

Rules of Thumb for the Prudent Property and Casualty Insurer if the Draft Bill Becomes Law

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Article abstract

Nous remercions Me John I.S. Nicholl d'avoir bien voulu accepter notre invitation à exprimer ses vues sur certains articles proposés dans l'avant-projet de loi intitulé *Loi portant réforme au Code civil du Québec du droit des obligations*. Ce texte origine d'une allocution donnée par l'auteur à la faculté de droit de l'Université McGill, le 29 novembre 1989, dans le cadre d'un séminaire intitulé : « Le droit des assurances, un raz-de-marée législatif ». L'auteur énonce ici onze règles qui, sans couvrir tout le champ de la nouvelle réforme en assurance, pourraient avoir un impact significatif sur les opérations en assurance de dommages.

Rules of Thumb for the Prudent Property and Casualty Insurer if the Draft Bill Becomes Law¹

by

John I.S. Nicholl²

Nous remercions M^e John I.S. Nicholl d'avoir bien voulu accepter notre invitation à exprimer ses vues sur certains articles proposés dans l'avant-projet de loi intitulé Loi portant réforme au Code civil du Québec du droit des obligations. Ce texte origine d'une allocution donnée par l'auteur à la faculté de droit de l'Université McGill, le 29 novembre 1989, dans le cadre d'un séminaire intitulé : «Le droit des assurances, un raz-de-marée législatif».

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In the Spring of 1988 the Government of Quebec issued a Draft of proposed amendments to the Civil Code which included numerous changes to the Fifth Title comprising Articles 2468 to 2605 which govern non-marine insurance. Eighteen months later, the Draft remains in the form of an «*avant-projet de loi*» and is not yet an actual Bill. It and the other amendments to the Civil Code proposed at the same time have been the subject of much hue and cry in the course of public hearings, and have been widely criticised in written submissions to the Government.

While no changes have been made to the Draft provisions on non-marine insurance as a result of the events of the last two years, it is our understanding that when Mr. Gil Rémillard replaced Mr. Herbert Marx as Minister of Justice, he was sufficiently concerned

¹This text, originally written in November 1989 for a seminar in insurance law held at McGill University, was updated in May 1990.

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by the storm of protest which had been raised with respect to the Draft generally that he requested that Mr. Justice Jean-Louis Baudoin chair a committee which would re-examine the “orientation” of the Draft provisions and submit a report to Mr. Rémillard advising whether changes would be appropriate. This report is believed to have been submitted directly to the Minister at the beginning of November 1989, but it is not yet known what it contained. At a speech given to the Quebec Risk and Insurance Managers Association on November 9, 1989 the Deputy Minister Mtre. Jacques Chamberland confirmed that there would in future be a review of the Draft provisions on non-marine insurance from a technical standpoint and that there would also in all probability be further public hearings in this regard.

The result is that the Draft Bill, which seemed until recently to have become an inexorable bureaucratic steamroller, has been checked in its progress, if not halted. It is to be fervently hoped that the Minister will take advantage of this opportunity to rethink some of the assumptions upon which the proposed provisions on damage insurance are based.

The “rules of thumb” which follow were first proposed at a conference entitled “Insurance Law — The Legislative Tidal Wave” held at the McGill University Faculty of Law on November 29, 1989. We emphasize that these rules do *not* cover all proposed changes to Articles 2468 to 2605 of the Civil Code, and are intended instead to highlight the salient amendments which are likely in our view to have the greatest practical impact on the property and casualty insurance industry. For ease of reference, the amendments referred to are presented in numbered paragraphs, and in each case the Draft Code Article and the corresponding provision of the current Code, where one exists, are quoted in full in both languages. The Draft has thus far been issued in French only, and we have not yet been told when an English version will be made available. *The English versions of the Draft Articles are thus our own unofficial translations, and we emphasize that they may differ from the official English versions, if and when the Draft Bill becomes law.*

Rule I

The broker or agent is always the representative of the insurer, and his knowledge and actions bind the insurer at all times, unless there is concrete and specific evidence that he was acting for the insured:

Current Code

Aucun.

None.

Draft Code

«2484. En matière d'assurance terrestre, l'agent ou le courtier en assurances est présumé le représentant de l'assureur.»

“2484. In non-marine insurance, the agent or the insurance broker is presumed to be the representative of the insurer.”

**Rule II**

All applications for insurance coverage must be in writing (Draft Article 2473, Current Article 2482) and must contain:

- A. *A comprehensive list of questions intended to elicit from the insured all information and all representations on which the insurer will rely in deciding to cover the risk or in setting the premium (Draft Article 2478);*
- B. *A statement that the application constitutes an offer by the insured to purchase the insurance coverage described in detail in the specific policy of which a complete copy is appended to the application; and*
- C. *A complete copy of the proposed policy wording, including the proposed declaration sheet and relevant endorsements and riders (Draft Article 2470):*

Current Code

«2478. L'assureur doit remettre au preneur la police et une copie de toute proposition faite par écrit.

