IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: ***Owners of Strata Plan LMS 3904 v. Commonwealth Insurance Company,*** 2009 BCSC 613

Date: 20090505
Docket: S063092
Registry: Vancouver

Between:

The Owners of Strata Plan LMS 3904
& Carrington Properties (Cranberry Lane) Ltd.

Plaintiffs

And

Commonwealth Insurance Company and
St. Paul Fire and Marine Insurance Company

Defendants

Before: The Honourable Mr. Justice Grauer

Reasons for Judgment

Counsel for the Plaintiffs:	P.M. Willcock J.R. Woznesensky
Counsel for the Defendants:	D.B. Kirkham, Q.C. R. Padda
Date and Place of Trial:	January 28-29, 2009 Vancouver, B.C.

INTRODUCTION

[1] Cranberry Lane is a 90-unit residential condominium complex in Richmond, B.C. It lies beyond the cranberry fields on the eastern reaches of Lulu Island. In March 2005, the plaintiffs, who own and manage the complex, discovered that all was not as tranquil as it seemed. Beneath its placid exterior, Cranberry Lane was infested with marijuana cultivation operations, commonly called grow ops. Fully one-third of its 90 units were found to have been so occupied. The plaintiffs thereafter incurred expense in restoring each unit to a habitable state, and lost rental income.

[2] The plaintiffs were insured under an All-Risks Property Damage and Business Interruption Insurance Policy to which the two defendants subscribed. The plaintiffs now apply for judgment against the defendants by way of summary trial. They seek a declaration that the losses they suffered as a result of damage to the residential units used as grow ops constitute a single "occurrence" as that term is defined in the policy.

[3] This is important because the policy provides for a deductible of $50,000 in respect of each occurrence of "Illegal Drug Activity" losses. If the total losses of nearly half a million dollars constitute one occurrence as the plaintiffs submit, then only one deductible applies. But if the losses from each unit constitute a separate occurrence as the defendants maintain, then the deductibles exceed the losses. The parties agree that the result may fall somewhere between these two positions.

[4] The principal issue in this case, then, is one of policy interpretation. A preliminary issue is whether the plaintiffs have the burden of establishing how many deductibles apply, or whether that burden rests upon the defendants.

THE TERMS OF THE POLICY

[5] The policy was prepared by CMW Insurance Services Limited ("CMW"), an insurance broker in Burnaby, B.C., for a Residential Condominium Program that it offered to insureds such as the plaintiffs. It provided a range of coverages, including the All-Risks Property Damage and Business Interruption Insurance at issue here, crafted for that market.

[6] CMW issued to the plaintiffs a Certificate of Insurance headed "RESIDENTIAL STRATA PROGRAM", which includes the following description of the deductibles applicable to the property damage coverage:

> **Deductibles**:
>
> > All losses $5,000. except: Water Damage & Sewer Back-up $5000.; Glass $100.; Master Key $250.; Earthquake **15%** (minimum $250,000.); Flood $10,000.
> > Loss or damage caused by any growing, cultivation, harvesting, manufacturing, distribution or sale of non-prescription controlled substance(s) - $50,000.

[7] The Certificate also contains the following clause:

> The insurance provide[d] by this individual Certificate is subject to all terms, conditions, provisions, limitations and exclusions of Master Policy Number CDN1119 [the policy in question] ....

[8] The policy itself begins with the GENERAL CONDITIONS, which include this deductible clause:

> 3. DEDUCTIBLE
>
> Each occurrence resulting in a claim for loss shall be adjusted separately and the Insurers' liability shall be limited to that amount by which the loss exceeds the deductible amounts shown hereunder. If the occurrence involves the application of more than one deductible amount, if the Insured shall so elect, only the highest deductible amount shall apply.
>
> DEDUCTIBLE AMOUNTS
>
> (Each being a combined amount for each occurrence for all interests insured herein unless specifically stated otherwise hereafter):
>
> (a) In respect of loss caused directly by the peril of earthquake shock:
>
> (i) In respect of loss caused directly by the peril of earthquake shock for locations situated in Richmond, Delta, New Westminster or White Rock, B.C.: 15% of the total insured value at each location for which indemnity is being claimed hereunder. In the interpretation of this clause, it is agreed that each building or structure insured herein shall be considered as a separate location. Regardless of the number or value of the buildings or structures involved in the loss, the minimum deductible for any one occurrence shall be $250,000.;
>
> (ii) In respect of loss caused directly by the peril of earthquake shock for all other locations: 10% of the total insured value of the insured property at each location for which indemnity is being claimed hereunder. In the interpretation of this clause, it is agreed that each building or structure insured herein shall be considered a separate location. Regardless of the number or value of the buildings or structures involved in the loss the minimum deductible for any one occurrence shall be $250,000.;
>
> (b) If from the peril of Flood: $10,000.;

> "Flood" as used in this clause shall mean waves, tides, tidal waves and the rising of, the breaking out or the overflow of any body of water whether natural or man made but this deductible shall not apply to loss resulting from any other ensuing peril(s);
>
> (c) In respect of glass losses: $100.;
>
> (d) In respect of master key losses: $250.;
>
> (e) In respect of "Illegal Drug Activity" losses: $50,000.;
>
> (f) In respect of water damage or sewer back up losses: $2,500;
>
> (g) In respect of All Other Losses: $1,000.

