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Résumé de l'article

Me John I.S. Nicholl nous communique un travail très fouillé sur des raisons qui peuvent justifier un assureur de refuser la garantie, dans le cas d'une assurance des biens. Me Nicholl entre dans beaucoup de détails pour conclure que l'assureur n'est libéré de son engagement que s'il est bien démontré : a) qu'il n'était pas au courant de tous les faits importants entourant le risque; b) que si l'assuré n'a pas présenté les aspects principaux du risque qui ont entraîné un sinistre; c) qu'on ne lui a pas communiqué tous les faits qui auraient pu influencer son jugement, qui l'auraient empêché d'accepter l'assurance ou auraient exigé une prime plus élevée. Si le texte de Me Nicholl semble un peu hermétique, il y a là une question difficile. Par ailleurs, si l'assuré ou son courtier est tenu de présenter l'essentiel, ceux-ci peuvent être tout à fait justifiés de prendre pour acquis que le risque est en substance bien présenté, suffisamment exposé pour permettre à l'assureur de payer le sinistre en totalité ou en partie, selon les faits. Sinon, ils doivent préciser ceux-ci à l'avance.

Breaches of conditions and warranties : when can coverage be denied ?[1]

by

John I.S. Nicholl

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a) qu'il n'était pas au courant de tous les faits importants entourant le risque ;

b) que si l'assuré n'a pas présenté les aspects principaux du risque qui ont entraîné un sinistre ;

c) qu'on ne lui a pas communiqué tous les faits qui auraient pu influencer son jugement, qui l'auraient empêché d'accepter l'assurance ou auraient exigé une prime plus élevée.

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The task of identifying the remedies available to a Quebec insurer for breach of policy terms is greatly complicated by the necessity of calling the term in question by its proper name, rather than

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[1] Texte d'une conférence donnée le 21 mai 1987 au Ritz Carlton dans le cadre du séminaire d'assurance Ogilvy Renault.

the label given to the term in the policy wording, which determines the appropriate remedy. Policies in this and other jurisdictions are filled with provisions unhelpfully labelled *exclusion* or *general condition* which are in fact nothing of the sort, and the resulting confusion is exacerbated in Quebec by the imprecision of the terminology employed by the legislator in the Civil Code.

It is submitted that the meaningful categories for the purposes of remedy identification are the following, each of which will be addressed in turn :

1. pre-contractual representations ;
2. continuing warranty ;
3. term describing the risk ;
4. pre-loss condition ;
5. post-loss condition ;
6. collateral stipulation.

Once the term in question has been assigned to its proper category, the remedy is apparent. As will be seen, the problem is in differentiating among the categories, and, where the term fits more than one, in choosing the most advantageous.

1.Pre-contractual representations

Since the revision of the Civil Code in 1976, the sequence of articles 2485 to 2490 inclusive makes up the sum total of the substantive statutory provisions with respect to *pre-contractual* representations by the policyholder, except in the case of life or health insurance.

There are many aspects of these provisions which have not yet been the subject of sufficient judicial comment to have their construction refined and verified, with the result that we are still dealing in 1987 with the delphic and often confusing language employed by the legislator. Moreover, as few of the present provisions bear any resemblance to their predecessors prior to 1976, little if any help may be derived from the case law prior to that date.

It may be said generally, however, that the rules of articles 2485 to 2490 appear to have abolished the traditional insurance law con-

cept of *warranty*, meaning a representation by the assured which, if false, would entitle the insurer to deny coverage without more, regardless of the materiality of the representation to the risk underwritten (see, for example, *MacGillivray & Parkington on Insurance Law*, paras. 829-832 (6th Ed. 1975) ; Colinvaux, *The Law of Insurance* 115 (5th Ed. 1984). The situation is thus that in Quebec the only meaningful use of the word *warranty* is now in relation to the *continuing* warranty contemplated by article 2489 (see below), such as the warranty in *Robitaille vs. Madill* (1985) C.A. 319 that the CO_2 fire extinguishing system in the assured's restaurant kitchen would
502 be regularly maintained and inspected throughout the policy period (the use of the term *continuing*, as opposed to *promissory*, is preferred by *MacGillivray & Parkington*, *supra*, para. 853 ; see also Colinvaux, supra, 119, para. 6-24.

