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The duty to collaborate and the examination under oath

Section 2471 of the *Civil Code of Quebec* (hereinafter the "CcQ") imposes on the insured a general obligation of collaboration with the insurer when a loss occurs.

This duty to collaborate is based on the principle that the insured must answer the insurer's questions in order to elucidate all the circumstances of the loss as precisely as possible. A serious and unjustified failure to act in accordance with this obligation can compromise the right to be compensated¹.

Known as the "statutory examination" before the reform of 1974, because it then was one of the "statutory conditions" of insurance policies, our courts broadly interpret the insured's obligation to undergo an examination under oath. The majority trend considers the right of the insurer to examine the insured under oath as an extension of the insurer's right to know "all the circumstances surrounding the loss". The insured can choose whether or not to undergo examination under oath. His refusal will not result in a *de facto* forfeiture of his right to compensation. However, the insurer may invoke the refusal where the obligation to collaborate is not otherwise satisfied by the insured. Under the *Civil code of Lower Canada*, our courts applied the same principle².

Recently, in a unanimous decision delivered by the Honourable Justice Chamberland, the Quebec Court of Appeal³ limited the right of an insured to refuse to be questioned by the insurer when a loss occurs.

The facts are as follows:

Éric Cloutier contracted an automobile insurance policy with AXA Insurance inc (now known as Intact Insurance inc) by which he insured himself, his business Centre Mécatech and the company which operates and owns his business, 9221-2133 Quebec inc.

The insured vehicle was a Cadillac Escalade 2005. Mr. Cloutier noted the disappearance of the vehicle on the morning of January 12, 2011, upon arriving at his place of business. He then reported the theft to the police and to his insurance broker.

Following the insurance claim made by Mr. Cloutier for the theft of his vehicle, the investigator assigned to the file requested that he undergo an interrogation under oath which he refused to do.

The Court of Quebec held that Mr. Cloutier's refusal to undergo the interrogation requested by his insurer could not in itself justify a refusal by the insurance company to compensate him. The Court did conclude that the refusal amounted to a lack of collaboration but that it did not prevent the insurer from obtaining any other information relevant to its investigation. The Court therefore ordered the insurer to pay a sum that was less than what was claimed by the insured, on the basis of the latter's "lack of collaboration" in the investigation.

The Court of Appeal overturned the trial judge's decision and reiterated that the duty of the insured to closely collaborate with the insurer when collecting information may include holding an examination under oath.

The Court concluded that the wording of section 2471 CcQ requires the insured to answer questions from its insurer concerning all the circumstances surrounding the loss, to provide documentation relating to the claim, to consent to the collection of information and to sign forms to that effect.

According to the Court of Appeal, the insured's flagrant lack of collaboration amounted to bad faith and caused prejudice to the insurer: the latter had not been able to question the insured regarding his true insurable interest in the vehicle, as well as the circumstances surrounding the purchase of the vehicle (the vehicle had been reported stolen in the past).

The Court of Appeal thus concluded that the insurer had suffered a prejudice which was the direct result of the insured's bad faith. As a result, the insured had lost his right to compensation. The appeal was therefore granted, the trial judge's decision overturned and the lawsuit dismissed.

In the end, the Court of Appeal reiterated long established judicial principles concerning an insured's obligation to collaborate when a loss occurs. Therefore, in similar cases, refusal to submit to an examination under oath may have fatal consequences, in the presence of dubious circumstances surrounding the loss. In such cases, the Court may be especially strict with the insured.

1. *Di Capua v. Barreau du Québec*, J.E. 2003-1310 (CA); *Lapointe v. Unique (L'), assurances générales inc.*, 2008 QCCQ 12692 (CanLII).
2. *Northumberland General Insurance Co. v. Genzuik*, J.E. 81-1072 (CA) p 6.
3. *Intact Assurances inc. v. 9221-2133 Québec inc. (Centre Mécatech)*, 2015 QCCA 916 overturning the decision of the Court of Quebec: *9221-2133 Québec inc. (Centre Mécatech) v. Intact Assurances*, 2014 QCCQ 1613.

The content of this newsletter is intended to provide general commentary only and should not be relied upon as legal advice.

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