

# Court of King's Bench of Alberta

**Citation: McGregor v Wawanesa Mutual Insurance Company, 2025 ABKB 227**

**Date:** 20250414  
**Docket:** 2101 03399  
**Registry:** Calgary

Between:

**Clifford McGregor and Katrina McGregor**

Plaintiffs

- and -

**Wawanesa Mutual Insurance Company**

Defendant

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**Reasons for Judgment  
of the  
Honourable Justice B.B. Johnston**

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[1] The Plaintiffs filed a claim seeking a declaration that they are entitled to coverage under a home policy of insurance related to an injury claim. They further sought damages for property loss.

[2] The Defendant applied for a summary trial, seeking to have this action dismissed on the basis that the Plaintiffs are not entitled to coverage under the policy. The Plaintiffs agree that a summary trial is appropriate but assert that any exclusions under the policy are not applicable.

## **Background**

[3] The Plaintiffs were the owners of a home with a detached garage located on Pinemill Road in northeast Calgary (the "Residence").

[4] As of October 2017, the Defendant insured the Residence pursuant to a personal insurance policy with a term of August 17, 2017 to August 17, 2018 (the "Policy").

[5] During the evening of October 6, 2017, Clifford McGregor was making cannabis oil in his garage.

[6] A fire ignited while Mr. McGregor was making the cannabis oil (the “Incident” or “Fire”).

[7] The sole and direct cause of the Fire was the production of cannabis oil including the use of butane in that process.

[8] The production of cannabis oil was illegal in 2017.

[9] The Fire resulted in damage to the garage. Mr. McGregor and two visitors to the property were injured.

[10] At no time did the Plaintiffs advise the Defendant that they intended to produce cannabis oil at the Residence

[11] On April 8, 2019, Mr. McGregor pled guilty to two criminal charges arising from the Incident. The charges included that on or about the 6<sup>th</sup> day of October 2017, Mr. McGregor did as follows:

Count 1: ...being the owner in whole or in part of property, to wit: [Pinemill Road] and as a result of a marked departure from the standard of care that a reasonably prudent person would use to prevent or control the spread of fires or to prevent explosions, did cause a fire or explosion in the said property that caused bodily harm to Clifford McGregor, Christopher Coffin and Bryan McIntosh, contrary to section 436(1) of the *Criminal Code of Canada*. ...

Count 4: ... did unlawfully possess a controlled substance, to wit: cannabis in an amount exceeding one gram, contrary to section 4(1) of the *Controlled Drugs and Substances Act*.

[12] As part of his plea, Mr. McGregor agreed to the following facts:

On October 6, 2017, at approximately 9:30 PM, an explosion occurred in the rear-detached garage at [Pinemill Road], a residence owned by the accused Clifford McGregor....

The Calgary Fire Department attended and contained the fire. CFD investigator Glenn Baxter conducted an examination of the garage and learned that the males inside the garage were making a version of hash oil by using butane as the fuel source. A collapsed butane can was identified as the potential point of the explosion, and the area was littered with additional butane canisters. A blue Tupperware bin containing multiple bags of marijuana was also present in the garage, weighing a total of 639.6 grams, with an approximate street value of \$3,000 Canadian. ...

On October 17, 2018, the accused was arrested and interviewed by Calgary Police. ... The accused admitted, at the time of the explosion, he was attempting to make hash oil, also known as shatter or honey oil, for personal consumption. Hash oil is only a resin produced by the solvent extraction of marijuana using butane. After filtering and evaporating the solvent, a sticky, resinous liquid remains, being the hash oil.

The accused admitted to producing hash oil in this way for personal use and had done it only one time before the incident. The accused admitted that a spark likely caused by a lit cigarette ignited the evaporated butane in the garage, causing the explosion. The accused told police that his friends, Mr. McIntosh and Mr. Coffin, were “just there” and had nothing to do with what happened. The victim, Mr. Coffin, and the accused suffered burns to their face, back, arms and hands and were hospitalized for four weeks. The victim, Mr. McIntosh, also suffered burns to his body and was hospitalized for one week.

[13] Mr. McGregor was sentenced to 24 months less one day of gaol time, to be conditionally served under house arrest for 8 months and 8 months in the community under curfew.

[14] One of the visitors to the Residence on the date of the Incident, Mr. Coffin, sued the Plaintiffs for bodily injury and related damages in Court of King’s Bench action number 1901-13245 (the “Coffin Action”). The Plaintiffs sought coverage from the Defendant to defend and indemnify the Plaintiffs in the Coffin Action under the Policy.