Article 2485

"The policyholder, and the insured if the insurer requires it, is bound to represent all the facts known to him which are likely to influence a reasonable insurer materially in the setting of the premium, the appraisal of the risk or the decision to cover it".

In light of this provision, what are the limitations on the content of the assured's obligation to disclose ?

Firstly, it is clear that the assured need only disclose facts which are known to him : see, for example, *Robitaille vs. Madill* (1983) C.S. 331, reversed on other grounds (1985) C.A. 319.

Secondly, the facts which the assured is bound to disclose are only those which are likely to influence a reasonable insurer materially. It has been argued (see Belleau *New Rules Concerning Misrepresentations and Warranties*, Meredith Memorial Lectures 1978, 23 to 41) that the effect of this wording is simply to return the law of Quebec to a common law test of materiality, namely by reference to the judgment of a reasonable insurer in his subjective decision to accept or refuse a risk, to the exclusion of the somewhat different test which had previously been evolved by Quebec courts, which tended to evaluate materiality from the point of view of the assured and prefer *objective* criteria linking a particular fact to the risk.

It has been clearly established by the case law since 1976 that the issue of materiality is indeed to be determined by the test of the

reasonable insurer, as article 2485 says. However, the question arises, and it has not yet been answered directly by our courts, whether the words "which are likely to influence" do not import a concurrent limitation on the information which must be divulged to that which a reasonable *assured* would perceive to be likely to influence his insurer. We would suggest that this is the most plausible interpretation to be given to the word *likely*, which would otherwise add little to the sentence. A number of cases since 1976 do indeed appear to impose such a *reasonable man* standard on the assured's duty to disclose, without however explaining precisely on what basis this is done : see, for example, *Bernier vs. The Mutual Life Assurance Company of Canada* (1973) C.A. 892 ; *Dunn vs. La Mutuelle d'Omaha Compagnie d'Assurance* (1979) C.S. 967 and *Robitaille vs. Madill, supra.* In our view, it is this interpretation which will continue to prevail, notwithstanding the somewhat ambiguous terms of article 2485, because it is consonant with the consumer protection viewpoint and avoids the somewhat draconian result obtained in some earlier cases where an assured was deprived of coverage by his failure to disclose a fact of which he was aware but which he could not have reasonably be expected to know would have influenced a reasonable insurer.

Further, the insurer may, in the course of its correspondence and communications with the assured, create a situation in which it waives the rights to disclosure which would otherwise be created by article 2485. This is because article 2485 is declared to be of "relative public order" by article 2500, with the result that is can only be derogated from by contract where the derogation favours the *assured.* It is thus lawful for the insurer and the assured to contract that the assured will *not* be obliged to disclose "all the facts known to him which are likely to influence a reasonable insurer materially", but only some *lesser* amount of information, *as defined by the contract.*

The circumstance in which this possibility becomes most interesting is obviously where the insurer tells the assured in writing what he (the insurer) wants to know, and the assured complies fully with this request. For example, where the insurer or his agent gives the assured an application for insurance which includes a questionnaire, and the questionnaire is duly and truthfully completed in full by the assured, is it then open to the insurer after a loss has occurred to argue that the assured ought to have disclosed some fact which was

not included in the questionnaire ? This problem has been dealt with in some common law jurisdictions as a matter of estoppel, but it is submitted that in Quebec this is not required. Because it is open to the insurer and the assured to derogate from the terms of article 2485 by contract, and because the application forms part of the insurance contract by the terms of article 2476 of the Civil Code, the position is simply that the insurer, by providing a questionnaire with the application, defined the information which he required, to the exclusion of any other facts which the assured might otherwise have had to disclose according to the standard established in article 2485.