[9] The GENERAL CONDITIONS are followed by POLICY SECTION A - LOSS OF PROPERTY. With respect to INSURED PERILS, this section of the policy insures against "All Risks of direct physical loss of or damage to the Insured Property except as specifically excluded herein". It contains no exclusions that would apply to this matter, whether of perils or of property.

[10] Next comes POLICY SECTION B, headed BUSINESS INTERRUPTION INSURANCE - GROSS RENTS AND EXTRA EXPENSE. This section provides the following insuring clause:

> If a part or all of any property insurable under this policy be lost, damaged or destroyed during the term of this policy by an Insured Peril (in accordance with the conditions of the applicable Policy Section), the Insurers shall indemnify the Named Insured for loss as provided herein.

[11] The policy goes on to provide under the heading MEASURE OF RECOVERY that the amount payable as indemnity under this section shall be:

> IN RESPECT OF REDUCTION IN GROSS RENTALS: The amount by which the Gross Rentals during the Indemnity Period shall, in consequence of the loss, destruction or damage, fall short of the Standard Gross Rentals ....

[12] These sections are followed by the policy's STANDARD CONDITIONS, which include the following definitions:

> 7. OCCURRENCE DEFINED
>
> For the purpose of this policy, an occurrence shall be defined as a loss and/or a series of losses which are attributable directly or indirectly to one cause, disaster or occurrence. All such losses shall be added together and the total amount of such losses shall be treated as one loss irrespective of the period or area over which the losses occur.
>
> Insofar as loss involving in whole or in part the perils of flood, lightning, tornado, windstorm, cyclone, hurricane or hail is concerned, the terms "one cause, disaster or occurrence" shall mean one single disturbance as designated by the Canadian or United States Weather Bureau. In the event the Bureau does not make such a designation, all earthquake shocks or atmospheric disturbances occurring within any consecutive seventy-two (72) hours during the term of this policy shall be construed to be a single cause, disaster or occurrence.
>
> Insofar as loss involving the peril of earthquake is concerned, if more than one earthquake shock occurs within any consecutive one hundred sixty-eight (168) hours during the term of this policy, solely for the purpose of determining the application of the deductible(s) therefor, such shocks shall be deemed to be a single earthquake occurrence.
>
> 26. DEFINITIONS
>
> ...
>
> (g) "Illegal Drug Activity" means any activity relating to either the growing, cultivation, harvesting, manufacturing, distribution or sale of any non-prescription controlled substance or substances enumerated in Schedule (Section 2) of the federal Controlled Drugs and

> Substances Act Narcotic Control Regulations C.R.C., c. 1041 (as amended from time to time), whether or not the Insured is aware of such activity.

[13] It will be observed that the definition of "occurrence" employs an unhelpful *ipse dixit*-ism by including the word "occurrence" in the definition of itself.

HOW THE GROW OPS WERE DISCOVERED

[14] We begin in the middle of February, 2005, when Mr. Goran Desnica, the resident property manager at Cranberry Lane, was called to do repairs on unit A1#5. The tenants in the unit would not let him go upstairs, ostensibly because someone was sleeping. Mr. Desnica told them to call him to return at a more convenient time, but did not hear from them again. He returned later to find the locks changed, causing him to post a 24 hour inspection notice. When he entered the unit two days later, he found the remains of a grow op in an otherwise empty unit, and called a police hot line. He was advised that if there were no growing plants, then there was no need for anyone to come to inspect the unit.

[15] On March 10, 2005, masked gunmen invaded unit A1#10. The police attended and in the course of their investigation learned of the presence of a grow op in the next-door unit, A1#9, apparently the intended target of the invasion.

[16] On or about March 15, 2005, an anonymous tipster telephoned Constable Yee of the Richmond RCMP Marijuana Enforcement Team to suggest that he investigate possible grow ops at Cranberry Lane in units A#7, A#13, A#14, A#16, A#21, A#22, D#44, A#49 and A#60.

[17] Constable Yee and Constable Mehat attended to investigate. Among other steps, including moving throughout the complex to sniff out any marijuana odours, they obtained the keys to the seven electrical rooms in the complex and checked the electricity usage of the units over a period of several days. On the basis of their investigation, they obtained a warrant to search unit A1#3, which they executed on March 24, 2005. Three suspects were arrested. The unit contained a fully functional grow op.