[15] On January 15, 2020, the Defendant advised the Plaintiffs that they would provide a defence to the Coffin Action pursuant to a reservation of rights. The Defendant has continued to provide the Plaintiffs with a defence in the Coffin Action. The Coffin Action is continuing.

[16] On March 8, 2021, the Plaintiffs commenced this action against the Defendant. The Plaintiffs sought property coverage under Section I of the Policy and liability coverage under Section II of the Policy. The Plaintiffs alleged, amongst other things, that the Defendant breached their duty to indemnify and defend the Plaintiffs for the Coffin Action under the terms of the Policy.

[17] Prior to commencing this action, the Plaintiffs never filed a proof of loss nor advanced a property claim as a result of the Fire.

[18] This matter was directed to a summary trial on October 2, 2023 by Justice Sidnell (the “Summary Trial Order”). The Summary Trial Order set out the procedural deadlines.

[19] An agreed statement of facts was filed on October 3, 2023.

[20] The Defendant’s application for a summary trial seeks the dismissal of this action including a determination that the Plaintiffs were not entitled to coverage under the Policy.

## **Policy**

[21] The Policy provides in part as follows:

### **Insured Perils**

"You" are insured against all risks of direct physical loss or damage, subject to the exclusions, limitations and conditions of this policy.

### **Section I**

#### **Loss or Damage Not Insured**

"We" do not insure:

...

(8) loss or damage caused by or resulting from the intentional or criminal acts or the failure to act by:

- (I) any "Insured" under this policy; or
- (II) any other person at the direction of any "Insured" by this policy;

...

Nor do "we" insure:

...

(20) loss or damage arising directly or indirectly from the growing, cultivating, harvesting, processing, manufacturing, distribution or sale of any drug or narcotic or illegal substance, whether or not "you" have knowledge of such activity. This includes any alterations of the "premises" to facilitate such activity;

## Section II

### Exclusions

"We" do not insure claims arising from: ...

(6) "bodily injury" or "property damage" caused by any intentional or criminal act or failure to act by:

- (I) any person insured by this policy;
- (II) any other person at the direction of any person insured by this policy;

...

[22] The Policy includes and is subject to statutory conditions 1 and 4 set out in section 540 of the *Insurance Act*, RSA 2000, cI-3 that provide:

#### Misrepresentation

1 If a person applying for insurance falsely describes the property to the prejudice of the insurer, or misrepresents or fraudulently omits to communicate any circumstance that is material to be made known to the insurer in order to enable it to judge the risk to be undertaken, the contract is void as to any property in relation to which the misrepresentation or omission is material. ...

#### Material Change in Risk

4 (1) The insured must promptly give notice in writing to the insurer or its agent of a change that

- (a) is material to the risk, and
- (b) within the control and knowledge of the insured.

(2) If an insurer or its agent is not promptly notified of a change under subparagraph (1) of this condition, the contract is void as to the part affected by the change. ...

...

[23] Section 533(2) of the *Insurance Act*, is also relevant and states:

### Claim for indemnity

(2) Unless a contract of insurance provides otherwise, a contravention of any criminal or other law in force in Alberta or elsewhere does not render unenforceable a claim for indemnity under a contract of insurance except when the contravention is committed by the insured, or by another person with the consent of the insured, with intent to bring about loss or damage.

### Issues

[24] The issues include:

- 1) Is this matter suitable for summary trial?
- 2) Are the Plaintiffs entitled to coverage under the Policy including:
  - a) under Section I- Property ; and,
  - b) under Section II Liability.

### Analysis

#### **Is the Matter Appropriate for Summary Trial?**

[25] The summary trial rules were previously set out in rules 7.5 to 7.11 of the *Rules of Court*. This matter was set down for summary trial by order of Justice Sidnell in October 2023 based on the consent of the parties. Given this consent order was entered prior to the repeal of the rules and the parties both wish to proceed on this basis, I will consider whether the matter is appropriate for summary trial.

[26] I agree with the parties that this matter is suitable for summary trial. The matter is not complex. The parties filed an extensive agreed statement of facts and agreed exhibits. There were no cross examinations on affidavits. There are no facts in dispute and the matters before the Court are questions of policy and statutory interpretation. Such matters are particularly well suited for summary adjudication: *Condominium Corporation No 0210494 v Rotzang*, 2024 ABKB 111 at para 40. Requiring this matter to proceed to a full trial could also result in prejudice to the Plaintiffs as they will not know if they have coverage related to the Coffin Action.

