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Chronique de jurisprudence

Fire Insurance — Implied Warranty and Materiality (*)

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The recent decision in Canadian **Home Assurance Co. vs Gauthier** (1), handed down by the Supreme Court, confirms previous decisions on certain points, and implies rejection of other previously accepted principles, which leads us to the careful examination of this case.

Facts

Plaintiff, Gauthier, was originally owner of a hotel in Lavaltrie which he acquired in 1954. In July 1957, Gauthier was a hypothecary creditor of the hotel now belonging to one Lapierre after numerous transfers. The original deed of sale from Gauthier contained a "dation en paiement" clause. By a judgment of November 7, 1957, Gauthier was reinstated as owner with retroactive effect.

Not wishing to operate the hotel, Gauthier appointed a caretaker on November 7, 1957, until the building could be sold. In the meantime, Gauthier wished to have the building insured as much of the insurance which Lapierre had on the hotel had been cancelled due to the latter's default in payment, and his bankruptcy.

On October 3, 1957, Gauthier got in touch with a broker, Corbeil, in order to obtain fire coverage for the hotel. Corbeil was not able to acquire full coverage for the hotel. Gauthier then instructed another broker, Girardin, to get in touch with Corbeil. Corbeil represented the hotel to Girardin who placed the remaining risk with other companies.

(*) I thank Mr. Claude Belleau, professor of law at Laval University, for the many hours which he devoted to this article and the many discussions we had together and whose assistance was invaluable.

(1) [1966] S.C.R. 305.

(†) Adjoint au Département de jurisprudence de « Les Cahiers de Droit ».

The two policies, which are the subject of appeal to the Supreme Court, were obtained through Girardin. These policies were issued on November 21, 1957, and the insured building was destroyed by fire on December 4, 1957. It is primarily the policies issued through Girardin which will interest us here.

The insurers refused to pay on the policies alleging concealment and misrepresentation and invoking articles 2485 and 2572 of the Civil Code.

In a more precise manner, they state in their defense that certain facts in the description were false and that the description given below was incorrect.

> « Sur le bâtiment seulement de l'immeuble à trois étages, ... seulement lorsque ledit bâtiment n'est occupé qu'à l'usage de Hôtel connu sous le nom Hôtel Laval avec pas plus de vingt chambres, licence pour boissons alcooliques et situé à Paroisse Lavaltrie, comté de Berthier, province de Québec. » (1a)

The Plaintiff took action on the grounds that he was the holder of policies obtained in good faith, having fully and fairly described the risk, and consequently that the defendant companies were on the risk.

The Superior Court received the action and condemned the defendant. The Court of Appeal confirmed this decision by a majority judgment; Judges Rivard, Rinfret and Bissonnette finding for the Respondent, and Montgomery and Owen dissident on four of the nine policies, those issued through Girardin. On the grounds offered by the dissident judges, two of these four policies were the subject of appeal to the Supreme Court, which set aside the majority decision of the Appeal Court.

The Court of Appeal confined itself to three principal arguments in discussing the case. The first argument was that of determining whose agents the brokers were. The Supreme Court did not enter into this question, but restricted itself to arguing from the conclusions reached in the Court of Appeal. The second concerned implied garantee, which the Supreme Court rejected outright. On the third point, materiality, the Supreme Court reversed the Court of Appeal's conclusion.

Whose agent is the broker ?

The Appeal Court unanimously agreed that Girardin and Corbeil were agents for the insurers, and consequently, that their knowledge

(1a) Canadian Home Assurance Company vs Gauthier, [1966] S.C.R. 305 at p. 310.

concerning the risk had to be considered the insurers' knowledge as well. Judge Bissonnette's note in *Alliance Insurance Co. of Philadelphia vs Laurentian Colonies and Hotels Ltd.*, (2) were copiously referred to in proving that point.

The dissident judges, Owen and Montgomery, disagree with the others as to the extent of the facts each broker possessed, and not to the fact they were the insurers' agents. Corbeil had direct information on the risk. Girardin did not. In fact, Girardin had been referred to Corbeil, by plaintiff, for a description of the risk. Hence, in this relationship, Corbeil was Gauthier's agent, while Girardin remained that of the insurers.

Judges Bissonnette, Rivard and Rinfret were vague on this point. They claimed the brokers, as company agents, were fully informed. This in itself was sufficient to dismiss the appeal, yet they took up the questions of implied warranty and materiality, indicating perhaps their uncertainty as to whether Girardin was or was not considered in direct possession of the facts. Hence, on this point, they leave the door open to Justice Montgomery's theory that Girardin's role was different from Corbeil's.