En cas de divergence entre la police et la proposition, cette dernière fait foi du contrat à moins que l'assuré n'ait indiqué par écrit au preneur les points de divergence.»

Draft Code

«2470. En matière d'assurance terrestre, l'assureur est tenu de remettre la police au preneur, ainsi qu'une copie de toute proposition écrite faite par ce dernier ou pour lui.

“2478. The insurer must provide the policyholder with the policy and a copy of any application made in writing.

In case of inconsistency between the policy and the application, the latter prevails unless the insurer has in writing indicated the inconsistencies to the policyholder.”

“2470. In non-marine insurance, the insurer must provide the policyholder with the policy, and also with a copy of any application made in writing by him or on his behalf.

En cas de divergence entre la police et la proposition, cette dernière fait foi du contrat, à moins que l'assureur n'ait, dans un troisième document, indiqué par écrit au preneur les divergences qu'il a constatées et, plus particulièrement, celles qui portent sur le risque, sur les obligations imposées à ce dernier et sur les clauses d'exclusion ou de limitation de la garantie.»

In case of inconsistency between the policy and the application, the latter prevails unless the insurer has, in a third document, indicated the inconsistencies of which he is aware to the policyholder in writing, particularly those inconsistencies which relate to the risk, the obligations imposed on the policyholder or exclusion clauses or clauses which limit coverage.”

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Rule III

All applications for insurance coverage must be completed and signed by the insured or his duly authorized representative, not by the broker or agent: (Draft Article 2484, see above).



Rule IV

The wording of the application for coverage constitutes the insurance contract until a copy of the policy is given to the insured:

Current Code

«2476. Le contrat d'assurance est formé dès que l'assureur accepte la proposition du preneur.»

“2476. An insurance contract is formed upon the insurer's acceptance of the policyholder's application.”

Draft Code

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«2468. Le contrat d'assurance est formé dès que l'assureur accepte la proposition du preneur, bien que l'acceptation formelle puisse n'être communiquée à celui-ci que plus tard.

“2468. An insurance contract is formed upon the insurer's acceptance of the policyholder's application, even if he is only advised of formal acceptance at a later date.

En matière d'assurance terrestre, la police qui était en vigueur immédiatement avant le renouvellement constitue la proposition du preneur, à moins que des modifications n'y soient demandées.»

In non-marine insurance, the policy which was in force immediately prior to a renewal constitutes the application of the policyholder, unless amendments thereto be requested.”

**Rule V**

Once a copy of the policy has been given to the insured, the wording of the policy constitutes the insurance contract except to the extent that it is inconsistent with the application: (Draft Article 2470, see above).

**Rule VI**

Where the policy wording is inconsistent with the application, the application prevails until the insurer has given the insured a third document which sets out the discrepancies in detail: (Draft Article 2470, see above).



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Rule VII

Once the insurer has given the insured i) a copy of the application; ii) a copy of the policy wording; and iii) the “third document” detailing the inconsistencies between the policy and the application, the insurance contract then comprises all three documents.

**Rule VIII**

On renewal or any transaction which may be assimilated to a renewal, the terms and conditions of the renewal contract are those constituted by the set of i) the application for the previous period of coverage; ii) the policy wording with respect to the previous period of coverage; and iii) the “third document” describing the inconsistencies between the application for the previous period of coverage and the policy wording, until the insurer gives the insured two further documents, namely i) a copy of the renewal of the policy wording; and ii) a fifth document which sets out in detail the inconsistencies between the three documents relating to the previous period of coverage and the renewal of the policy wording: (Draft Article 2468, see above).

**Rule IX**

All insurance policies must include a comprehensive list of the facts and circumstances which the insurer considers aggravations of the risk and of which it expects to be notified by the insured:

256 Current Code

«2566. L'assuré doit communiquer promptement à l'assureur les aggravations du risque spécifiées au contrat, ainsi que celles résultant de ses faits et gestes et qui sont de nature à influencer de façon importante un assureur raisonnable dans l'établissement du taux de prime, l'appréciation du risque ou de la décision de maintenir l'assurance.

L'assureur peut alors résilier le contrat selon l'article 2567 ou proposer par écrit un nouveau taux de prime que l'assuré doit accepter et acquitter dans les trente jours de sa réception sans quoi la police cesse d'être en vigueur.

