# The Québec Court of Appeal considers the issue of the amount of insurance:[1] liability of the broker and/or chartered appraiser

November 30, 2016

## Facts

Bar et spectacles Jules et Jim inc. (hereinafter the “Bar” or “Insured”) sought to renew the insurance coverage for its building, which was then insured for $424,000.[2] On the recommendation of its broker, it obtained an appraisal which concluded that the reconstruction cost of the building would be $565,000, meaning that the Bar was underinsured. The Bar’s representative sent the appraisal to the broker, who took no further action and, more specifically, did not forward it to the insurer.

The inevitable happened: a fire destroyed the building. The insurer paid the insurance indemnity of $424,000 as per the policy in effect. However, the reconstruction costs were admitted to be $715,000.

The Bar therefore brought an action against both the broker and the appraiser alleging that the reconstruction costs, including the demolition, in fact reached $799,000. It therefore claimed the amount of $375,000 representing the difference between this amount and the indemnity received ($424,000).

The Bar argued that the broker had neglected to conduct a diligent and rigorous follow-up of the Bar’s request to increase the amount of the insurance on the basis of the appraiser’s report. It also sued the appraiser on the basis that his report contained several errors that caused him to conclude that the reconstruction cost was $565,000, instead of $799,000.[3]

## Trial judgment

The trial judge found that the broker had committed several faults, namely in: accumulating delays in the process of renewing the insurance policy; failing to inform his client (the Bar) of the need to consider the demolition costs in the amount of the insurance; delaying the retention of the chartered appraiser; failing to conduct an adequate follow-up of the appraisal; and especially, failing to forward the appraiser’s report to the insurer in a timely manner.

In so holding, the judge found the broker was liable to reimburse his client in the amount of $348,000, representing the difference between the indemnity received ($424,000) and the amount of

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the insurance it should have received ($772,000) had the broker properly fulfilled his professional obligations.[4]

The fault of the appraiser was admitted, however the Court held that the more significant faults of the broker broke the chain of causation that would be necessary to find the appraiser liable.

The broker appealed the judgment, arguing that if he had fulfilled his professional obligations, the policy limits would have been increased from $424,000 to $565,000 in accordance with the appraiser's report. He therefore admitted his liability for the difference between these two amounts ($141,000). The appraiser obviously relied on the trial judgment, which had held that there was no causal link between the appraiser's faults and the damage, given that the broker's faults had broken the chain of causation. As for the Bar, it argued that regardless of the apportionment of liability, it should be awarded the difference between the indemnity it ought to have received ($799,000), if the defendants had properly fulfilled their respective contractual obligations, and the indemnity actually received ($424,000), representing a difference of $375,000.

## Québec Court of Appeal's judgment

The Court noted that the faults of the broker and appraiser were not at issue on appeal, and the only question was [translation] "their respective liability to the insured".

First, the Court of Appeal reiterated the obligations of insurance brokers, noting that they have an obligation not only to provide information to their clients, but also to advise them. In that respect, the Court refers to section 39 of the *Act respecting the distribution of financial products and services*:

> **39. Damage insurance agents and brokers must, when renewing an insurance policy, take the necessary steps to ensure that the coverage provided corresponds to the client's needs.**

Since the broker is recognized as a specialist in risk assessment, he must act at all times with prudence and diligence.

In some cases, his obligation to advise should lead him to suggest that his client's property be assessed by a competent appraiser. If he does so, he is generally not responsible for any damages that may result from a poor appraisal.

As for appraisers, their obligations are governed by the *Code of Ethics of the members of the Ordre des évaluateurs agréés du Québec*. In this case, the appraiser committed three main faults:

> His appraisal of the building was based on the criteria for a residential property although the building was, at least in part, used for commercial purposes;
> He neglected to include the demolition costs;
> He neglected to consider the costs of upgrading to new standards in the event of the building's reconstruction.

Had he properly prepared his appraisal, his report would have concluded that the reconstruction value (including demolition) was $799,000, rather than $565,000.

Both the appraiser and the broker committed faults of a contractual nature. Everyone acknowledged that the amount of the damages was the difference between the amount of the insurance that ought to have been contracted for ($799,000) and the amount of the existing coverage ($424,000), or $375,000.

The Court of Appeal held that the broker's primary fault was his failure to forward the appraiser's report to the insurer. If he had done so, based on the conclusions in the appraiser's report, the amount of the insurance would have been increased by $141,000. Furthermore, once the broker

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noticed that the appraiser had failed to consider the demolition costs, he ought to have increased the insurance amount to $610,000. This therefore increases the broker's liability to the total amount of $186,000 ($610,000 — $424,000).

As for the appraiser, had he properly carried out his work, his appraisal ought to have been for the amount of $799,000. Therefore, after the indemnity paid by the insurer ($424,000) and the portion of the damages attributable to the broker ($186,000), the balance owed by the appraiser was $189,000.

The Court noted that the broker is not liable for the appraisal of the insurance amount where it is done by the insured, whether or not through an appraiser.

In conclusion, the broker ought to have been found liable for the amount of $186,000 and the appraiser for the amount of $189,000.

## What to remember

First, it is important for all of the parties involved (insured, broker and appraiser) to pay attention to the amount of insurance. Indeed, buildings can increase in value as renovations and improvements are made. Reconstruction costs can also fluctuate with changes both in building standards and inflation.

The primary responsibility for obtaining the correct amount of insurance falls on the insured himself. However, the broker, who has a duty to give advice, should remind his client to verify the amount and suggest that he retain an appraiser, in appropriate circumstances. In addition, where the broker has a mandate to change the amount of the insurance, he must act with due diligence.

As for the appraiser, he must comply with industry practice and should include an assessment of the reconstruction costs, demolition costs and costs of upgrading to current standards in his appraisal, since these standards can change over the years. His analysis should also be based on the proper standards, which can vary as opposed for a residential building to a commercial building.

If the amount of the insurance is insufficient in the event of a loss, one or more of the insured, broker and appraiser may be at fault and the rules of civil law will apply to determine the apportionment of liability.

In this regard, the decision of the Court of Appeal also contains a very interesting analysis (which we can't review in detail in this bulletin) of various concepts relevant to causation, such as the notions of contributory fault, successive fault, fault that is a determining factor in the occurrence of the damages, and the theory of the break in the chain of causation.

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1. *Maison Jean-Yves Lemay Assurances inc.* c. *Bar et spectacles Jules et Jim inc.*, 2016 QCCA 1494.
2. All amounts are rounded up.
3. This last amount includes the demolition costs.
4. Note that the Court of Appeal found that the trial judge committed an error only in this respect, since the admitted amount of the damages was $799,000 and not $772,000.

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