Judge Rinfret seems to confuse the issue by implying that Girardin should have sought more information if he so desired. Such is not the nature of insurers' agent's (Girardin), complaint, for he is not invoking concealment, but misrepresentation. Judge Rinfret says :

> « Ses renseignements lui venaient de Corbeil, non de Gauthier. Il eût pu se renseigner auprès de ce dernier, s'il désirait de plus amples détails. » (3)

This line of reasoning was ignored by the Supreme Court, which concluded that the disclosure was incorrect as given, and should have been described as unoccupied and without permit rather than as occupied and with a permit. Justice Abbot says :

> "... I am satisfied that respondent and Corbeil failed to disclose to Girardin, when applying for insurance, that the hotel license had been cancelled, ... hotel was vacant." (4)

It is well to note, however, that there is no disposition existing in our law, which obliges the insurer to verify declarations made. The

(2) Alliance Insurance Company of Philadelphia and others vs Laurentian Colonies and Hotels Ltd., [1953] Q.B. 214, pp. 272-273.

(3) Royal Insurance Co. vs Gauthier, [1964] Q.B. 861 at p. 887.

(4) Canadian Home Assurance Company vs Gauthier, [1966] S.C.R. 305 at p. 311.

burden of correct declarations or descriptions rests entirely with the insured or his representative once they are made. Otherwise, the insured could declare anything, and the policy would be valid simply because the ruse went undiscovered.

The validity of implied warranty in Quebec

In fire insurance, the description is an implied warranty of the contract. Hence, any condition therein is exempted from an express writting in, as foreseen in section 241 of the Insurance Act. (5) This is borne out by article 2572 of the Civil Code of Quebec :

> "It is an implied warranty on the part of the insured that his description of the object to the insurance shall be such as to show truly under what class of risk it falls according to the proposals and conditions of the policy."

Such being the case, the insurers often broaden the description so as to vary, omit or add a new condition, and the change is a garantee, by article 2572 C.C., even though it has not been set out as a "variation in condition", as section 241 of the Insurance Act would have it. In the case at hand, the liquor permit and occupancy would, therefore, be garantees of the policy and violation of them would be fatal to the validity of it.

Judge Rivard denies the possibility of using the description to modify the statutory conditions of the policy and uses an amendment of the Ontario Legislature, in 1929, to back his point. (6)

> "... nor shall anything contained in the description of the subject-matter of the insurance be effective in so far as it is inconsistant with, modifies, or avoids any such condition..." (7)

It is not for us to appreciate this disposition of the Ontario Insurance Act, but only to say that the Ontario laws, passed by that Province's legislature have, or should have, no weight in the interpretation of our laws. It is not for the judge to apply Ontario Law, but for the legislature to create it if it sees fit. The legislator, not having done so, the judge is definitely over extending his role when he refers to this law.

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(5) [1964] R.S.Q. ch. 295, Amended by 13-14 Elizabeth II, ch. 75.

(6) Ontario Insurance Act, section 98.

(7) Royal Insurance vs Gauthier, [1964] Q.B. 861 at p. 878.

There is nothing in our legal system which prevents using this mechanism of including a limit to the risk within the description, and therefore using it as a guarantee or implied warranty. The Supreme Court's conclusion seems to establish this.

Justice Abbot refers to article 2572 of the Civil Code, which was invoked in the Appellants' defence, and says :

> "The significant words in the description of the object insured, as contained in the policies, are these,
>
> « . . . seulement lorsque ledit bâtiment n'est occupé qu'à l'usage de Hôtel, connu sous le nom Hôtel Laval, avec plus de vingt chambres, licence pour boissons alcooliques et situé à la paroisse Lavaltrie, comté de Berthier, province de Québec . . . » (8)

And with respect to the decision of the Court of Appeal that since there could be no insertion varying statutory conditions the above context was descriptive only, Justice Abbot replies, "I cannot agree with that interpretation." (9)

Quebec insurers have, therefore, been left their escape hatch. In fire insurance, the Court of Appeal was foiled in its attempt to force the insurers to use section 241 of the Quebec Insurance Act, rather than attempting to avoid this formality by including a variation to statutory conditions in the description and using article 2572 of the Civil Code in creating an implied warranty.

The Court of Appeal had two motives, agency and implied warranty, on which to dismiss the appeal. Nevertheless, it chose to discuss materiality, perhaps if only to reaffirm that it was established as a matter of law.

Materiality :
A Matter of Fact or Law ?

In what can only be described as an attempt to lighten the burden of the insured's obligation to disclose, the Court of Appeal, by a decision in *Alliance Insurance Company of Philadelphia vs Laurentian Colonies and Hotels Ltd.*, (10) established that materiality is a matter of law, and not a matter of fact to be established by the insurer. Once more, the court called upon this case for notes, definitions and examples.

