in warranty against the contractor was therefore dismissed.

As regards the City's action in warranty brought against Lombard, the Superior Court first held that the specifications and the agreement referred exclusively to work needing to be performed by CMS. Furthermore, as the rider was related to the contractual documents, only faults committed by CMS would have fallen under the aegis of the insurance coverage.

The Superior Court dismissed the City's action in warranty against Lombard, considering that no insurance covered the City's fault, which was in this case the City's failure to adequately identify the fire hydrant's presence.

On appeal, the Court stated that the City continued to possess a management power with respect to the performance of the contract. Consequently, the City could have potentially been held liable, and the rider therefore would have covered the City due to the snow-removal agreement.

However, as the fault retained in the principal action had nothing to do with the snow-removal agreement, the City was not able to benefit from the insurance coverage issued by Lombard.

Though not specifically addressed by the Court, it appears that since the City had imposed the text of the rider, its terms may not be interpreted against the insurer, contracts being interpreted against the party that stipulated the obligations (1432 C.C.Q.).

In its decision, the Court of Appeal specified that the scope of the insurance coverage and the insurance clause appearing in the contract was limited to the faults related to the performance of the contract.

This judgment raises an interesting comparison with the matter of *Saanich (District)* v. *Aviva Insurance Company of Canada*, 2011 B.C.C.A. 391 rendered by the British Columbia Court of Appeal on October 5, 2011.

In this matter, the municipality of Saanich had been added as an insured on an insurance policy issued by Aviva, but only with respect to liability originating from the named insured's operations.

Following an injury caused during a dog training lesson by a ball gone astray from an adjacent lacrosse game, the victim instituted proceedings against two sports associations and the municipality. Aviva, who had issued the civil liability insurance policy, refused to take up the municipality's interests notwithstanding the rider, alleging, among other things, that the proceedings had been brought against the

municipality due to its failure to maintain a safe premises, and not due to the named insured's operations.

Although the Court was called to render judgment with respect to the insurer's duty to defend, both the British Columbia Supreme Court and the British Columbia Court of Appeal came to the conclusion that the allegations established "*the claim against Saanich ar[ose] out of the activities of the La Crosse Association*" [paragraph 27].

In concluding, it is of note that the matter of an additional insured will not modify the scope of the coverage. As such, a civil liability policy will not be converted to a professional liability insurance policy simply because the named insured agreed to include a professional as an additional insured (*Intact Compagnie d'assurance* v. *Pétrifond Fondation Compagnie Limitée*, 2010 QCCS 4916).

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1. *Montréal (Ville de)* c. C.*M.S. Entrepreneurs généraux inc.*, EYB 2011-187452 (C.A.)
2. *Compagnie d'assurance ING du Canada* c. *Montréal (Ville de)*, 2009 QCCS 1711

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