#### **Are the Plaintiffs Entitled to Property Loss Coverage under Section I of the Policy?**

[27] At the outset of trial, the Plaintiffs withdrew their property claim and advised they will undertake to amend their pleadings accordingly.

[28] The Plaintiffs also withdrew their arguments relating to relief from forfeiture under section 520 of the *Insurance Act*.

#### **Are the Plaintiffs Entitled to Liability Coverage under Section II of the Policy?**

[29] The Defendant argues that the Plaintiffs claims for a defence to and indemnity for the Coffin Action, are excluded from the Policy. Specifically, they assert that the bodily injury claims alleged in the Coffin Action were caused by Mr. McGregor's criminal acts and are therefore excluded from the Policy's liability coverage under Section II- Exclusion 6. They argue his intention to cause the Fire is irrelevant. Alternatively, they argue that the losses are

excluded due to the insureds failure to disclose the illegal and dangerous production of cannabis oil at the Residence and the Plaintiffs breach of the statutory conditions including both misrepresentation and failing to disclose a material change in risk, both of which void the liability coverage under the Policy.

[30] The Plaintiffs disagree and argue that the criminal act exclusion is not applicable as the Defendant has not established Mr. McGregor subjectively intended to cause the Fire or any harm to Mr. Coffin. Therefore, the Plaintiffs are entitled to coverage for the Coffin Action under the terms of the Policy.

[31] Section II of the Policy outlines the liability coverage and exclusions.

[32] The parties agree on the general principles to be applied to the interpretation of insurance policies. Specifically, where the language of a policy is unambiguous, the Courts should give effect to the clear language of a policy. Where the language of a policy is ambiguous, courts are to rely on general rules of contract construction: *Progressive Home Ltd. v Lombard General Insurance Co. of Canada*, 2010 SCC 33 [*Progressive*].

[33] The onus is on the Defendant to establish that an exclusion applies: *Progressive* at paras 22 and 23.

[34] It is not disputed that the acts in question were criminal acts. Indeed, Mr. McGregor pled guilty to two criminal counts. The main point of contention between the parties is whether an unintentional criminal act is excluded under the Policy. Put another way, whether the Defendant is required to prove that the insured subjectively intended to cause the loss or damage for the exclusion to apply.

[35] Section 533 of the *Insurance Act* states that a contravention of a criminal law itself will not render unenforceable a claim for indemnity except where the contravention was committed by the insured with the intent to bring about the loss or damage.

[36] Section 533 also prefaces the above protection with the words: “Unless a contract of insurance provides otherwise”. The Defendant argues that the applicable Policy does provide otherwise in the clear and unambiguous wording found in Section II- Exclusion 6. The Policy wording they argue clearly indicates that the Defendant does not cover claims for bodily injury “or property damage... caused by ...criminal acts”.

[37] The Defendant relies on a number of cases where courts have found that the criminal act exclusion is not ambiguous such that it applies regardless of intent. The cases relied upon by the Defendant are discussed below.

- In *Buttar v Safeco Insurance Co. of America*, 1986 CanLII 1260 (BCSC)[*Buttar*], the insured was convicted of an offence under the *Criminal Code* after his house caught fire. His homeowner policy contained an exemption for loss or damage caused by criminal or wilful acts or omissions. The insured used gasoline to start a fire in his fireplace. When some nearby clothing caught fire, he threw clothing into the fireplace and added more gasoline. He left his house and when he returned his house was on fire. The Court rejected the insured’s argument that he only intended to set fire to his clothing and not his house and therefore the criminal act exclusion did not apply. The Court disagreed and opined that

criminal acts were excluded. This was not limited to cases where there was an intention to commit the acts. The Court found there was no ambiguity in the language of the exclusion.