A further wrinkle is provided by article 2499, which states that any ambiguity in an insurance contract must be interpreted against the insurer. If the assured completes the questionnaire as part of his application for insurance, and after a loss has occurred the insurer attempts to deny coverage on the basis that the assured's responses to the questionnaire were incorrect or incomplete in some material aspect, it is open to the assured, because the questionnaire forms part of the insurance contract under the article 2476, to plead that any ambiguity *in the questionnaire* must be interpreted against the insurer. Once again, in an instance where the application is accompanied by a questionnaire, this has the effect of imposing an additional limitation on the assured's duty to disclose under article 2485.

Article 2486

"The obligation respecting representations is deemed met if the facts are substantially as represented and there is no material concealment.

There is no obligation to represent facts known to the insurer or which from their notoriety he is presumed to know, except in answer to inquiries.

Misrepresentation or deceitful concealment by the insurer is in all cases a cause of nullity of the contract that the party acting in good faith may invoke."

The first factor to be noted in relation to this provision is that it is of absolute public order pursuant to article 2500, and cannot be derogated from by contract, whether in favour of the assured or otherwise.

What, then, is the effect of the first paragraph of article 2486 ? It is submitted that it imposes two additional criteria on the regime established by article 2485, the mechanism being that so long as the terms of article 2486 are respected, the assured's obligation to disclose is *deemed* by legal fiction to have been met. It should be noted as well at this point that the terms of article 2486 are not limited in their application to situations where article 2485 has not been derogated from by contract in favour of the assured. In other words, it would appear that article 2486 has its effect on the assured's obligation to disclose *however that obligation may have been defined by contract.*

The first of the factors imposed by article 2486 is a doctrine of substantial compliance. It will be noted, however, that this appears to relate only to facts which have been represented by the assured, and not to facts *omitted* by him.

The second part of the first paragraph says that in order for the deeming provision to operate, there must not only have been a substantial correlation between the reality and the facts represented by the assured, but there must also have been "no material concealment". In our view, this latter phrase connotes deliberate failure to disclose amounting to bad faith on the part of the assured, with respect to information which is *material* in the sense in which that word is used in article 2485.

In substance, then, what the legislator appears to be saying in article 2486, "which cannot be derogated from by contract", is that if the facts represented are substantially true and the assured is acting in good faith, the duty of disclosure will be deemed to have been met. On a strict interpretation, however, article 2486 does not appear to modify the terms of article 2485 as regards good faith *omissions* by the assured to represent facts "known to him which are likely to influence a reasonable insurer materially. . . " In other words, it seems that an assured who is guilty of *omissions*, even in good faith, does not have available to him the deeming provisions of article 2486. This is not to say, of course, that he cannot prove as a matter of fact that his omission was not such as to breach his obligation of due disclosure under article 2485, or such lesser obligation as may have been agreed upon by contract.

The second paragraph of article 2486 imposes limits dictated by common sense on the assured's duty to disclose : in the absence of a specific inquiry, the assured does not have to tell the insurer things the insurer already knows, and does not have to recite a litany of commonly known facts in order to ensure that he cannot afterwards be accused of omitting some item of which the insurer is inexplicably unaware. The concept of *notorious* facts, however, is not without its pitfalls : whereas under article 2485 an assured who has failed to disclose some material fact can argue plausibly, as we have seen above, that he could not reasonably have been expected to know that the
506 omitted fact would be of interest, it appears that an assured who fails to disclose to the insurer a fact which he (the assured) *knows* to be material, but which he also believes to be *notorious* within the meaning of article 2486, is taking the chance that a post-loss determination that the omitted fact was *not* notorious will deprive him of all or some of this coverage, however reasonable his assumption of notoriety may have been.

The other interesting problem relating to insurer knowledge, whether deemed or otherwise, is that the case law established clearly that under some circumstances the insurance broker or agent may be acting on the *insurer's* behalf during the process which precedes the formation of the contract : see, for example, *Guardian Insurance Company of Canada vs. Victoria Tire Sales Limited et al.* (1979) 2 S.C.R. 849. Does article 2486 mean that where the local broker or agent acts on the insurer's behalf, however briefly, that insurer is thereafter held to know i) everything the broker or agent knows regarding the assured ; and ii) everything that is sufficiently notorious in the locality that the broker or agent is deemed to know about it ?

