IN FACT AND IN LAW

Insurance Law

March 1999

The ice storm: the Court of Québec refuses to apply a "change of temperature" exclusion

by Me Jean-Pierre Casavant

We have recently become aware of what we believe is the first judgment to interpret an insurance policy as a result of a claim arising from the January 1998 ice storm. The judgment was the subject of press comment, specifically the March 9, 1999 edition of *La Presse.*

The Court ruled against the insurer.

The case, *Pâtisserie Française St-Constant Enr.* v. *Compagnie d'Assurance Missisquoi Inc.*, was decided by Mr. Justice Claude H. Chicoine of the Court of Québec on February 2, 1999 (Longueuil, No. 505-22-002392-985, (JE-99-522)).

The plaintiff claimed $6,000 for the loss of its pastry production that had been in its refrigerators and freezers at the time of the ice storm.

The policy covered "**All perils likely to directly affect the insured property**" with the classic exclusion covering "**changes of temperature**". Part of the exclusion clause was reproduced in the judgment as follows:

> **"B. PERILS EXCLUDED: This insurance policy does not insure against damage caused directly or indirectly:**
>
> **(i) By dampness or dryness of atmosphere, <u>changes of temperature</u>, freezing, heating, shrinkage, evaporation, loss of weight, leakage of contents, exposure to light, contamination, pollution, change in colour or texture or finish, rust or corrosion, marring, scratching or crushing, but this exclusion does not apply to damage..."**

According to the judge, it is necessary to trace the chain of causation to find what he called "**the determinative cause (without which the risk would not have occurred)**", which in his opinion was the ice storm (page 14 of his judgment).

The reasoning of the Court is clearly set out at page 11 of the judgment and reads as follows:

> **"Applied to the case before us, it could be said that an ice storm is a fortuitous event, covered by the multiple-peril terms of the policy (section 6); had it not been for this superior force, the electricity supply would have remained on and the temperature would not have risen in the plaintiff's refrigerators and freezers. Had it not been for this unforseeable event (the ice storm) the loss would not have occurred."**

This line of reasoning may appear persuasive. However, with respect, in our view it is incorrect because, if taken to its logical conclusion, it completely eradicates the exclusion clause. As if it never existed.

In our opinion, in retaining the exclusion clause, the parties agreed that the policy would not cover damages caused "**directly or indirectly**" by certain

LAVERY, DE BILLY
BARRISTERS AND SOLICITORS

Me Jean-Pierre Casavant has been a member of the Barreau du Québec since 1972 and specializes in insurance law.

events, such as "**dampness or dryness of atmosphere**" or "**changes of temperature**" or "**freezing**" as well as the whole series of events listed in the exclusion clause. Thus far, the issue does not appear to be very complicated.

If an apple, an orange, a cream cake or a "Baked Alaska" is found damaged or destroyed as the result of an increase or decrease in temperature, it seems obvious that the damage is caused "**directly or indirectly**" by a "**change of temperature**" and such damage is excluded. The same holds true if the apple, the orange or some grapes freeze due to cold. In our view, it is abundantly clear that in that case the damage is caused "**directly or indirectly**" by "**freezing**", which is also excluded.

However, the Court decided to trace the chain of causation, an exercise that could go on indefinitely. There is always a cause behind a cause. In this particular case, the Court, ruled that the determinative cause was the ice storm and in doing so stated, "**Had it not been for this unforeseeable event (the ice storm) the loss would not have occurred**" (the relevant passage at p. 11 of the judgment is reproduced above).

As mentioned earlier, we believe that the Court's reasoning is incorrect.

The applicable insurance law principle, in common law jurisdictions, is that of "proximate cause" (Brown and Menezes, *Insurance Law in Canada*, 1992, page 192), and the comparable civil law concept is "**the direct and immediate cause**" (Didier Lluelles, *Précis des assurances terrestres*, 1999, page 209).

If it is necessary to trace the chain of causation for every situation listed in the exclusion clause, the result would be that the clause could never be applied. There is a cause for every case listed in the exclusion clause. "**Dampness**" is not a phenomenon that exists by itself. It is always caused by something. The same is true for "**dryness of atmosphere**" and "**changes of temperature**". There is always a primary cause for such phenomena, and searching for the cause means that the exclusion clause could never apply.

Could it be argued that this simple interpretation would, for example, operate so as to exclude from insurance coverage any damage caused to apples and oranges by a "**change of temperature**" due to electricity being cut off because of a fire elsewhere in the insured's building? A close reading of the entire exclusion clause provides a clear reply to the argument. Unfortunately, the judge left out several lines of the exclusion clause apparently in the belief that they were not useful for interpretation purposes. In our view, they are very important because they allow for an interpretation of the policy "**which promotes a sensible commercial result**", to adopt the words of Mr. Justice Estey in the classic Supreme Court of Canada decision of *Exportation Consolidated Bathurst v. Mutual Boiler and Machinery*, [1980] 1 S.C.R. 888, at page 901.

