

The Legal Brief

May 2016

Why a legal column?

- Because law is constantly evolving;
- Because the team of Michaud LeBel, s.e.n.c.r.l. is always up to date on recent legal developments;
- Because we want to keep our clients and partners posted on the latest legal developments about matters which concern them;
- Because we hope this will help you in properly conducting your own files.

This is why we hope that you will appreciate our bulletins and that you will give us your impressions, ask us any questions you may have and let us know what your needs are.

AN INSURED'S OMISSION TO COOPERATE IS PENALIZED

An insured's omission to cooperate, which is specified in article 2471 C.C.Q. is rarely penalized. A recent judgment of the Court of Appeal in *Intact Insurance Inc. v. 9221-2133 Quebec Inc. (Centre Mécatech)*¹ confirmed an insurer's latitude in its power of investigation and called insured parties to order when dealing with their duty to cooperate.

Regarding insurance matters, an insured's obligation of cooperation requires that the insured disclose all facts relevant to the losses claimed. An insurer is entitled to **know all the circumstances regarding a loss**, [TRANSLATION] "including the probable cause, the nature and scope of the damage, the location of the property, third parties' rights and concurrent insurance."² An insured must disclose supporting documentation and exhibits to his insurer and certify their truthfulness under oath.³

In addition to an investigation by a claims adjuster, an insurer may sometimes have recourse to a statutory examination. This is an extension of the well-known obligation of cooperating.⁴

On May 25, 2015, in *Intact Insurance Inc. v. 9221-2133 Quebec Inc. (Centre Mécatech)*⁵, the Court of Appeal rendered a valuable decision in which it reiterated some of an insurer's powers and an insured's obligations, which are too often ignored...

FACTS

The insured was claiming from his insurer the value of a vehicle which he alleged was stolen from him.

Invoking the fact that the insured did not comply with his obligation to cooperate by not answering the insurer's questions and by refusing to participate in a statutory examination, the insurer refused to indemnify.

At trial level, the Court allowed the insured's suit and ordered the insurer to indemnify him. The trial level judge ruled that in spite of the insured's lack of cooperation, the insurer was able to conduct its investigation, as it had access to information through third parties and the insured was not required to submit to an examination by the insurer's representative.

This decision was however unanimously reversed by the Court of Appeal, which ruled that the refusal to answer the insurer's questions (those asked by the claims adjuster and by the attorney conducting the statutory examination) was in this case a lack of cooperation which entailed the loss of the right to an indemnity.

How is this decision useful for insurers?

- The Court of Appeal acknowledged an insurer's right to obtain details about the facts regarding the **purchase of the vehicle**. The effect of this is to reaffirm that the right to investigate, which is provided under article 2471 C.C.Q., extends to the relevant facts concerning the risk and the indemnity and not only concerning the loss itself.



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- The Court underlined the fact that an insured has a duty to cooperate and that [TRANSLATION] “he must answer the insurer’s or his representative’s questions regarding all circumstances in connection with the loss and he must disclose supporting documentation to justify his claim. At the insured’s request, he must also consent to the collection of required information and sign all documents necessary to do so”.⁶
- The Court also underlined the fact that it is not up to an insured to decide the way in which an insurer conducts its investigation.⁷ An insured has no discretion to decide if his statement is required or not.
- An insured cannot shirk this obligation merely by giving his consent so that an insurer could contact third parties and obtain information relevant to its investigation.⁸
- The Court of Appeal acknowledged in this case that a refusal to participate in a statutory examination is a lack of cooperation entailing the forfeiture of the right to an indemnity.

Over the last ten years, on several occasions the courts have penalized insured who refused to submit to such a statutory examination, by forfeiting their right to an indemnity.⁹ Some judgments have however, refused insurers the right to require a statutory examination.¹⁰

We do underline the fact however that the obligation to cooperate does obviously have its limits. An insurer may successfully invoke this argument and deprive an insured of his right to an indemnity when it may be inferred from an insured’s conduct that his refusal to cooperate is equivalent to bad faith and the insurer sustains prejudice.¹¹ An insurer must never wrongly invoke such a shortcoming to avoid its obligation to indemnify.

Even if it’s true that the forfeiture of the right to an indemnity is a severe penalty for an insured, it is justified in case of an insured’s refusal to cooperate, specifically including his refusal to submit to a statutory examination, according to the circumstances.

Because the Supreme Court dismissed the motion for permission to appeal, this judgment is now final. We believe that it may bring Quebec courts to more severely penalize any such omissions.

References

- 1 2015 QCCA 916 (motion for permission to appeal to the Supreme Court dismissed, No. 36569, February 28, 2016)
- 2 *Civil Code of Quebec*, art. 2471
- 3 *Civil Code of Quebec*, art. 2471
- 4 *Nordique Insurance Company of Canada v. Imperial Tobacco Canada Limited*, REJB 2004-81441 (S.C.), para. 67-68; *9028-9893 Quebec Inc. v. Axa Insurance Inc.*, 2008 QCCS 3671; *René v. Promutuel Lac St-Pierre-Les-Forges*, 2010 QCCQ 3845
- 5 Cited above, note 1
- 6 Cited above, note 1, para. 20
- 7 Cited above 1, para. 17
- 8 Cited above note 1, par. 22
- 9 *Berthey v. Promutuel Lanaudière, société mutuelle d’assurances générales*, 2006 QCCQ 4803 (Small Claims Division); *Huaracha v. Axa Insurance Inc.*, 2009 QCCQ 14772 (Small Claims Division)
- 10 *Centre de développement familial provincial (1978) Inc. v. Axa Insurance Inc.*, EYB 2007-125674 (S.C.); *Utica Mutual Insurance Company v. Aspler, Goldberg, Joseph Ltd.*, 2008 QCCS 3811; *Martin Bédard v. Axa Insurance Inc.*, 2007 QCCS 1316
- 11 *Promutuel les Prairies, société mutuelle d’Assurances générales v. Selmay*, 2011 QCCA 524; *Di Capua v. Bar of Quebec*, REJB 2003-44353 (C.A.); *Touchette v. Oppenheim*, EYB 2014-245758, (2014 QCCS 6039, J.E. 2015-136) (Summary); *London Assurance Corp. v. Girard and Charlebois* [1960] B.R. 770; *Lapointe v. Unique (L’)*, *assurances générales Inc.*, 2008 QCCQ 12692

This bulletin, which is for our clients, features general comments on recent legal developments.

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