- In *British Columbia Insurance Corp v Kraiger*, 2001 BCSC 16; aff'd 2002 BCCA 521, the insured pled guilty to an offense under the *Criminal Code* after he started a forest fire. He argued that he had no intention for the fire to spread and cause damage to other property. The insured was sued for property damage caused by the fire. His policy of insurance had a criminal act exemption. The Court again concluded that the insured's intention regarding what he intended to burn was irrelevant in the application of the criminal act exemption. Therefore the losses were properly excluded.
- The Court of Appeal in *R.E. v. Wawanesa Mutual Insurance Company*, 2007 ONCA 92 [*Eichmanis*] considered whether the criminal act exclusion in a homeowners policy applied to criminal acts where there was no intent to cause injury. The Court of Appeal concluded that in order to apply, the criminal conduct need not be intentional.
- *Wong Estate v Liberty Mutual Insurance Company*, 2009 ABQB 324 [*Wong*] dealt with whether the operator of a day home who had been convicted of criminal negligence causing death, had insurance coverage which would allow recovery by the parents of the deceased child of a judgement against the insured. The trial judge in the criminal action concluded that the incident was "an unintentional act committed with no degree of deliberation". Notwithstanding the lack of intent, the Court in the injury action concluded that the criminal act exclusion applied to the facts of the case.
- In *Butterfield v Intact Insurance Company*, 2022 ONSC 4060; aff'd 2023 ONCA 246 [*Butterfield*], the insured was charged with aggravated assault after he stabbed a store owner. Although he had an honest but deluded belief that he was acting in self defence and he was found not criminally responsible due to his schizophrenia, the Court nevertheless upheld the finding that the criminal act exclusion in his policy of insurance applied. The Court again found that the insurance policy term "criminal act" was unambiguous. The language of the exclusion allowed the insurer to exclude indemnification for the damages caused regardless of intent or lack of intent to cause damage. They opined that the exclusion applies even without proof of intention to cause the injury so long as the act that causes the harm is criminal in nature: *Butterfield* at para 24.

[38] The Plaintiffs disagree and assert there is ambiguity in the criminal act exclusion. They submit that the cases relied on by the Defendant were wrongly decided or are distinguishable. The Plaintiffs argue that subjective intent is required for the criminal act exclusion clause to apply. They refer to the following cases:

- *Gamblin v O'Donnell*, 2001 NBCA 109 [*Gamblin*], where the Plaintiff was sued after he was mistakenly shot by the insured who was deer

hunting. The insured was convicted of the careless use of a firearm. The Court of Appeal accepted that the criminal act exclusion was only with respect to a criminal act that was “other than an inadvertent, accidental or negligent one”. Since the insured did not intend to cause the bodily harm to the Plaintiff, the criminal act exclusion did not apply.

- *Non-Marine Underwriters, Lloyd's of London v. Scalera*, 2000 SCC 24 [*Scalera*], involved a claim under a homeowners policy of insurance related to sexual assaults alleged to have been committed by five transit drivers. The Court considered the intentional act exclusion and concluded that this exclusion required an intent to injure on the part of the insured.

[39] Of the authorities cited, the decision of Ontario Court of Appeal in *Eichmanis* is most relevant. In that case, as here, the Court considered the criminal act exclusion. They determined the exclusion was not ambiguous when it excluded “bodily injury or property damage caused by any intentional or criminal act or failure to act by any person insured by this policy...”.

[40] In concluding that the language of the criminal act exclusion was clear and was not contingent on intentionality, the Court distinguished *Scalera*. They opined that the Court in *Scalera* “considered only the intentional act exclusion and not the criminal act exclusion”.

[41] The Court of Appeal in *Eichmanis* noted that the policy before them provided the insured with broad coverage for damages arising from bodily injury except where such damages were caused by an intentional act or by a criminal act. They noted that the Supreme Court of Canada in *Scott v. Wawanesa Mutual Insurance Co.*, 1989 CanLII 105 (SCC) “characterized a similar exclusion as “perfectly clear and unambiguous”. They further opined that:

...Canadian courts have not discerned any ambiguity in the “criminal act” exclusion in this policy, or in similar exclusions. In this case, the policy of insurance excludes liability of the insurer for damages caused by intentional or criminal acts of the insured. I do not see how the insurer could have worded its policy to exclude the risk of damage caused by a criminal act other than by the precise terms used in its policy. It is undisputed that Ryan E.’s injury was caused by Ryan P.’s criminal act. He acknowledged committing the criminal act by pleading guilty to, and being convicted of, criminal negligence causing bodily harm. I appreciate that the result of this appeal may appear to be harsh. However, where the language of a contract is unambiguous, as in my view it is in this case, courts should not give it a meaning different from that expressed in clear language, unless the contract is unreasonable or is contrary to the intention of the parties.

