The absence of a written disclosure of a latent defect: a defect to avoid

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A recent decision rendered by the Honorable Justice Aznar once again confirmed the importance of disclosing the existence of a latent defect by a written notice. As such, being a *sine qua non* condition of a recourse based on the warranty of quality, we deemed it necessary to expose the key elements of this decision while emphasising the elements that should guide an insurer when dealing with a similar matter. The case in question is *Aviva, compagnie d'assurance du Canada v. Nissan Canada Inc*.[1]

As part of its recourse in subrogation, Aviva, compagnie d'assurance du Canada[2] sued Nissan Canada Inc.[3] in order to recover the insurance benefits that it paid to its insured following the destruction of his vehicle in a fire that occurred on August 14, 2006.

The evidence, which was not contradicted by the Defendant, held that the said fire was caused by a manufacturing defect attributable to the Defendant.

Following the occurrence of the loss, and so as to shed light on the cause of the fire, the adjuster for the Plaintiff appointed an expert mechanical engineer. In view of the conclusion of his report, which was mentioned above, the adjuster sent, by ordinary mail on November 10, 2006, a letter to the Defendant informing him of the fire, holding him liable for damages, and requesting a cheque for the amount of such damages.

As demonstrated during the investigation, it appeared that the letter was not sent to the correct address, which explained why the Defendant never responded to the Plaintiff. It must however be noted that the letter was never returned to the sender.

Then, on February 9, 2007, the Plaintiff parted with the vehicle in question and disposed of the debris. Subsequently, a second notice was sent to the Defendant, and this time it was sent to the correct address.

Upon receiving this second notice, a representative of the Defendant contacted the adjuster for the Plaintiff in order to inquire about the location of the vehicle for purposes of obtaining an expertise. That is when the Defendant was informed of the disposal of the vehicle and the sale of the debris.

On August 16, 2007, a copy of the expert report was sent to the Defendant, dated October 16, 2006. By a letter dated September 4, 2007, the Defendant informed the Plaintiff that it did not intend to follow-through with the claim. The Plaintiff then instituted a court action on November 12, 2008.

The issues at the heart of the case at hand were twofold: first, it was for the Court to determine whether the Plaintiff had complied with the provisions of article 1739 of the Civil Code of Québec and second, whether the notice dated February 20, 2007 constituted the notice of disclosure provided for in article 1739 Civil Code of Québec.

This article states the following:

> *A buyer who ascertains that the property is defective may give notice in writing of the defect to the seller only within a reasonable time after discovering it. The time begins to run, where the defect appears gradually, on the day that the buyer could have suspected the seriousness and extent of the defect.*
>
> *The seller may not invoke tardy notice from the buyer if he was aware of the defect or could not have been unaware of it.*

With respect to the first question, the Court concluded that the Defendant was informed on February 20, 2007 of the incident that occurred. On that date, the insured vehicle was not available for verification. Moreover, the notice that was sent on November 10, 2006, which predated the disposal of the vehicle but which had not been received by the Defendant, could not provide the notice required under article 1739 of

the Civil Code of Québec. However, was the Letter of Demand which was sent on February 20, 2007 sufficient?

To this end, the Court reiterated the objectives underlying the disclosure of a defect, namely: permitting the seller or the manufacturer of the good to verify whether the good is truly affected by a defect and, where such is the case, to allow for the repair or replacement. The Court also reminded us that this disclosure is necessary when in the presence of a professional seller or manufacturer. Consequently, the Court concluded that the Letter of Demand dated February 20, 2007 could not constitute the notice required under article 1739 of the Civil Code of Québec. As such, the Court dismissed the Plaintiff's action.

The motion for leave to appeal this decision was dismissed on September 14, 2010. It is interesting to note that the Court emphasized that, given the particular facts of this case, it could not debate the principle proposed by the applicant.

Disclosure, too strict of a requirement?

Despite the severity of the Courts with respect to the disclosure of latent defects, case law has shown some flexibility. Indeed, as noted by the Court of Appeal in *Quincaillerie Côté & Castonguay Inc.* v. *Castonguay*[4], it is recognized that in the case of an emergency or where the seller has repudiated its liability for the defect or has waived the benefit of the lack of notice, the lack of notice is not fatal.

In light of the jurisprudence, it is therefore crucial for insurers or any person claiming to be a victim of a latent defect to duly disclose said defect.

Thus, in order to ensure that one’s interests are protected, a notice should notably:

– be in writing;
– be sent to all the parties concerned (i.e. vendor, manufacturer, any person who distributes the good under his name or as his own, a supplier of the good, including the wholesaler and the importer);
– be sent at the moment of discovery of the defect;
– clearly state the nature of the defect as well as what is claimed thereon and be addressed to the correct recipient of the notice; and
– be sent to the correct address in a manner that will constitute proof of sending and receipt of such notice.

Finally, it is essential to distinguish the Letter of Demand from the written notice of disclosure. The Letter of Demand provides its recipient with an opportunity to cure the defect rather than disclosing its existence. Furthermore, the Letter of Demand is often sent after notice, although the two writings may be merged into one document[5]. As a result, we must, at the time of drafting, keep in mind the objectives of both documents and ensure that they are properly met.

*** Special thanks to Me Raffaela Commodari**

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[1] *2010 QCCQ 6661*

[2] *Hereinafter referred to as the “Plaintiff”.*

[3] *Hereinafter referred to as the “Defendant”.*

[4] *2008 QCCA 2216, par. 7, on this question, see also : Immeubles de l’Estuaire phase II Inc. v. Syndicat des copropriétaires de l’Esturaire Condo phase II, 2006 QCCA 781; Promutuel Deux-Montagnes, société mutuelle d’assurances générales v. Venmar Ventilation Inc., 2007 QCCA 540; Weiss v. Raschella, 2009 QCCA 2186*

[5] *Prévost v. St-Pierre, AZ-50188075, C.Q.*