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## Out of the Frying Pan and into the Fire — The Insurer's Burden of Proof in the Matter of Intentional Acts by an Insured

The consequences of accusing an insured of having attempted to fraudulently obtain an insurance indemnity are serious. The Superior Court of Quebec issued an important reminder of the insurer's burden of proof in the case of *Eggsotique Café inc. c. Promutuel Lanaudière, société mutuelle d'assurances générales* (2015 QCCS 178).

Ms. France Corbeil was the sole shareholder and director of l'Eggsotique Café inc (the insured). She had worked her entire life as a waitress. Following the death of her husband, she decided to open her own restaurant. By way of the insured company, she purchased a commercial building: the rent paid by the tenants would cover the monthly expenses of the building. She obtained a mortgage from the bank to finance the majority of this purchase. Within the first year of operation of the restaurant, she had already reimbursed a portion of the loan to the vendor and

had borrowed more money from the bank to add improvements to the restaurant.

Unfortunately, Ms. Corbeil was a poor manager and knew very little about finances or accounting. On March 20th, 2009, the bank served her tenants with a Notice of Withdrawal of Authorization to Receive Rent. Six months later, in December 2009, the bank served her with a Sixty Day Notice of Exercise of Hypothecary Rights.

In an attempt to extricate herself from this deteriorating financial situation, Ms. Corbeil endeavoured to negotiate the sale of the building and to lease space for her restaurant. During the negotiations, the building went up in flames. The investigation determined that the cause of the fire was criminal in nature.

(See next page)



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The evidence revealed that two people had penetrated inside of the restaurant to light fires in three different areas. There was no sign of break-in and the alarm did not go off.

In light of the details revealed by the investigation, the insurer, who had issued a commercial policy, denied Ms. Corbeil's claim. Due to her precarious financial situation, she was suspected of having mandated accomplices to set fire to the building. The insurer believed that she was the only person who stood to gain from the loss of the building.

In defense of her business, Ms. Corbeil entered additional facts into evidence. In the days preceding the fire, she had noticed that money was missing from the restaurant's petty cash and identified two of her employees on the restaurant's surveillance video. The next day, when watching new surveillance footage, she noted that these two same employees were also stealing food. She went on site to confront them and they admitted to their crime. She scheduled a meeting with them for the next day. Later this same night, two people were identified as having lit the three fires that destroyed the restaurant. One of these employees had the key to the restaurant and knew the alarm system's code.

It was also put into evidence that Ms. Corbeil had enacted a number of changes before the occurrence of the fire so as to attempt to redress her financial situation. She had reduced the number of employees in the restaurant. She had hired a manager and had implemented marketing strategies to draw more cus-

tomers base in the months preceding the fire. The day before the fire, she had ordered cases of beer for the restaurant, as well as ink.

When confronted with the conflicting versions presented by the insurer and the insured, the Court decided in favor of Ms. Corbeil and ruled that the insurer's claim that Ms. Corbeil had an interest in setting fire to her own restaurant was unlikely. The Court deemed that it was more probable that the thieving employee of the restaurant and his accomplice had been responsible for the devastating fire.

According to the Court, the facts presented by the insurer did not establish "precisely and directly" (our translation) the implication of Ms. Corbeil in the arson.

The Court cited excerpts from ***Union canadienne (L') compagnie d'assurances***, in which the Court of Appeal explains the role of the Court in such situations:

*[35] The judge must ask himself three questions:*

- 1. Does the relationship between the known facts and the unknown facts allow, by deduction, to conclude to the existence of the latter?*
- 2. Is it equally possible to draw different conclusions, or even contrary conclusions? If so, the burden of proof has not been met.*
- 3. In the whole, do the known facts tend to directly and precisely establish the unknown fact? (Our translation)*



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The Court ruled that the insurer had not met its burden of proof with respect to the cause of the fire and that the circumstances raised by the insurer were not sufficient within the parameters of article 2849 of the *Civil Code of Quebec*.

Furthermore, the Court concluded that Ms. Corbeil did not, in fact, have a sufficient financial motive. The revenues of the restaurant were her only source of income. Having received an indemnity from the insurer following the incident would not have allowed her to improve her financial situation, or to keep the building. She would still have been required to sell it to reimburse the bank.

The insurer was not only condemned to compensate the insured for the damages resulting from the fire but also to pay \$10,000 for moral damages as a result of its denial of coverage. This amount was set by the Court *“in consideration of the state of the jurisprudence with respect to*

*the attribution of moral damages”* (our translation).

Even if, at first glance, the elements raised to invoke fraud by the insurer might have seemed sufficient to establish an intentional act on the part of the insured, this judgment serves as an important reminder that it is vital to analyse all of the facts raised by the insurer or by third parties and to weigh them in their totality, to ensure that the insurer will be able to meet the applicable burden of proof before the Court. A thorough arson investigation is essential to any such case and with the advent of the new *Code of Civil Procedure* it will be all the more important for these investigations to be completed in a timely fashion.