[18] Later that same day another warrant was executed on unit A#72. The unit contained the remnants of a grow op, but was otherwise deserted.

[19] At the request of the RCMP, Mr. Desnica posted 24 hour inspection notices on a number of other units which the police thought contained grow ops. The inspections were carried out on March 30, 2005. The rents were paid up to date for all of these units, but by the time of the inspections, all had been vacated without notice.

[20] The inspections and searches indicated that the following units had been used as grow ops: A#5-7, A#9, A#13-16, A#19-22, D#44, A#48, A#59-62, A#65, A#71-74, A2#1, A1#2-3, A1#9, A1#11 and A1#12, totalling 29 in addition to the first unit discovered to have been used for that purpose, A1#5. That first unit does not form part of the plaintiffs' claim. The other 29 units do.

[21] These units all suffered varying amounts of damage as a result of the grow ops, and repairs were carried out between March and August of 2005.

[22] A police press release concerning the discovery of the grow ops was widely publicized in the media, after which the plaintiffs found it difficult to attract tenants.

[23] On March 21, 2006, counsel for the plaintiffs delivered a proof of loss with supporting documentation to counsel for the defendants, supporting a claim of $470,866.68. On April 13, 2006, the defendants' solicitor advised counsel for the plaintiffs as follows:

> The insurers have instructed me to advise you that the interim Proof of Loss that you sent to me on March 21 is rejected. Because a separate deductible applies to each apartment that was the location of a grow-op, and the repair [cost] in respect of each apartment is less than the deductible, the insurers' position is that there is no indemnity due under the policy.

ISSUES

[24] The plaintiffs submit that they are entitled to the declaration they seek on the following bases:

- They have established an entitlement to be indemnified for loss and damage to insured property, and the burden is on the defendant to establish that the claim is reduced or eliminated by the application of multiple deductibles, which the defendant has failed to do.

- In any event, they have established a series of losses attributable directly to one cause.

- In the alternative, they have established a series of losses attributable directly to one occurrence.

- In a further alternative, they have established a series of losses attributable indirectly to one cause or one occurrence.

- In the further alternative, if the losses are not all attributable directly or indirectly to one cause or occurrence, there are nevertheless groups of them sufficiently linked to constitute a limited number of occurrences, as opposed to 29.

DISCUSSION

[25] I note at the outset that in dealing with these issues, both parties referred in argument to a number of cases construing the definition of "occurrence" in various insurance policies. None of those cases, and none of those policies, involved the definition we are considering here.

1. Who has the burden of proof?

[26] I am advised by counsel, both of whom have a great deal of experience in the field of insurance law, that there are no Canadian authorities on the issue of whether the insured or the insurer has the burden of proving the applicability of deductibles (that is, the number of occurrences). There are, however, American cases on point.

[27] The American cases tend to support the position of the defendants in this case, that the onus is on the insured to establish the number of occurrences, and

hence applicable deductibles: see, for instance, ***U.S. Liability Insurance Company v. Bove***, 347 So. 2d 678 (1977) (Fla. C.A.), ***Appalachian Insurance Company v. United Postal Savings Association***, 422 So. 2d 332 (1982) (Fla. C.A.) and ***Digital Medical Diagnostics v. United Automobile Insurance Company***, 958 So. 2d 505 (2007) (Fla. C.A.).

[28] The thrust of these cases is that the application of the deductible provision in a policy of insurance is a basic part of the policy, and is not an affirmative defence which must be proven by the insurer. In the ***Appalachian Insurance Company*** case, for instance, which considered incidents of vandalism and theft occurring over a four-month period, the Court of Appeal of Florida (Third District) held that the burden was on the plaintiff insured to show that any claim exceeding the deductible amount was attributable to a single occurrence.

[29] The plaintiffs argue, however, that a deductible clause functions as a limitation on the liability of the insurer, and therefore should be treated in the same way as an exclusion clause, the applicability of which the insurer is obliged to establish. The plaintiffs would therefore distinguish cases in which the *insured* seeks to establish multiple occurrences in order to take advantage of multiple limits, from those in which the *insurer* seeks to establish multiple occurrences in order to take advantage of multiple deductibles. The onus, say the plaintiffs, should be on the insured in the former, and on the insurer in the latter.

[30] In this regard, the plaintiffs argue that on the issue of the onus of proof, the ***Appalachian Insurance*** case, which concerned multiple deductibles, failed to make this distinction and wrongly relied on the ***Bove*** case, which concerned multiple limits.

