**NOVA SCOTIA COURT OF APPEAL**

**Citation:** *Linden v. CUMIS Life Insurance Company*, 2015 NSCA 20

**Date:** 20150303
**Docket:** CA 427262
**Registry:** Halifax

**Between:**

Wanda Linden, as personal representative of
Patrick Linden (deceased)

Appellant

v.

CUMIS Life Insurance Company

Respondent

| | |
|---|---|
| **Judges:** | Saunders, Hamilton and Fichaud, JJ.A. |
| **Appeal Heard:** | February 3, 2015, in Halifax, Nova Scotia |
| **Held:** | Appeal dismissed with costs, per reasons for judgment of Fichaud, J.A.; Saunders and Hamilton, JJ.A. concurring |
| **Counsel:** | Ronan W. Holland and Aileen K. McGinty for the appellant<br>Karen N. Bennett-Clayton and Jennifer L. Taylor for the respondent |

**Reasons for judgment:**

[1] The judge of the Supreme Court found that Mr. Linden's application for life and disability insurance materially misrepresented his medical history. This entitled the insurer to deny benefits. Did the judge err by finding that Mr. Linden's answers on the health questionnaire were material misrepresentations?

## *Background*

[2] On March 23, 2011, in connection with a mortgage loan, Mr. Patrick Linden and his wife Ms. Wanda Linden signed and submitted an application for life and disability insurance. The insurer was CUMIS Life Insurance Company. The life coverage was $53,200 and disability benefits would be $550.29 monthly.

[3] CUMIS' application document asked whether the applicants had received medical advice or treatment during the preceding 36 months. Mr. Linden answered "yes". The document said that, if the applicant answers "yes", then "CUMIS will contact you by phone to obtain additional medical information (supplemental health questionnaire) to assist in the review of your application".

[4] The supplemental health questionnaire ("SHQ") was completed in a telephone interview on April 1, 2011. CUMIS' tele-underwriter was Ms. Alexis Kaine. Ms. Kaine asked the questions, recorded Mr. Linden's answers, and prepared the resulting SHQ. Mr. Linden did not sign the SHQ.

[5] At the hearing in the Supreme Court, Ms. Kaine did not testify and Mr. Linden was deceased. But the parties agreed that the SHQ document would be admitted for the truth of its contents. At the hearing in the Court of Appeal, the appellant's counsel acknowledged this meant the SHQ would be taken as evidence that Mr. Linden gave the answers that were recorded on the SHQ.

[6] Mr. Linden's completed SHQ included:

> 6. Any psychological or psychiatric disorder including psychosis, anxiety or depression?
>
> Yes
>
> a) What is the name of the condition?
>
> Depression

What is your age?

47

b) How many episodes have you had?

1

c) How long has it been since your episode?

20 years, 0 months

d) How long did your episode of depression last? Please provide details.

currently been of [*sic*] medication for 1 month

e) Have you ever been hospitalized for this condition?

No

f) Are you currently under the care of a psychiatrist?

Yes

g) How many times have you seen your psychiatrist in the past twelve (12) months?

3

h) Are you employed?

Yes

i) Have you missed any work in the past 12 months due to depression?

No

j) Are you taking any medication(s) for depression?

No

k) Is there any other information that you haven't already disclosed about this condition? Please provide details.

no

…

15. Any mental or physical condition not listed above?

No

16. Have you ever been a patient in a hospital, medical facility or treatment centre?

No

…

18. Have you ever used illegal drugs? (Drugs other than over the counter or those prescribed by a physician?)

No

…

20. Have you received or been advised to have treatment for the use or abuse of drugs?

No

…

24. Have you ever had an electrocardiogram, x-ray or other diagnostic test?

Yes

a) What tests have you had?

Other Diagnostic Test(s)

b) Please advise what test(s) were performed.

Stress Test

c) Why did you have these test(s)?

Can't remember

d) When were they performed?

10 years ago

e) What were the results (normal, abnormal, don't know)?

"fine"

…

30. Why did you last consult with your physician?

Regular check-up

*Application Comments: Follow up visit with his psychiatrist to see how is doing off the medication*

a) What was the result?

Normal

[7] Questions #16 and #20 are of particular relevance to this appeal.

[8] On May 5, 2011, CUMIS issued the policy that covered disability and critical illness plus life insurance. The Policy included:

**APPLICATION FOR INSURANCE** means the form or forms provided by CUMIS Life to enable an Applicant or Joint Applicant to apply for this insurance.

…

> **THE CONTRACT**
>
> This Policy, any attached Riders or Endorsements, the Application for the Policy and the Application for Insurance and any amendments comprise the entire insurance contract.
>
> …
>
> **MISREPRESENTATION**
>
> Misrepresentation or failure to disclose facts material to the insurance coverage under this Policy by an Insured Borrower or Joint Insured shall, except as provided in the Incontestability Provisions, render the insurance coverage evidenced by the Certificate of Insurance voidable by Us.

[9] In June 2011, Mr. Linden was hospitalized after a suicide attempt. Thereafter he suffered recurrences of depression.

[10] In January 2012, he claimed disability benefits from CUMIS. CUMIS responded with requests for records of Mr. Linden's medical history from Mr. Linden's family physician.

[11] On May 20, 2012, Mr. Linden died of a heart attack resulting from atherosclerotic coronary artery disease.