The third paragraph of article 2486 appears to be wholly superfluous in that it deals with misrepresentation or deceitful concealment by the *insurer* : it is difficult to conceive of a situation in which this problem might arise and for which the ordinary principles of insurance law would not provide an adequate solution. The most plausible suggestion we have yet heard come from one of our students at the McGill Faculty of Law, who proposed that this provision was in fact a throwback to the days of *Carter v. Boehm*, 3 Burr 1905, 97 Eng. Rep. 1162 (K.B. 1766) when the insurer might have private knowledge before underwriting a voyage that the ship in question had in fact arrived safely in port, and so get his premium without as-

suming a risk. If this is indeed the scenario addressed by the third paragraph of article 2486, why is it still in the Civil Code ?

Article 2487

"Subject to articles 2510 to 2515, misrepresentation or concealment by either the policyholder or the insured, in regard to the facts contemplated in articles 2485 and 2486, nullifies the contract at the instance of the insurer, even for losses not connected with the risks so misrepresented."

Article 2487 establishes the general rule with regard to sanctions for breach of the duty to disclose by the assured. As with the preceding articles, the most startling thing about this provision is its hierarchical status : it is not of public order at all ! The result is that it can be freely derogated from by contract in favour of either the insurer or the assured. In substance, however, as the effect of the provision could not be more favourable to the insurer than it already is, any derogation would necessarily be one which mitigates the draconian effect of the article on the coverage available to the assured.

The principal sanction, then, is that of nullity at the instance of the insurer, without any connection being necessary between the fact misrepresented and the loss which has in fact occurred. The principal unresolved ambiguity in this article is the phrase "misrepresentation or concealment. . . in regard to the facts contemplated in articles 2485 and 2486". It will be remembered that article 2486 *deemed* the assured's obligation of disclosure to be completed if i) the facts were substantially as represented, and ii) there was not material concealment. The effect of article 2487, however, in the absence of any contractual provisions to the contrary, appears to be that good faith misrepresentation *alone* will nullify the contract. We are not aware of any jurisprudence which clarifies this point.

Article 2488

"In damage insurance, unless the bad faith of the proposer is established, the insurer is liable for the risk in the proportion that the premium collected bears to that which it should have collected, except where it is established that it would not have covered the risk if it had known the true facts."

This provision proceeds to stand on its head the ostensibly *general* rule established by article 2487. Article 2500 says that article 2488 is of "relative public order", and it can therefore be derogated from by contract *in favour of the assured only*. As a practical matter, however, it is difficult to see how the rule established by article 2488 could be *more* favourable to the assured than it already is.

We propose to deal with the article phrase by phrase, as follows.

"In damage insurance"

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Article 2469 C.C. defines the whole realm of insurance as being devided into "marine insurance" and "non-marine insurance". In turn, article 2471 C.C. defines "non-marine" insurance as being divided into "insurance of persons" and "damage insurance". Article 2475 C.C. then defines "damage insurance" as "protecting the insured from the consequences of an event that may adversely affect his patrimony".

The latter article states that "damage insurance" includes "property insurance, the object of which is to indemnify the insured for material loss sustained by him, and liability insurance, the object of which is to protect him from the pecuniary consequences of an act for which he may be liable in damages". In sum, then, article 2488 appears to be applicable to all insurance except for personal lines.

"Unless the bad faith of the proposer established"

The result of this phrase would appear to be that where the assured is shown to have deliberately concealed or misrepresented facts in bad faith, he is deprived of the potential benefit of article 2488 and the applicable sanction reverts to the general rule expressed in article 2487.