[31] In support of its position, the plaintiffs cite ***Phoenix Insurance v. Branch***, 234 So. 2d 396 (1970) (Fla. C.A.), ***Jewelers Mutual v. Balough***, 272 F.2d 889 (1959) (U.S.C.A., 5th Circ.), and ***Beaumont-Gribin-Von Dyl Management Company v. California Union Insurance Company***, 63 Cal. App. 3d 617; 134 Cal. Rptr. 25 (1976). The first two, however, deal with the applicability of exclusion clauses, where the onus is clearly on the insurer. The third, a decision of the Court of Appeal of California, Second Appellate District, does indeed equate a "deductibility clause" to an exclusion clause, but in terms of construction *contra proferentum*, rather than the onus of proof, and in a liability policy rather than a property policy.

[32] The real issue in this case is whether the provisions of the policy have the effect of aggregating the plaintiffs' losses or not. In my respectful view, it would make no sense to construe the provisions *contra proferentum* if their relevance is to deductibles, but not if their relevance is to limits, thereby potentially yielding two different interpretations of the same wording in the same policy. Similarly, I am not persuaded that the onus of proof must depend upon whether we are looking at deductibles or limits *per se*.

[33] In my view, the burden of proof should depend, as is normally the case in civil litigation, upon which party must establish a point in order to succeed. The question

here is not which deductible applies. There is no doubt about that. The issue is whether the definition of occurrence aggregates the losses from the various units. I conclude that where the question is whether losses that occurred in different places at different times should be aggregated or not, then the burden should fall upon the party seeking to establish the aggregation, or connection, whether it be relevant to limits or deductibles. In this case, that puts the burden of proof on the plaintiffs.

2. Are the losses attributable directly to one cause?

[34] The plaintiffs take the position that the losses that occurred as a result of the grow ops in the 29 apartments constitute a "loss or series of losses which are attributable directly ... to one cause" and therefore constitute a single occurrence as that word is defined. The one cause, the plaintiffs say, was "illegal drug activity". Accordingly, the plaintiffs submit, even if there had been a loss incurred in apartment A from a marijuana grow op discovered in March, and a loss incurred in apartment B from a methamphetamine lab discovered in November, the effect of the definition of "occurrence" would be to aggregate those two losses, as both are attributable to the one cause of illegal drug activity.

[35] The plaintiffs point to the deductible clause and note that in describing the deductible amounts, the clause first refers to losses caused directly by particular *perils* such as earthquake shock, and flood; and then deals with certain *types* of losses, such as illegal drug activity losses. The plaintiffs argue that this distinction between losses described by peril and losses described by type amounts to a description of "illegal drug activity" as a "cause" as distinct from a "peril", thus

supporting the contention that all losses arising in one policy period from illegal drug activity are losses attributable to one cause.

[36] The plaintiffs rely on cases such as:

- ***World Trade Center Properties LLC v. Hartford Fire Insurance Co. et al.***, 467 F.3d 107 (2006) (U.S.C.A. 2d Circ.), where the insurers took the position that, notwithstanding that there were two separate collisions between two different aircraft and two different towers, the attacks constituted but one occurrence. The policy at issue in that case defined occurrence as: "... all losses or damages that are attributable directly or indirectly to one cause or to *one series of similar causes* [emphasis added]." The United States Court of Appeals (Second Circuit) concluded that this definition aggregated the losses from the two towers into one occurrence, with one limit.

- ***Pacific Rim Nutrition Limited v. Guardian Insurance Company of Canada***, [1998] B.C.J. No. 1852 (C.A.), where the insured argued that a series of thefts constituted numerous separate occurrences. The policy defined occurrence as including "... any act or *series of related acts* involving one or more persons which results in a loss [emphasis added]". The Court of Appeal for British Columbia confirmed the trial judge's finding that the thefts constituted a single occurrence as the thefts were all related, being part of a single individual's systemic and ongoing plan to steal from the insured.

- ***Canadian Imperial Bank of Commerce v. Madill*** (1983), 43 O.R. (2d) 1, 150 D.L.R. (3d) 417 (C.A.), where 25 different operators successfully carried out 93 different transactions in different cities, fraudulently obtaining $900,000. The Court of Appeal for Ontario concluded that the insurers had suffered but one loss from these different transactions, because the series of transactions were carried out in furtherance of a single conspiracy (see para. 74).

- ***Uniguard Insurance Company v. United States Fidelity and Guaranty Company***, 111 Idaho 891, 728 P.2d 780 (1986), where a tractor used by a snow clearing service damaged 98 doors in a ministorage rental facility while removing snow over a 4-hour period. The Court of Appeals of Idaho concluded that the losses arising from the damage to the 98 doors constituted one occurrence (which the policy did not define) on the ground that they arose from a single underlying and continuing cause.

[37] In my view, none of these authorities helps the plaintiffs. The policy wordings they consider differ significantly from the wording that applies in this case, and their factual circumstances beg the question I must determine here. The issue here is simply whether losses from a number of individual grow ops constitute a 'series of losses attributable to one cause', being "illegal drug activity". The question of whether, factually, the losses were in some way connected or coordinated, falls to be determined in connection with different issues.

