

## When the Duty to Investigate Prevails Over Misrepresentations

By Evelyne Verrier



*On May 14, 2004, the Superior Court rendered judgment in Landry vs. L'Union Vie, Compagnie mutuelle d'assurance<sup>1</sup> and allowed the action of the Plaintiff, Ms. Lucie Landry, in which she claimed \$50,000 in insurance proceeds following the death of her brother on October 26, 2000, pursuant to a life insurance policy issued by Union Life on July 28, 2000. The case is currently under appeal.*

### The Facts

On July 28, 2000, Union Life Mutual Assurance Co. issued a life insurance policy on the basis of an insurance application which had been completed by the insured, the late Émile Landry, on July 24, 2000 through Gilles Cossette Croissance Capital Inc., described as the representative of the insurer, despite the fact that the insurer maintained that he acted as Mr. Landry's "adviser".

The insurance application contained a section entitled "Declarations of Insurability", which included the following question:

"DECLARATIONS OF INSURABILITY

**DOES ANY PERSON CONCERNED BY THIS APPLICATION:**

(...)

**13. Have a criminal record or has he/she declared bankruptcy?"**

The insured, having answered in the affirmative, had to provide appropriate details in relation to the question asked. Cossette recorded the following information:

**"declared personal bankruptcy in 1989 following his divorce"**

The investigation conducted following the death revealed that Landry had been involved in several criminal proceedings between 1988 and 1999, which were not mentioned in the insurance application.

Had the insurer known that Landry had a criminal record, it would have refused to issue his life insurance policy. The insurer therefore invoked nullity of the insurance policy and offered to refund to the succession the amount of insurance premiums collected.

It should be noted that the intermediary Gilles Cossette was not called as a witness and that the evidence given by the Defendant's underwriters to establish that it had been justified in seeking nullity of the policy was not contradicted.

### Issue in Dispute

Because the life insurance policy had not been in force for more than 2 years, the insurer did not have to establish fraud. It only had to prove that it was well founded in seeking nullity of the policy on the grounds of the applicant's misrepresentations regarding his criminal record because these circumstances were of such a nature as to significantly influence an insurer in determining the premium, appreciating the risk or deciding whether or not to accept it<sup>2</sup>.



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<sup>1</sup> *Landry vs. Union Vie, Compagnie mutuelle d'assurance*, C.S. Trois-Rivières, 450-17-000341-012, May 14, 2004, REJB 2004-64790. Motion to disallow appeal dismissed: C.A. Québec 200-09-004857-048, September 20, 2004, appeal pending.

<sup>2</sup> Articles 2408, 2409, 2410 and 2424 C.C.Q.



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## The Decision

The Superior Court first analyzed the role of the insurance representative by underlying the fact that it is up to the insurer to assess the answers provided by the insured, and that it is also solely up to the insurer to evaluate the importance of the information provided in the insurance application.

On the basis of the insurer’s obligation to verify, the Court was of the view that this obligation is all the greater when the information given by the applicant is ambiguous.

In this context, the Court adopted the words of Professeur Deslauriers, which read as follows:

**[our translation] “(...) in any event, we believe that if the insured had provided unequivocal information, the insurer must, to satisfy the obligation of utmost good faith, do complementary research or ask further questions.”**

Having established this obligation, the Court added that the equivocal information provided by the applicant resulted from the very wording of the question pertaining to a criminal record which [our translation] “was ambiguous and overlapped with the applicant’s bankruptcy”.

The Court therefore allowed the Plaintiff’s action for the following reason:

**[our translation] “(...) we must therefore find that the insured never answered the question regarding his criminal record in the negative, that the ambiguity arises from the insurer’s formulation of the question and that the latter only had to further investigate, as it was obliged to do.”**

Thus, in the event that the Court had agreed that a criminal record could result in nullity of the policy and although the insurer supplied convincing evidence that the risk would not have been accepted, its formulation of the question alone was sufficient to defeat the nullity sought.

## Conclusion

Although it is being appealed, this decision nevertheless highlights how important it is for the insurer to ask clear and unequivocal questions. In the circumstances under consideration, two separate questions – one covering criminal records and another covering bankruptcy - would perhaps have allowed the parties to avoid the dispute altogether. The judge in fact noted that some insurers proceed in this manner.

In any event, the Court of Appeal will have an opportunity to consider the issue regarding the extent of the obligation incumbent on the insured to declare. This issue has been raised regularly before the courts and has been the subject of several decisions since the past few years. In the present case, even if the answer provided by the applicant had not been strictly false, the Court of Appeal will have to decide if

the judge of first instance erred in not sanctioning the insured’s failure to provide the appropriate details regarding his criminal record, which was specifically raised by the question asked, notwithstanding that there was limited space in which to answer.

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