(8) Canadian Home Assurance Co. vs Gauthier, [1966] S.C.R. 305 at p. 312.
(9) Canadian Home Assurance Co. vs Gauthier, [1966] S.C.R. 305 at p. 312.
(10) [1953] Q.B. 214.

Judge Rivard, neglecting that he could rely on the two preceeding motives to dismiss the case, went on to the question of materiality. He states :

> « J'ajoute également que la question de savoir si une déclaration affecte la nature et l'étendue du risque, est une question de droit réservée au tribunal, je mets de côté toute cette partie de la preuve suivant laquelle, après avoir assumé le risque, les officiers des défenderesses affirment que, s'il avait connu certains faits ignorés, ils n'auraient pas émis la police d'assurance. » (11)

In other words, it is not for the insurer to declare what is material, but for the court to appreciate the fact omitted and the relationship of cause an effect it will have upon the risk.

When Judge Rivard says above ". . . je mets de côté . . . la preuve suivant laquelle . . . les officiers des défenderesses, . . . n'auraient pas émis la police", what "preuve" is he referring to ?

In Corbeil's case, the company is presumed to know all, so this cannot be what is referred to. In Girardin's case, there is evidence in the record that he did not know all, and that he warned the insured that because of the false declarations, the policy could not come into force, unless the insured saw to it that the hotel conformed to the description given of it. This testimony of Girardin's was never contradicted by plaintiff. In effect, Girardin testified, that only when he delivered the policies, and not when application was made, did he find out the true condition of the hotel.

> « Je (Girardin), lui ai fait souligner, à ce moment-là que c'était mentionné sur les polices d'assurance : « HÔTEL LAVAL », si je me rappelle bien, avec des chambres et avec permis de la Régie des Alcools. Je lui ai demandé si c'était bien ça ? Il (Gauthier), m'a dit : « Bien, avec permis, je vais l'avoir d'ici quelques jours. » Je lui ai dit : « Si vous n'avez pas de permis, l'assurance n'entre pas en force; il faut que ça suive la police . . . suive ce qu'il y a dans le contrat. » (12)

In other words, this is "la preuve" which Judge Rivard "met de côté", because materiality is a matter of law. Such being the case, it now remained for Judge Rivard to determine in law whether occupancy and a liquor licence constituted a material fact. But before going into this aspect, let us examine what, in the file, is relevant to materiality.

There are two arguments of facts in the record, and there are two arguments in law put forward by Judge Rivard. The first two of fact

(11) Royal Insurance Co. vs Gauthier, [1964] Q.B. 861 at p. 874.

(12) Idem at p. 890.

are : 1) Girardin's testimony to the effect that it was made clear to the insured that the risk was unacceptable as an unoccupied and unlicenced building; 2) the letters sent to Corbeil by some insurers, namely Prudential, to the effect that either Gauthier obtain a permit and operate, or they would not continue the risk. (13) As matter of fact, these two points show clearly that occupation and a permit were considered important to the insurers.

The two other arguments are those in law : 1) there is Judge Rivard's own contention stating that the hotel was already at a maximum premium, hence the impossibility for the insurer to elevate this premium of the facts were made known. (14) 2) there is this judge's argument that a building, not operating and without a permit, logically constitutes a better risk than a hotel full of people and possessor of a liquor permit. (15)

Materiality, seen as a matter of law, automatically attached more weight to certain arguments. Let us resume the criteria which the Court of Appeal, relying heavily on the *Alliance* (16) case, was to use.

In the Alliance case (17), Judge McDougall refers to, *Glickman vs Lancashire and General Assurance Co. Ltd.*, (18) and this is quoted by Judge Rivard (19), in the case at hand. In summary, the criteria is that the parties may not call upon someone else to say what is material, "that is a matter for the court on the nature of the facts".

In this same *Alliance* case, Bissonnette defines materiality, which Judge Rivard quotes :

> « Pour être matériel, un fait doit avoir un rapport quelconque avec l'élément du risque... » (20)

and a few lines which Judge Rivard did not quote from the same definition,

> « C'est, à mon sens, le rapport intime et logique entre un fait... et l'influence qu'il joue pour une juste appréciation du risque... ce n'est pas l'affaire d'experts, mais une question de droit laissée aux tribunaux... matérialité n'est pas d'ordre subjectif, mais bien objectif et elle constitue une question de droit. » (21)

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(13) Royal Insurance Co. vs Gauthier, [1964] Q.B. at p. 891.
(14) Idem p. 876.
(15) Idem p. 877.
(16) [1953] Q.B. 214.
(17) Idem at pp. 253, 255, 270.
(18) [1925] 2 K.B. 593, à la p. 609.
(19) Royal Insurance Co. vs Gauthier, [1964] Q.B. 861 at p. 875.
(20) Idem at p. 875.
(21) Alliance Insurance Company of Philadelphia and others vs Laurentian Colonies and Hotels Ltd., [1953] Q.B. 214 at p. 277.