[38] I am unable to accept the plaintiffs' position. In my view, it would make no commercial sense. The distinction between "peril" and "type of loss" in the deductible clause surely has no bearing on the question. Otherwise, the reference to a deductible of $1,000 for "all other losses" would mean that all losses neither of a type nor caused by a peril specified in that clause would be attributable to the same cause. Loss from a fire occurring in unit A1#4 in February would be aggregated with loss from a fire occurring in unit D#38 in September although there was no connection between the two fires.

[39] In my opinion, the reference to "illegal drug activity" in the deductible clause is not meant to describe a cause as that term is used in the definition of "occurrence". It simply collects together a number of activities ("any activity related to the growing, cultivation, harvesting, manufacturing, distribution or sale of any non-prescription controlled substance ...") which will attract a deductible of $50,000 in the event they give rise to an occurrence that causes loss.

[40] I am of the view that one must look beyond the *classification* of the type of loss, which is what the plaintiffs urge, to the actual *cause* of the loss. In this regard, the loss attributable, for instance, to Unit A#72, was caused by damage arising from activity (a grow op) that took place in that unit. It was not caused by any of the activities carried on in the other 28 units.

[41] The type of activity *per se* is in my view irrelevant to the question of cause as an aggregating factor in the absence of something that is common to the series of losses other than type classification. Accordingly, in the absence of evidence of

such a connecting factor, which will be explored below, I conclude that it cannot be said that the losses from the 29 units are all directly attributable to one cause simply because activities of a similar type were carried on in them.

[42] I should add that the manner in which the adjuster initially approached the claim (as one occurrence until the defendants balked and sought a legal opinion) is in my view irrelevant to how the definition of occurrence should now be interpreted and applied.

3. Are the losses attributable directly to one occurrence?

[43] The question here is whether the losses arising from the 29 units constitute one "occurrence" in the sense that they comprise 'a loss or series of losses attributable directly to one occurrence'. The potential circularity of this enquiry is dizzying. I can only conclude that the drafters meant the word "occurrence", as it appears within the definition, to be interpreted in its ordinary sense as meaning "an incident or event" (***Concise Oxford English Dictionary***, 11th ed., revised 2006), rather than as the policy defines the term for aggregating purposes. The definition would otherwise be nonsensical.

[44] The plaintiffs submit that, on the evidence, it is clear that multiple actors decided to start grow ops in the complex at the same time, and were probably acting according to a co-ordinated plan. This plan, they say, may be regarded as an occurrence that resulted directly in the loss.

[45] Alternatively, the plaintiffs invite me to draw the inference from the evidence that there was at least a sharing of knowledge or intelligence among multiple actors, which sharing constitutes one occurrence to which the losses are attributable.

[46] I cannot accept this reasoning. First, it is not clear on the evidence that multiple actors decided to start grow ops in the complex at the same time. While it is evident that multiple actors were carrying on grow ops at approximately the same time, there is no evidence about when those various actors began their grow ops.

[47] What the evidence shows is that the tenants of the 29 units had moved in at different times over the years 2002, 2003, 2004 and 2005. Their names disclose no particular pattern. The majority (but not all) would appear to have been of East Asian ethnic origin (principally Vietnamese and Chinese), but that by itself is of no significance in today's Lower Mainland. It certainly does not give rise, without more, to an inference of coordination, while the timing of the commencement of the tenancies would argue against it.

[48] Similarly, I am unable to conclude that the evidence supports an inference of shared knowledge or intelligence among multiple actors. The fact that many of the grow ops continued even after the initial police involvement, and after several days of police investigation in the complex, would suggest that any such sharing, while possible, was not probable.

[49] But even if the evidence were otherwise, I consider that any inference of some kind of "coordinated plan", or "shared knowledge or intelligence" would not

constitute one occurrence in the sense of one "incident or event" to which the losses are directly attributable within the meaning of the definition of "occurrence".

4. Are the losses attributable indirectly to one cause or occurrence?

[50] With respect to their argument that their losses are all attributable indirectly to one cause or occurrence, the plaintiffs rely upon an expert opinion provided by John Karlovcec, a retired RCMP officer whose 25 years in the force included a number of years in the Drug Enforcement Sections of the Maple Ridge and Surrey Detachments.

[51] Based upon his familiarity with marijuana grow ops in the Lower Mainland, as well as his review of the evidence, Mr. Karlovcec expressed the opinion that the numerous grow ops at Cranberry Lane were likely coordinated in some fashion. His opinion including the following statement:

> My Policing experience has been that criminal organizations will frequently utilize multiple residences adjacent to each other for marihuana grow operations. The benefits of having multiple grow units in close proximity to each other are numerous. The main benefit is security. An organized group could readily oversee multiple marihuana grow operations and provide security for all the operations if they were in close proximity to each other. The renting or purchasing of multiple units in a cul-de-sac or townhouse complex would certainly make it more difficult for the police to make the necessary observations required for their affidavits to obtain a search warrant as the individual overseeing could easily observe the Police and alert the appropriate people within the criminal organization to the presence of the Police. It has been my experience that organized crime groups are familiar with the law as it relates to the Police conducting these types of investigations and the fact that the Police can only make observations from adjacent properties to the actual residents being investigated.... Further by having several marihuana grow operations in close proximity to each other, it would be difficult for not only the Police but

> anyone to identify the source of the smell of the marihuana grow operation and to determine which specific suspect units in the multiple residential complexes might contain the marijuana grow operation.