"The insurer is liable for the risk in the proportion that the premium collected bears to that which it should have collected"

The rule appears to be that if the insurer had been collecting premium A in return for a given coverage, but would in fact have charged premium B for the same coverage had it been aware of all the facts, the insurer will then be liable only for A/B x loss. This method of calculation has been applied without debate in at least three decisions of the Superior Court, being *Paquet vs. Allstate du*

Canada (1984) C.S.Q. 200-05-001722-80, reported in Bois et al., *Les principaux arrêts du droit des assurances* 358 (1985) ; *Dupuis vs. Phoenix du Canada*, J.E. 83-851 (C.S.) ; *Lapierre vs. Assurances Robert Dionne Inc.* (1984) C.S. 18.

The issue which inexplicably has not been debated, however, is whether the liability of the insurer should be calculated as a percentage of the actual loss for which indemnity is claimed, as in the cases cited above, *or as a percentage of the applicable policy limits.* This latter approach has been adopted in at least one decision of the Superior Court, again without explanation or debate : see *Savage vs. Société d'assurance des Caisses Populaires* (1980) C.S. 629.

The following example illustrates the potential discrepancy between the two methods of calculation :

Total coverage :	$ 10,000
Total claim :	$ 5,000
Proportion of risk for which insurer is liable :	50%

In this instance, the insurer will be obliged to pay the full extent of the loss if the ratio is applied to the policy limits, but will only be obliged to pay $2,500 if it is applied to the amount of the loss.

It may be argued that if article 2488 is interpreted so to apply the percentage to the *loss*, the result is to make the provision punitive and arbitrary in that it simply expropriates a proportion of the loss without regard to the policy limits. We submit that the proportionality rule must be applied in relation to the time at which the assured's disclosure was to take place, namely prior to the policy inception date, at which point the loss remains an unknown contingency and the known factor is the amount of the *risk* undertaken by the insurer with respect to any one loss or occurrence.

The contrary argument can also be made, however, that it is not only the possibility of a claim for the full extent of the policy limits which concerns the insurer, but also the *number* of claims which will occur during the policy period. If the undisclosed fact is one which gives rise to concern as to how well the assured will take care of the property insured, or as to how often the assured will be sued for professional malpractice, then the appropriate penalty is one which exacts a percentage of *each* of the losses claimed by the assured dur-

ing the policy period, because it is their *frequency* and not their quantum which was misrepresented.

"Except where it is established that it would not have covered the risk if it had known the true facts"

The cases establish clearly that the burden is on the insurer to show that it would not have covered the risk : *Nadeau vs. Oeuvre et fabrique de la Paroisse de St-Ignace-de-Loyola de Giffard*, J.E. 80-517 (C.S.). The standard of proof is on the balance of probabilities : *Uniformes M.H.P. Inc. vs. Commerce and Industry Insurance Co. of Canada*, J.E. 85-753 (C.S.).

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It is thus of particular importance that insurers make a concerted effort in cases involving article 2488 C.C. to prove that they would not have accepted the risk and this generally involves introducing evidence of an established internal policy against underwriting risks in that category ; see *Bourgault vs. Cie d'Assurance Bélair*, J.E. 84-143 (C.S.), *Lejeune vs. Cumis Insurance Society Inc.*, J.E. 85-291 (C.S.).

Article 2490

"Every clause releasing the insurer in case of omission, misrepresentation or breach of warranty is without effect, except in conformity with the provisions of this title".

We skip to article 2490, as article 2489 relates to *continuing* warranties rather than to pre-contractual representations, and will be considered below.

Article 2490 is of absolute public order, with the result that it cannot be derogated from by contract. The article appears to be largely superfluous, at least with regard to *omission* and *misrepresentation* as articles 2485, 2486 and 2488, being of relative or of absolute public order, cannot in any event be derogated from in favour of the insurer. It has been suggested, however, that the purpose of article 2490 is to underline the intention of the legislator that the provisions of article 2485 and following are to be applied not only to policy provisions which would traditionally be thought of as relating to disclosure, but also to other provisions which are characterized rather as exclusions or questions of policy attachment.

