IN FACT AND IN LAW

Damage and General
Insurance Law

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Not Telling the Truth is Not Necessarily Lying (Art. 2472 C.C.Q.)

By Bernard Larocque

In June 2003, in Bernier *v.* l'Union Québécoise, Compagnie d'assurance Inc.[1]*, the Quebec Court of Appeal held that a misrepresentation to the effect that inventory was in place immediately preceding a loss was not a bar to the insured if he did not have the intent to defraud.*

The Facts

The owners of a pig farm claimed reimbursement from their insurers following two successive thefts which occurred in April 1992 and June 1992.

Following the first theft, Lloyds refused to indemnify them. The insureds subsequently obtained an endorsement from the Union Québécoise insurance company to extend the coverage of their existing policy to their livestock. Less than one month after the endorsement was issued, the insureds were the victims of a second theft. As with Lloyds, Union Québécoise refused to reimburse them.

In both cases, the insurers argued that:

- the circumstances showed that there had, in fact, been no theft;
- the claim was so exaggerated that it constituted a deceitful representation (art. 2576 C.C.L.C., now art. 2472 C.C.Q.).

It seems that there was disagreement between the parties as to the number of pigs stolen. At no time, the judgment states, was it possible to establish with certainty the exact number of pigs at the farm. In addition, the parties did not agree on certain accounting issues, such as whether the livestock should be considered a fungible asset leading to significant fluctuations in calculating the loss.

The Superior Court Decision

The trial judge quickly came to the conclusion that there had definitely been two thefts since, in his opinion, the evidence was clear. The judge based himself on the excellent cooperation of the insured party:

> **"The insurer was satisfied with the information it obtained. However, it should be noted that the plaintiffs were not required to take inventory regularly. They merely did minimal counting based on their type of business and needs. This counting apparently was perfectly satisfactory to the tax authorities and bank lenders. We cannot blame them for not having been able to provide more detailed accounting. They had the burden of establishing their losses, not providing the insurer with ideal information to do so." (Translation)**

However, with respect to the second theft, the trial judge, after his examination of the facts, which the Court of Appeal described as meticulous, and after taking into consideration the "evasive or vague" testimony of the plaintiffs with respect to the taking of inventory just before the second theft, held that there had been no taking of inventory, that the numbers had been made up and that, in fact, the insureds wanted to trick the insurer in this respect. He therefore dismissed the claim based on article 2576 C.C.L.C., now 2472 C.C.Q.

The Judgment

The judgment was written by Mr. Justice Yves-Marie Morissette. He held that there were no grounds for intervening in the conclusion of the trial judge to the effect that there had been no taking of inventory just before the second theft. This conclusion, based on inferences which the judge drew from all the evidence and the credibility of the witnesses, was well-based. There was no clear and obvious error allowing the Court of Appeal to intervene in this issue.

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1 Court of Appeal, Montréal, June 11, 2003, J.E. 2003-1193, Mailhot, Pelletier and Morissette JJ.

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However, the judgment in first instance was overturned with respect to the second claim, through a strict interpretation of the concept of deceitful representation. Justice Morissette held that the insureds did not intend to mislead the insurer and said in this respect:

> **"That the Appellants stated or repeated a falsehood with respect to the fictitious inventory of June 17 resulted from the judgment at trial and, on this point, the judge correctly appreciated the credibility of the witnesses without committing an error of fact. However, this does not mean that the appellants had tried in this way to mislead the Respondent in order to receive a benefit, payment or indemnity to which they were not entitled. The context indicates otherwise. During the month of June 1992, the Appellants were already having serious problems with their first insurer and they could see the mistrust or scepticism the experts had towards their internal accounting method. It would have been non-sensical on their part to stage a second, fictitious theft in such an atmosphere. The second theft, the occurrence of which was not questioned by the trial judge, lead to serious losses in the Appellants' business, including the additional disappearance of 67 pigs that died of the cold or drowned in liquid manure. With respect to the second setback, the Appellants invented, if I may use this word, the June 17th inventory, but submitted a claim which appeared to them to correspond to reality." (Translation)**

Without specific evidence of a fraudulent intent on the part of the insured for the purpose of misleading his insurer or obtaining a benefit, the loss should be reimbursed. The Court of Appeal thus restated the approach that it had already adopted in 1995 in *Bureautique Nouvelle-Beauce inc.* v. *Cie d'assurances Guardian du Canada*[2]. We can thus conclude that not telling the truth is not always a lie!

Particular attention should therefore be given to the facts and an insurer cannot draw any inference depriving an insured of an insurance benefit simply because certain elements declared on the proof of loss form do not correspond to reality, especially when, as in this case, the loss of a certain number of animals is real.

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2 [1995] R.R.A. 307 (C.A.)

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