[52] Mr. Karlovcec goes on to opine that Cranberry Lane had a number of attributes that made it ideal for marijuana grow ops. These attributes included

- its location adjacent to Westminster Highway, a major arterial route useful for serving the location, but from which drivers would be unable to detect the odour of growing marijuana;
- its high density construction, and the ability of anyone residing in the units to be able to observe persons coming into the complex including police investigators, who would stand out in comparison to residents;
- the inability of police to make observations from other than the "common property" areas, and to identify from which specific units any marijuana odours were emanating; and
- the fact that a large number of the units were rental.

[53] On the basis of his experience, it was Mr. Karlovcec's view that the total number of units being used as grow ops itself suggested some level of coordination, that marijuana grow ops would not likely be conducted adjacent to other grow ops without "some level of coordination or at least implied acceptance or tolerance of the adjacent operation", that criminal organizations will typically target and rent multiple units within specific developments in order to enhance security, that such units

would typically not be occupied by residents, and that an organized component was also suggested by the information relating to several units supplied to the police by the informant, who would typically be someone involved to some degree with others in the enterprise.

[54] Based upon this opinion, the plaintiffs submitted that it is probable that the losses from the various units were attributable indirectly to one of the following causes or occurrences:

(a) the overall establishment and coordination of the grow ops by a single "kingpin" or criminal organization;

(b) the particular fitness of the complex for grow ops; or

(c) the knowledge that was developed and shared among multiple actors that the units were particularly suited for grow ops.

[55] Though I do not doubt Mr. Karlovcec's general expertise, I find a number of problems with his specific conclusions. First, a review of his curriculum vitae and evidence indicates that his experience was mainly in connection with grow ops in cul-de-sacs and townhouse developments, rather than multiple unit complexes such as Cranberry Lane. Second, much of what he says seems to be based principally upon the proposition that there must have been some kind of coordination in order for there to have been so many grow ops in one place. But the reasons he gives do not stand up to close analysis.

[56] For instance, the question of the premises providing an organization with security is belied by what in fact happened in this case. As Mr. Karlovcec himself noted, anyone could access this complex. This was not like the cul-de-sac or townhomes he mentioned where police could only observe from adjacent premises. In this complex, the police were able to move about easily to check for the smell of marijuana, and had immediate access to the electrical rooms where they could monitor the usage of electricity - important evidence of the existence of a grow op.

[57] If the ability to observe non-residents was important, it was clearly ineffective given the continuation of a number of grow ops after the first few were discovered. Overall coordination would suggest that all grow ops should have been abandoned once the police started their investigation, at which time their presence at the complex was hardly covert. That is not, however, what happened, and the police ended up confiscating both plants and equipment.

[58] The evidence from the police and also from the manager indicated that many of the units used as grow ops were in fact lived in, and there is nothing in the police investigation itself which supports the contention of coordination in the establishment and operation of these grow ops. In fact, an RCMP representative, Const. Thiessen told the press that, "We don't believe there was one operation being controlled by a central mother ship", a view he accepted as correct in his deposition.

[59] I note as well that just because, in Mr. Karlovcec's experience, criminal organizations frequently use multiple adjacent units for grow ops, it does not

necessarily follow that where there are a number of grow ops in one complex, they are all controlled by one criminal organization. That, with respect, is reverse logic.

[60] Taking into account all of the evidence, I am unable to accept the opinion of Mr. Karlovcec as establishing, on a balance of probabilities, that all of these grow ops were coordinated by a single kingpin or organization. If I concluded otherwise, then I agree that the plaintiffs would have established that their losses were attributable indirectly to one cause or occurrence. Indeed, the defendants conceded as much. But I find that the evidence does not take us that far.

[61] As to the alleged particular fitness of this complex for grow ops (in comparison to what is not clear), I do not find it to be established on the evidence. Notwithstanding the attributes outlined by Mr. Karlovcec, there were other attributes that made this complex unsuited to the successful operation of these enterprises. As discussed above, these included the open access to the complex, the ability of police to move freely around it without trespassing or requiring warrants, and the unrestricted access of the police (with the manager's permission) to the Hydro meters.