Thus, for example, it might plausibly be argued on the basis of article 2490 that a provision in a fleet policy, or in the assured's application therefore, stating that any vehicles with respect to which the assured fails to supply the requisite details will be excluded from coverage, is without effect, and the rules of articles 2485 and following are substituted instead. Similarly, a provision in a professional indemnity policy requiring the assured to declare any circumstances of which he may be aware which could give rise to a claim against him, and excluding any claims made during the policy period as a result of circumstances which the assured omitted to declare in his application, could also be characterized as an *omission* and therefore quashed by the terms of article 2490.

Article 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.

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."

We note that the first, second and fourth paragraphs of this article are of *relative* public order, and can therefore be derogated from by contract so long as the derogation favours the assured. In substance, then, the analysis above of possible derogations from articles 2485 and 2488 applies in the case of article 2566. The third paragraph of the article, however, is of *absolute* public order and cannot be modified.

The effect of article 2566 is essentially to apply the terms of articles 2485 and 2488, *mutatis mutandis*, to the assured's obligation to disclose *aggravations* of the risk to his insurer. It should be noted, however, that there is no provision in article 2566 which limits the

assured's duty of disclosure to matters within his *knowledge*, as with article 2485. Instead, the assured's duty is to keep the insurer apprised of i) aggravations of the risk which are specified in the policy ; ii) aggravations of the risk resulting from events within his control (« résultant de ses faits et gestes »). In other words, the assured must make it his business to be aware of aggravations of the risk during the policy period, as his ignorance *in fact* of a specific aggravation will not excuse his failure to report it, or save his coverage.

512 We also emphasize that article 2486 does *not* apply to aggravation of the risk situations, with the result that i) the assured is not entitled to the benefit of any deeming provision where the facts respecting the aggravation are substantially as represented and there is no material concealment ; and ii) it is not clear whether the assured can excuse a failure to declare an aggravation of the risk by pleading the notoriety of the facts in question.

Summary

The following is a brief summary of our conclusions with respect to articles 2485 and following :

1. The criteria which define the information which must be conveyed by the assured to the insurer are i) the knowledge of the assured ; ii) the requirements of a reasonable insurer ; iii) the perception of a reasonable assured as to the requirements of a reasonable insurer ; and iv) the materiality of the facts to the risk to be underwritten.

2. Rule # 1 above may be derogated from to the extent that the derogation favours the assured, and so for example where the insurer provides a questionnaire which forms part of the insurance contract, it may be said that the insurer has waived his right to require additional information.

3. The assured's obligations of disclosure are *deemed* to be met if i) there is no substantial *misrepresentation*, and ii) there has been no deliberate concealment in bad faith. It is not clear what rule applies in the case of omissions which do not amount to deliberate concealment.

4. The general rule as regards sanctions is that either i) misrepresentation or ii) concealment by the assured nullifies the

contract whether or not the loss is related to the facts misrepresented or concealed.

5. The very large exception to the rule in #4 above is that with respect to property and liability insurance, unless the insurer proves i) that the assured acted in bad faith, or ii) that it would not have covered the risk if it had known the true facts, the insurer is liable in the proportion that the premium collected bears to that which it should have collected. It is not clear, however, whether this proportion is applied to the policy limits or to the amount of the loss.

6. It may be that the provisions of articles 2485 and following prevent the operation of policy clauses imposing sanctions for omissions to reveal information which are characterized other than as matters of non-disclosure, such as exclusions and policy attachment provisions.

7. The effect of article 2566 is essentially to apply the rules paid down in articles 2485 and 2488 to aggravation of the risk situations, *mutatis mutandis*. It should be noted, however, that article 2486 does *not* apply, so that there is no "substantial compliance in good faith" defence available to the assured. The status of the notoriety defence is unclear.

2.Continuing warranties and terms describing the risk

As noted above, article 2489 of the Civil Code refers only to warranties, as follows :

> "A breach of warranty aggravating the risk suspends the coverage. The suspension ceases when the insurer has acquiesced or the breach has been remedied."