If materiality is a matter of law, the procedure in testing a certain fact as to its materiality is clear.

The fact is presented, and the tribunal determines whether logically this fact can influence the appreciation of the risk as considered by the judges, and not as considered by the insurer or the experts.

If the relationship between the fact and the risk is not logically evident in terms of cause and effect, then the fact is immaterial in law. Such being the case, the court must find "occupancy" and "a liquor permit" to increase or diminish the chance of fire taking place. Hence, Girardin's testimony, and the letters sent to Corbeil, are matters of fact as neither show that the risk was diminished or increased, and to be material, this is what the Judges must consider. For, neither shows how the fact influences the nature or the extent of the risk.

The legal contentions were those logically constructed by the judge to test the fact on the nature and extent in relationship with the risk undertaken. These two arguments, per se, reveal that the risk itself was not increased by inoccupancy and the absence of a permit.

If materiality is a matter of law as the Court would understand it to be, then it has no choice but to accept these legal arguments over those of fact. This seems clear enough, for the arguments in fact show clearly that the insurer, although he considers these important, established materiality as a matter of fact, by attempting to show he would not have contracted had he known. It is contrary to the theory of materiality as matter of law to let the insurer establish this himself. Had the Courts found the risk of fire increased with inoccupancy, then it would have been material. Consequently, the first arguments of fact in the record must be overlooked in favour of the last two. The reasons for this are clear enough if we recall the quoted definitions of materiality. (22)

Although we agree with the Court of Appeal that no other decision, other than that which was handed down here, could have been reached if materiality is a matter of law, the Supreme Court reversed this decision entirely. In Judge Abbot's notes we find :

> "In my opinion, the description of the property both as to occupation and the possession of a liquor license was material to the risk. There is evidence to that effect in the record." (23)

(22) See ref. 11, 19, 20 and 21.

(23) Canadian Home Assurance Co. vs Gauthier, [1966] S.C.R. 305 at p. 312.

The Supreme Court had already accepted the mecanism of implied warranty, and on this basis alone, the appeal could have been allowed. Yet the Supreme Court chose to answer the Court of Appeal on the question of materiality as well. Taken as a case of implied warranty, materiality does not enter the discussion, for in the case of guarantee, a fact does not necessarily have to be material (show the nature and extent of the risk), but only has to be to the *prejudice* of the insurer. This is confirmed by decisions in *Confederation Life vs Miller* (24), *Gilles vs Canada Fire* (25), *Aréna de Québec vs Stevenson* (26), *Duchesneau and Bleau vs Great American Insurance Co.* (27)

As we have shown above, the Supreme Court found that a liquor licence and occupation were material to the risk, but did not specify outright whether it was a matter of fact or of law. There is, however, a definite indication that it was a matter of fact as the Supreme Court founds its decision on : "There is evidence to that effect in the record." (28)

If we examine "the record" we find the previously mentioned arguments of fact, and we can only conclude that the Supreme Court is referring to the two arguments of fact which the Court of Appeal had set aside maintaining its position that materiality is a matter of law.

For, if the Supreme Court had decided that occupancy and a permit were material in law, it would have done so on its own, for there were no arguments present in "the record" which would show that the nature and extent of the risk was influenced by the presence or absence of these facts. The only evidence present was that tending to show the insurer would not have contracted had he known. This evidence is presented by the insurer, and in no manner shows, in itself, to what degree these facts influence the nature or the extent of the risk.

As such, the theory of materiality of a fact being a matter of law is not necessarily rejected, but it certainly is no longer absolute, for in this case the Supreme Court seems to imply that the materiality here is one of fact.

The decision of the Supreme Court in this case has a twofold effect. First, it maintains the mecanism of including a condition in the

(24) 13 S.C.R. 330.
(25) 26 S.C. 126.
(26) [1944] S.C. 325.
(27) [1955] Q.B. 120.
(28) Canadian Home Assurance Co. vs Gauthier, [1966] S.C.R. 305 at p. 312.

description of the object, and using it as a guarantee by invoking article 2572 of the Quebec Civil Code to avoid using section 241 of the Quebec Insurance Act.

Secondly, of the decision seems to destroy the theory that materiality of a fact is an absolute matter of law. Since the Supreme Court, by the decision, implies materiality as a matter of fact, without specifying that it cannot be a matter of law, we may conclude that it leaves the question open to discussion.

This refusal to say categorically whether materiality is a matter of fact or law creates a dilemma. We are now faced with the existence of both possibilities. Future jurisprudence may wish to remain vague, leaving the question to be settled in each case, or it might go so far as to take a definite stand on the issue, which seems rather doubtful.