[62] But in any event, I cannot accept that a factor such as the unintended suitability of the complex for an activity can amount to one cause, incident or event to which the losses can be indirectly attributed, in the absence of coordination of the activities themselves. The plaintiffs' argument in this regard really amounts to suggesting that the fact that the losses all occurred in the same complex provides

sufficient commonality to satisfy the definition of "occurrence". It does not. That is essentially another iteration of the direct cause argument rejected above.

[63] For much the same reasons, I reject the plaintiffs' alternative submission that there was knowledge that was developed and shared among multiple actors that the units were particularly suited for grow ops, and that this constitutes a cause, incident or event to which the losses can be indirectly attributed. I find that the evidence establishes neither that the units were particularly suited to grow ops, nor that there existed shared knowledge among multiple actors. Even if shared knowledge existed, I do not see how, in the absence of coordination, it can provide the necessary connection among the losses that occurred.

[64] Similarly, I am unable to conclude that Mr. Karlovcec's observation that marijuana grow ops would not likely be conducted adjacent to other grow ops without "some level of coordination or at least implied acceptance or tolerance of the adjacent operation" is capable of establishing the degree of commonality that the definition of "occurrence" requires. That some of the operators may have known of, and tolerated, the operations of others is not in my view significant. There would have to have been some coordinating or common link among those tolerant operators before the losses directly flowing from their individual operations could be aggregated as indirectly attributable to one cause, incident or event. No such link is established on the evidence, with the possible exception of the matter of the informant, which I will discuss below.

[65] I conclude that there is no basis in the evidence for finding that the plaintiffs' losses from the 29 units constitute one occurrence as being attributable indirectly to one cause or occurrence. I should add that the authorities submitted by the plaintiffs in support of their position once again do not assist them. The plaintiffs refer, for instance, to ***Trenville Farms Limited Partnership v. Wawanesa Mutual Insurance Co.***, 2003 ABQB 83, 11 Alta. L.R. (4th) 190 (Q.B.), where the Alberta Court of Queen's Bench aggregated as one occurrence losses suffered as the result of the theft of 1,029 hogs between January and November of 1999. There, however, the Court's decision turned on a very different definition of "occurrence" from what we are considering. The definition in that case defined an "occurrence" as including "continuous or repeated exposure to substantially the same general harmful conditions". Ours does not.

5. Are there other factors which would aggregate at least some of the losses into one occurrence?

[66] The plaintiffs point out that the units reported by the informant to the RCMP were generally situated in clusters of two or more adjacent units that were in fact used as grow ops, and argue that the losses arising from all of those units so connected by proximity should be considered as arising from one occurrence.

[67] This requires a finding of two connecting factors. The first is coordination in relation to the units reported by the informant, on the basis of Mr. Karlovcec's opinion that an informant would typically be someone involved to some degree in the criminal enterprise on which he or she was informing, thereby suggesting an

organized component. The second is an assumption that the informant would also have known of the other units adjacent to the ones he or she reported because of their proximity, thereby bringing them into the same organized component. The plaintiffs argue that the informant did not need to refer to all of those clustered units because leading the police to one in each cluster would lead the police to all of them.

[68] The units involved were as follows:

Reported Unit(s)	*Adjacent unit(s)*	*Status*
A#7	A#5, 6	All grow ops
A#13, 14, 16	A#15	All grow ops
A#21, 22	A#19, 20	All grow ops
D#44	None	Grow op
A#49		Not a grow op
	A#48	Grow op
A#60	A#59, 61, 62	All grow ops

There were, of course, other clusters of units that all contained grow ops to which the informant made no reference, such as A#71-74 and A2#1, A1#2 and A1#3.

[69] The defendants submit that this argument amounts to pure speculation. There is simply not enough, they maintain, to connect the nine units reported by the informant. That the informant did not report any other units indicates, they say, an obvious lack of coordination. Moreover, according to the defendants, the plaintiffs'

"cluster theory" relating to the units adjacent to those reported by the informant, simply does not hold water.

[70] I agree with the defendants' position in so far as the "cluster theory" is concerned. A review of the table above demonstrates a lack of any clear pattern that would make it probable that knowledge of the units in the first column indicates knowledge of the units in the second column. For instance, if the plaintiffs' theory is correct, then why would the informant report three out of the four units A#13-16, leaving out only A#15. It should have been sufficient to report only one of those units. Accordingly, I conclude that while it is certainly possible that the informant knew of all 17 units, the evidence does not establish that knowledge on a balance of probabilities.

[71] The question comes down, then, to the nine units reported by the informant (accepting, as I do, that the report of A#49 was intended to refer to A#48). Is it pure speculation to suggest that the informant's knowledge provides a link among these grow ops? Taking into account all of the circumstances, I conclude that it is not. I accept Mr. Karlovcec's opinion, based upon his considerable experience, that it is probable that an informant such as this gained his or her information through association with an enterprise that was involved in and coordinated the grow ops.