The language of the exclusion is disjunctive. An act of an insured that causes injury is excluded when it is either an intentional act, or a criminal act. In [*Buttar*], the insured, who had been convicted of arson, contended that the criminal act exclusion did not apply because, although he intended to set fire to clothing and blankets, he had no intention of causing a fire to his house. In rejecting this submission, MacKinnon J. stated at p. 765 D.L.R.:

In any event there is no authority for the proposition that the exclusionary clause in the policy is to be read as if “criminal act”

applies only to criminal offences carried out with the intent of causing the loss. The exclusionary clause is not so worded. It does exclude criminal acts causing the loss. There is no ambiguity or uncertainty in the language used. Criminal acts causing the loss are excluded. In addition, wilful acts causing the loss are excluded.

I would adopt the comments of MacKinnon J. and apply them to the circumstances of this case.

The motion judge's interpretation of "criminal act" as applying only to criminal acts intended to cause injury renders the phrase "criminal act" superfluous. An insurer intending to exclude only criminal acts where the insured intends to cause injury could achieve the same result by merely excluding intentionally caused injuries. It is a well established principle that insurance contracts should not be interpreted to render their terms meaningless. ...

*Eichmanis* at para 22- 24.

[42] The Plaintiffs argue that the Court of Appeal in *Eichmanis* misinterpreted *Scolera* which they argue was not limited to the intentional act exclusion but should also be applied to the criminal act exclusion.

[43] The Plaintiffs rely on an article written by Professor Erik Knutsen in support of their argument that only losses willfully caused by an insured are excluded from coverage: Knutsen, Erik S, "Fortuity Clauses in Liability Insurance: Solving Coverage Dilemmas for Intentional and Criminal Conduct" (2011) Queen's Law Journal 37:1.

[44] As noted above, they also rely on *Gamblin*.

[45] The *Gamblin* decision was considered and rejected by the Court in *Wong*. The Court in *Wong* found the reasoning in *Eichmanis* persuasive and accepted that the "words "any criminal act" are clear and unambiguous and do not require a modifier for clarity": *Wong* at para 49.

[46] The Plaintiffs likewise argue the Court in *Wong* wrongly accepted the flawed logic in *Eichmanis*. They urge the Court to follow the reasoning in *Gamblin*.

[47] I too find the reasoning in *Eichmanis* persuasive, and I agree with the Court's conclusion in *Wong*.

[48] Section 533(2) of the *Insurance Act* protects an insured's right to indemnity in cases where a criminal act is committed without the intention to cause the loss or damage. It also permits the Defendant within its contract of insurance to provide otherwise and exclude the claims for indemnity for loss caused by any criminal act whether intentional or not.

[49] That is precisely what the Defendant in this case did with the exclusion set out in Section II- Exclusion 6 of the Policy. Exclusion 6 expressly excludes from indemnity, claims arising from bodily injury or property damage caused by any criminal acts that are committed by the insured. The intention of the insured is irrelevant. I accept that the "language of the exclusion is disjunctive". An act of an insured that causes injury is clearly excluded when it is either an intentional act, or a criminal act.

[50] While the insured need not intend to cause the injury for the exclusion to apply, the criminal act must still nevertheless be the cause of the injury for the exclusion to relieve the Defendant from its obligation to indemnify the insured. On this issue, one need only look at the charges to which the insured pled guilty. Mr. McGregor admitted that he “did cause a fire or explosion in the said property that caused bodily harm to Clifford McGregor, Christopher Coffin and Bryan McIntosh, contrary to section 436(1) of the *Criminal Code*”. In light of this admission, the essential facts necessary to trigger the exclusion exist and relieve the Defendant of its obligations to indemnify the Plaintiffs.

[51] Given I have found the criminal act exclusion applies such that the Plaintiffs are not entitled to liability coverage under the Policy, I need not consider whether the liability coverage was voided as result of a misrepresentation or a failure to disclose a material change in risk.

### **Conclusion**

[52] I find that the criminal act exclusion applies and the Plaintiffs are not entitled to liability coverage under the Policy.

[53] The Defendant’s action is allowed.

[54] The parties may speak to costs within 30 days.

Heard on the 06<sup>th</sup> day of March, 2025.

**Dated** at the City of Calgary, Alberta this 14<sup>th</sup> day of April, 2025.

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**B.B. Johnston**  
**J.C.K.B.A.**

### **Appearances:**

Paul J. Stein, K.C.  
for the Applicant/Defendant

Colin D. Roberts  
for the Respondent/Plaintiffs