We have managed to obtain a copy of the policy and the following is the exclusion clause reproduced in its entirety, including the lines not reproduced in the judgment:

> **"B. PERILS EXCLUDED: This insurance policy does not insure against damage caused directly or indirectly:**
>
> **(i) By dampness or dryness of atmosphere, changes of temperature, freezing, heating, shrinkage, evaporation, loss of weight, leakage**

of contents, exposure to light, contamination, pollution, change in colour or texture or finish, rust or corrosion, marring, scratching or crushing, <u>but this exclusion does not apply</u> to damage:

- **directly or indirectly caused by <u>Named Perils</u>, rupture of pipes or breakage of apparatus not excluded under paragraph (b) above, theft or attempt thereat of accident to transporting conveyance;**

- **caused by freezing to pipes that are not excluded in paragraph (b) above;"**

The term "**Named Perils**" is the subject of a long definition, the basic parts of which we reproduce below for discussion purposes.

"Named perils

A) <u>Fire</u> or lightning.

B) Explosions, except with respect to: (...)

C) Impact by land vehicle, aircraft, spacecraft or articles dropped therefrom, except for (...)

D) Riot, vandalism of malicious acts (...)

E) Smoke caused by a sudden, and unusual occurrence in the operation of a stationary heating apparatus (...)

F) Leakage from fire protective equipment, namely leakage (...)

G) Windstorm or hail, excluding damage caused by (...)"

Read in its entirety, the exclusion clause gives us the following result: Damages caused "**directly or indirectly... by dampness and dryness of atmosphere, changes of temperature, freezing, etc...**" are excluded except where they themselves are "**directly or indirectly caused by... fire, lightning, explosions...**".

Furthermore, it should be noted that, in the event of fire, the governing provisions of article 2485 of the *Civil Code of Quebec* will apply. That article stipulates that the insurer is responsible for repairing "**any damage which is an immediate consequence of fire or combustion, whatever the cause, including damage to the property during removal or that caused by the means employed to extinguish the fire, subject to the exceptions specified in the policy. The insurer is also liable for the disappearance of insured things during the fire...**".

In our view it was important to circulate this somewhat lengthy comment as we are aware that there are many cases raising exactly the same issues currently in abeyance with various insurers.

Hopfully, the courts will have occasion to reconsider this issue.

Me Jean-Pierre Casavant

You can contact any of the following members of the Insurance Law group in relation with this bulletin.

At our Montréal Office

Claude Baillargeon
Edouard Baudry
Anne Bélanger
Jean Bélanger
Marie-Claude Cantin
Michel Caron
Paul Cartier
Jean-Pierre Casavant
Louise Cérat
Louis Charette
Daniel Alain Dagenais
Claudine Décarie
François Duprat
Nicolas Gagnon
Jean Hébert
Odette Jobin-Laberge
Bernard Larocque
Stéphanie Lefebvre
Jean-François Lepage
Robert Mason
Pamela McGovern
Jean-François Michaud
Anna Mittag
Jacques Nols
J. Vincent O'Donnell
Janet Oh
Alain Olivier
André René
Ian Rose
Jean Saint-Onge
Tania Tretiak
Julie Veilleux
Evelyne Verrier
Dominique Vézina
Richard Wagner

At our Québec City Office

Michèle Bernier
Pierre Cantin
Philippe Cantin
Pierre F. Carter
Pierre Gourdeau
Sylvie Harbour
Claude M. Jarry
Claude Larose
Jean-François Pichette
Jean Provencher
Marie-Élaine Racine
Judith Rochette

At our Ottawa Office

Brian Elkin
Patricia Lawson
Alexandra LeBlanc

Montréal
Suite 4000
1 Place Ville Marie
Montréal, Quebec
H3B 4M4

Telephone:
(514) 871-1522
Fax:
(514) 871-8977

Québec City
Suite 500
925 chemin Saint-Louis
Québec, Quebec
G1S 1C1

Telephone:
(418) 688-5000
Fax:
(418) 688-3458

Laval
Suite 500
3080 boul. Le Carrefour
Laval, Quebec
H7T 2R5

Telephone:
(450) 978-8100
Fax:
(450) 978-8111

Ottawa
20th Floor
45 O'Connor Street
Ottawa, Ontario
K1P 1A4

Telephone:
(613) 594-4936
Fax:
(613) 594-8783

Associated Firm
Blake, Cassels & Graydon
Toronto
Calgary
Vancouver
London (England)
Beijing (Chine)

Web Site
www.laverydebilly.com

All rights of reproduction reserved. This bulletin provides our clients with general comments on recent legal developments. The texts are not legal opinions. Readers should not act solely on the information contained herein.