[72] In my view, it is improbable that the informant would have known of nine completely independent and unrelated grow ops. Accordingly, I find on a balance of probabilities that those nine grow ops were connected by a coordinating enterprise, and that the losses arising from them are therefore attributable indirectly to one

cause, and thus constitute a single occurrence. Had the informant included additional units in his report, I would have included the losses arising from those units as part of the same occurrence. But he referred only to nine, and I am unable to infer from the evidence that he knew of any others.

[73] It remains for me to consider the impact of the rental loss claim.

[74] The plaintiffs argue that the measure of recovery of rental losses is indivisible, because the policy provision refers to a reduction in overall actual gross rentals compared to standard gross rentals. Accordingly, the plaintiffs maintain, the loss of rental income cannot be attributed to any particular unit. The complex as a whole was affected, and multiple deductibles cannot logically be applied.

[75] It will be recalled that the plaintiffs allege that they suffered losses in gross rentals from essentially two causes. For the purposes of this application, I take this aspect of the claim as having been established but make no findings as to the cause of any of the gross rental losses claimed by the plaintiffs.

[76] The first cause was this: the units that had been used as grow ops could not be rented out during the time it took to restore them to habitable condition. The second was connected to the activity, but not to the repair time. It was the apparent unwillingness of the renting public to rent units at the complex after the RCMP issued a press release. In this regard, it was widely reported in the press that, after a "botched home invasion" by "three masked gunmen who forced their way into an apartment", the RCMP discovered that the apartment complex was "rife with grow

operations". The reports went on to refer to Cranberry Lane as a "pot-infested complex" and noted that "criminals who target grow operations have become increasingly bold and violent".

[77] The defendants argue that the rental loss is simply part of the loss arising from each occurrence of illegal activity in each unit.

[78] The BUSINESS INTERRUPTION INSURANCE section of the policy comes into play when "a part or all of any property insurable under this policy" is lost, damaged or destroyed by an insured peril. Clearly that happened in this case. The policy then provides that the measure of recovery will be the amount by which the gross rentals "*in consequence of* the loss, destruction or damage" falls short of the standard gross rentals [emphasis added].

[79] Just as with POLICY SECTION A - LOSS OF PROPERTY, the GENERAL CONDITIONS apply, including the deductible clause, as do the STANDARD CONDITIONS, including the definition of occurrence. This means that the claims for loss must be treated separately for each occurrence, whether they consist of property damage or business interruption/rentals loss. I have found that there was one occurrence involving the losses from the nine units that were the subject of the informant's report, and 20 other occurrences involving the losses from each of the remaining 20 units.

[80] I agree with the defendants that difficulty in apportioning the rental losses among those occurrences does not affect the analysis as to the number of

occurrences. But, as we have seen, the policy defines the word "occurrence" so that occurrences consist not of causes or events, but of losses that are attributable to causes or events. Losses arising from a reduction in gross rentals are related by the policy to the property damage by the requirement that the former be a consequence of the latter. In this case, as noted, those losses consist of two components.

[81] The first component is comprised of losses arising directly from the unavailability of the 29 units for rental while repairs were being carried out. Those losses are directly attributable to the activity of maintaining grow ops in the units, which grow ops constituted physical damage to insured property. Apart from the nine units discussed above, they share no other common denominator.

[82] The second component, however, is comprised of losses that are not limited to those units because, although they are connected to the grow ops, they share a further contributing cause: the reputation of the complex in the public's mind as a centre of crime and violence after the discovery of the grow ops was widely publicized.

[83] In my view, the rental losses that comprise the second component were also a consequence of the damage to the insured property as required by the section's insuring agreement. But for the grow ops, the publicity of their discovery and the public's reaction would never have happened. In addition, however, these rental losses, unlike those comprising the first component, did share a common denominator. They were also attributable, directly or indirectly, to the one cause or occurrence (incident or event) of publicity/public perception. It follows that the loss

arising from the reduction in gross rentals attributable to that unfavourable public perception, as opposed to the unavailability of the units while undergoing repairs, constitutes another single occurrence as that term is defined.

CONCLUSION

[84] The losses arising from the nine units that were reported by the informant, being units A#7, A#13, A#14, A#16, A#21, A#22, D#44, A#49 and A#60, constitute one occurrence subject to one deductible of $50,000. Those losses include the repair costs and the rental losses attributable to the unavailability of those units while they were being repaired.

[85] The losses arising from each of the remaining 20 units constitute 20 separate occurrences, each subject to a further deductible of $50,000. Those losses include the repair costs attributable to each unit, and the rental losses attributable to the unavailability of each unit while it was being repaired.

[86] The additional rental loss attributable to the unfavourable public perception of the complex, to the extent provable, constitutes one more occurrence subject to one further deductible of $50,000.

[87] Counsel are at liberty to make further submissions on the issue of costs if they cannot reach agreement.

"GRAUER J."