The nature of the remedy prescribed, however, together with the prohibition by articles 2485 and following of the old concept of pre-contractual warranty, makes it clear that article 2489 contemplates *continuing* warranties involving an undertaking by the assured that he will maintain a particular state of affairs throughout the policy period. The remedy for breach is suspension until the insurer acquiesces (by renewing while the breach continues, for example) or until the breach is remedied. This excludes by implication (article 2489 being of relative public order) the once-admissible argument that breach of a continuing warranty entitled the insurer to

deny coverage in respect of any loss occurring after the breach, *whether the breach had been remedied at the time of the loss or not.*

It is to be noted, however, that only a breach of warranty *aggravating the risk* suspends coverage. An extra burden is thus placed on the insurer to demonstrate the impact of the breach on the risk underwritten, but the Code does not go so far as to require that the breach have any causal relationship to the *loss* in respect of which the insurer wishes to deny coverage. An interesting question arises in relation to policies which cover a multitude of perils whether the aggravation of any of those perils by a continuing breach of warranty would be sufficient to justify a denial of coverage in respect of a loss caused by an entirely different peril. Under a home-owner's policy, for example, if the assured's failure to install smoke detectors does aggravate the risk of fire, can the insurer invoke this aggravation to justify a denial of coverage in respect of a loss caused by a tornado ? We are not aware of any case law on point.

The effect of limiting the available remedies to suspension of coverage, moreover, is in effect to render the continuing warranty identical to the concept of "term describing the risk" with the important exception that where there is a *breach* of a term describing the risk, there is no necessity to show that the breach *aggravated* the risk in order to deny coverage.

A term describing the risk is simply a component of the policy which identifies the risk underwritten (see *MacGillivray & Parkington, supra*, para. 859 ; Colinvaux, *supra*, 120-121). The insuring clause will read, for example : "1987 Kenworth tractor-trailer while being driven in Quebec". If the vehicle is driven outside Quebec and a loss occurs, then the risk is simply no longer as described and there is no coverage : see, by way of illustration, *Provincial Insurance vs. Morgan* (1933) A.C. 240 ; *De Maurier (Jewels) vs. Bastion Insurance* (1967) 2 LL. L.R. 550, 558 ; *Chateau Nancy Inc. vs. La Compagnie d'Assurance Canadienne Universelle Limitée* (1977) I.L.R. 1-825 (C.A.) ; *Britsky Building Movers Limited vs. The Dominion Insurance Corporation* (1981) I.L.R. 1-1420.

If, however, the policy instead contains a clause under the rubric *Warranty* :

> "The named assured warrants that the assured vehicle will not be driven outside the Province of Quebec during the policy period".

the result is apparently that the availability of a remedy in the event of breach is limited by article 2489, and in order to deny coverage for a loss which occurs while the breach continues, the insurer will have to demonstrate that driving outside Quebec somehow constituted an aggravation of the risk.

3. Conditions

It is tempting to conclude that the enactment of articles 2485 and following simply abolished *conditions* in Quebec insurance law, replacing them with the limited categories enunciated in article 2490, namely omissions, representations and breaches of warranty. *515*
A closer analysis of the Civil Code and the case law reveals however that this cannot be the case. Firstly, it is clear that the post-loss condition is alive and well : for example, breaches of the obligation to give timely notice of loss (article 2572 C.C.) clearly entitle the Quebec insurer to deny coverage without showing prejudice : see *Marcoux vs. The Halifax Fire Insurance Company* (1948) S.C.R. 278 ; *Canadian Shade Tree Service Ltd. vs. The Northern Assurance Co.* (unreported) Que. C.A., Dec. 11, 1986. Moreover, the conditional obligation is perfectly legitimate in contractual matters generally, as indicated by the terms of articles 1079 and following of the Code.

The difficulty arises where the condition in an insurance policy relates to the *pre-loss* situation. It is clear from article 2482, paragraph 1, that such conditions do exist : the question is how they are to be distinguished from i) pre-contractual representations ; ii) continuing warranties ; and iii) terms describing the risk, for the purpose of identifying the appropriate remedy. If for example in a professional indemnity policy, one finds a provision which says :

> "It is a condition of coverage that the assured firm shall inform the insurer within the thirty days of any increase in the professional membership of the firm." is this a *condition*, the breach of which entitles the insurer to deny coverage without more, or is it rather a matter of *representation* or *aggravation of the risk* with the result that articles 2485 et seq. or article 2566 must be applied ?