“2566. The insured must promptly advise the insurer of any increase in the risk specified in the contract or that resulting from events within his control and which is likely to materially influence a reasonable insurer in the setting of the rate of the premium, the appraisal of the risk or the decision to continue to insure it.

The insurer may then cancel the contract in accordance with Article 2567 or propose in writing a new rate of premium which the insured must accept and pay within thirty days of its receipt, failing which the policy ceases to be in force.

L'assureur est réputé avoir acquiescé au changement qui lui a été ainsi communiqué s'il continue à accepter les primes ou s'il paye une indemnité après sinistre.

À défaut par l'assuré de remplir son obligation en vertu du premier alinéa, l'article 2488 s'applique *mutatis mutandis*.»

Draft Code

«2537. L'assuré est tenu de déclarer à l'assureur, promptement, les circonstances qui aggravent les risques, lorsqu'elles sont connues de lui et spécifiées dans la police.

Lorsque l'assuré ne remplit pas cette obligation, les dispositions de l'article 2481 s'appliquent en faisant les adaptations nécessaires.»

The insurer is deemed to have acquiesced in the change communicated to him if he continues to accept the premiums or pays an indemnity after a loss.

If the insured fails to discharge his obligation under the first paragraph, Article 2488 applies *mutatis mutandis*.”

“2537. The insured must promptly advise the insurer of circumstances which increase the risks, insofar as they are known to him and specified in the policy.

When the insured does not fulfill this obligation the provisions of Article 2481 apply, *mutatis mutandis*.”

Rule X

All property policies must include a stipulation that the policy shall not constitute a contract pour le compte de qui il appartiendra unless this is the specific intention of the insurer.

Current Code

Aucun.

None.

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Draft Code

«2554. L'assurance de biens contractée pour le compte de qui il appartiendra vaut tant comme assurance au profit du titulaire de la police que comme stipulation pour autrui au profit du bénéficiaire, connu ou éventuel, du contrat.»

“2554. Property insurance contracted on behalf of any person to whom the property may belong avails both as insurance for the benefit of the owner («*titulaire*») of the policy and as a stipulation for the benefit of a third person inuring to the beneficiary of the contract, whether known or to be determined.”

**Rule XI**

All property policies must be rated and underwritten on the assumption that an absolute minimum of fifteen days of full coverage may be created at any time in favour of a complete stranger at the whim of the insured, and without any reassessment of the risk:

Current Code

«2577. Le contrat d'assurance ne peut être transporté qu'avec le consentement de l'assureur et qu'en faveur d'une personne ayant un intérêt d'assurance dans la chose.»

“2577. The contract of insurance may be transferred only with the consent of the insurer and in favour of a person who has an insurable interest in the object of the insurance.”

Draft Code

«2546. Le contrat d'assurance individuel de biens peut, du seul consentement de l'assuré, être cédé à un tiers qui a un intérêt d'assurance dans le bien, pourvu que l'assureur soit aussitôt avisé du nom et de l'adresse du cessionnaire.

“2546. The individual contract of property insurance may, by the sole consent of the insured, be transferred to a third party who has an insurable interest in the property, providing that the insurer is notified immediately of the name and the address of the transferee.

L'assureur peut alors résilier le contrat ou proposer, par écrit, un nouveau taux de prime, auquel cas le cessionnaire est tenu d'accepter et d'acquitter la prime ainsi fixée dans les trente jours qui suivent la réception de cette proposition, à défaut de quoi la police cesse d'être en vigueur. Toutefois, s'il continue d'accepter les primes ou s'il paie une indemnité à la suite d'un sinistre, l'assureur est réputé avoir acquiescé à la cession.»

The insurer may then cancel the contract or propose in writing a new rate of premium, in which case the transferee must accept and must pay the premium thus established within thirty days of receipt of the proposal, failing which the policy ceases to be in force. However, if the insurer continues to accept the premiums or pays an indemnity after a loss he is deemed to have acquiesced in the transfer."

Garçon, de quoi écrire, par Jean d'Ormesson, chez Gallimard, Paris

Dans son dernier livre, Jean d'Ormesson est brillant, sûr de lui, même s'il en doute parfois. Il s'exprime très franchement sur certains écrivains. Ainsi, de Léon Daudet, il n'hésite pas à dire que s'il était admirablement doué pour l'injure, il était un écrivain brillant et un critique avisé. De Raymond Aron, il écrit : «Ce n'était pas un écrivain, mais un homme politique remarquable.» Par contre, de Sartre, il affirme : «Il ne cessait de proférer des *conneries*, mais c'était un écrivain accédant comme tel à un univers dans lequel Aron, malgré toute sa science, ne pénétrait jamais.»

Il y a là un livre bien enlevé, qui permet de comprendre l'homme, l'écrivain et une époque : la nôtre.