Similarly, if a fleet policy contains the following clause :

> "Conditions
>
> . . . The assured vehicles shall not be driven outside the Province of Quebec during the period of coverage".

is this a condition, a continuing warranty or a term describing the risk ?

It is submitted that the only plausible basis for distinction between the pre-loss condition, on the one hand, and the continuing warranty on the other, is that the latter concept necessarily involves some element of control by the assured – the warranty is in the nature of an undertaking to do or not to do (and in this respect the French version of article 2489 is the most appropriate : "engagement formel"). By deduction, therefore, we conclude that a pre-loss condition must relate to a fact on circumstance which is *not* within the assured's control, for example :

> "It is a condition of coverage that the Suez Canal shall remain open to commercial shipping".

If the Canal is closed, then presumably the coverage is at an end without any necessity for the insurer to rely on article 2489 with respect to *warranties.*

4.Collateral stipulations

This is a residual category which is distinguished principally by the absence of a specific remedy attached to a breach, other than the general remedies for breach of contract under the Civil Code (see *MacGillivray & Parkington, supra*, para. 860). The only example we have seen recently was a clause in a business interruption policy issued to a large oil company which did not appear under any specific rubric, and which required that the assured notify the insurer of any increase in the world price of crude oil above a specific ceiling. We were asked by the insurer whether a breach of this provision would justify a denial of coverage, and were obliged to advise that it would not because we were dealing only with a collateral stipulation. Presumably, however, the insurer would have been able to claim from the assured any damages directly caused by the breach, as with any other contractual obligation.

We note that although it is unlikely that any insurer would *willingly* characterize a policy term as being a collateral stipulation, the fact that this category is the most favourable to the assured because the insurer has no specific remedy for a breach will necessarily result in any policy provisions of *ambiguous* character being labelled col-

lateral stipulations by the courts in furtherance of the Quebec version of the *contra proferentem* rule :

> Article 2499 : "In case of ambiguity, the insurance contract is interpreted against the insurer."

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Les connaissances personnelles du juge, dans un procès civil *517*

Dans *The Canadian Bar Review* de septembre 1987, volume 66, numéro 3, Me Claude Fabien étudie de façon fort intéressante l'origine des faits qui sont présentés au juge, appelé à se prononcer dans un sens ou dans un autre. Voici, en résumé, ce que dit l'auteur :

> « Dans les systèmes judiciaires de tradition anglaise, comme ceux que l'on trouve dans les provinces du Canada, y compris au Québec, deux techniques, entre autres, sont utilisées pour favoriser la découverte de la vérité. Une première consiste à soumettre le processus d'acquisition de l'information par le juge à des règles de preuve qui limitent les éléments de preuve qui peuvent être présentés au juge, généralement en fonction de leur degré de fiabilité, et qui limitent aussi sa discrétion dans l'appréciation de la force probante des éléments reçus en preuve. La seconde technique consiste à garantir qu'une partie connaît toute l'information que l'on veut faire valoir en justice contre elle et qu'elle a toute liberté de la rectifier ou de la compléter, lorsquelle s'écarte de la vérité, soit en apportant des éléments de preuve contraires, soit en plaidant. Ces techniques ont un dénominateur commun : elles donnent à une personne qui est partie à un litige une certaine mesure de contrôle sur le processus d'acquisition des connaissances par le juge. Les moyens de ce contrôle se retrouvent dans plusieurs dispositions expresses de la loi relatives aux règles de preuve et de procédure civile, alors que son principe est inclus dans le grand principe de justice naturelle *audi alteram partem*, qui consacre le droit de chacun à une audition libre et entière ».

Dans cet article, Me Fabien pose la question de façon très précise. Il montre aussi les écueils que doit éviter le juge pour assurer la qualité de ses décisions.