[12] CUMIS received the requested records for Mr. Linden's medical history. On June 12, 2012, CUMIS wrote to Ms. Linden, stating that the disability and life claims were denied based on "non-disclosure of pertinent medical information material to the insurance risk".

[13] The reasons of the application judge, Justice Denise Boudreau, summarize the records of Mr. Linden's medical history:

> [19] The medical reports of Patrick Linden were provided to this Court, in the form of Joint Exhibit Books Vols. 1 and 2. It would appear, based on a review of this documentation, that Patrick Linden had a fairly lengthy history of medical intervention in his life. I have reviewed all of this documentation. I note here (in summary fashion) some of the most pertinent information in my view.
>
> > (a) Exhibit Book #1 Tab 3: On September 23, 1988 Patrick Linden (DOB: 03/15/64; then aged 24) was seen in the outpatient department of the Sydney City Hospital for carbon monoxide inhalation. The documentation is not clear as to whether this was a suicide attempt or an accidental inhalation. While original reports suggest an accidental event, it would appear that Mr. Linden may have later acknowledged that this was a suicide attempt due to difficulties with a girlfriend.

(b) Exhibit Book #1 Tab 4: On January 14 1989 Patrick Linden attended St. Rita's Hospital OutPatient department. The summary indicates: "to OPD with friends after taking Xanax x 14 tabs…episode precipitated by argument with ex-fiance". Final diagnosis indicates "Depression, Xanax overdose". It would appear that treatment was provided, but it is further noted that Mr. Linden signed himself out of hospital after 12 hours. The document signed indicates, among other things, "This is to certify that I, Pat Linden, a patient in St. Rita Hospital, am leaving the hospital against the advice of the attending physician and of the hospital administration."

(c) Exhibit Book 1 Tab 5: On December 19 1995 Patrick Linden attended the Cape Breton Regional Hospital Crisis Intervention Program. Under "Nature of Crisis", the document notes that that while drinking Mr. Linden smashed up his home, threatened his wife, cut his arm quite badly on glass, required surgery; history of alcohol problems, history of problems with anger management. The document notes that Mr. Linden has seen Ron Gillis five or six years ago at Sydney Mental Health Clinic, not seeing anyone at present. Report notes as "interventions": resource counselling-addiction services, second chance program.

(d) Exhibit Book 1 Tab 6: In April of 1996, Report from Cape Breton Regional Hospital, cumulative therapeutic record. It is stated that Mr. Linden "is presently a resident at the local addiction centre. That is, he is taking the 21 day intensive treatment program."

In October 1996, Patrick Linden attended mental health services, complaining of anorexic and bulimic symptoms, clinician notes "mildly depressed with anxious features". In November 1996 Mr. Linden was seen in the eating disorder clinic for a nutritional assessment and diet counselling. Admits to binging/purging behaviour. This continues to be an ongoing issue for Mr. Linden through 1997.

(e) Exhibit Book 2 Tab 3: Records indicate "This patient was recently discharged from Detox on a voluntary admission." It is unknown whether this is referring to the April 1996 detox program, or a later one.

(f) Exhibit Book 1 Tab 9: On October 8, 2004 (Emergency Record Cape Breton District Health Authority), Mr. Linden attended hospital indicates he is not feeling well and feels he is taking too many medications. He is taking clonazepam (.5 mg), mistaqspine (30 mg) and gravol. The assessment notes that he feels "he is taking too many clonazepam to cope with stresses"; he feels he is "craving meds", "has thoughts of suicide on a daily basis, "all the time", and "has attended numerous programs in the past". Regarding alcohol and drugs: comment indicates 8 years of sobriety, last admission to detox and attendance with addiction services, AA attender in the past, indicates never being admitted to psychiatry but has seen many health professionals in the past including

Dr. John Gainer, and outpatient mental health counsellors in Sydney. Diagnosis is listed as "benzodiazepine dependence". Management noted by Dr. Khan: "I have advised him to contact the addiction services next week and to book a bed for himself in the detox". Also, referral to be made to Sydney Mental Health.

(g) Exhibit Book 1 Tab 10: During the evening of March 29 2005 Mr. Linden presented at Cape Breton District Health Authority having "suicidal thoughts, agitated, unable to see psychiatrist for 4 weeks". He is still having difficulties with abusing medication, and possible suicidal ideation. Mr. Linden presented as very upset, angry, irritable.

At that time Mr. Linden was admitted to hospital pursuant to a formal medical certificate for admission, in accordance with to s. 36 of the *Hospitals Act* and Regulation 12. Dr. Brian Roxburgh signed the certificate, noting that he had reasonable and probable grounds to believe that Mr. Linden (a) suffered from a psychiatric disorder; and (b) should be admitted to a facility under the Hospitals Act because (i) he required the in-patient services provided by the facility; and (ii) he required care that could not be adequately provided outside the facility because he was a danger to his safety or the safety of others. Under the section marked "observations from my own examination in support of (a) and (b) above, Dr. Roxburgh noted: "threatening to take overdose, aggressive, smashing hand on table, throwing glasses".

Mr. Linden was formally admitted to Cape Breton Regional Hospital on March 30, 2005. He was discharged on the 4th of April, 2005. At that time the discharging physician notes that Mr. Linden seemed to be responding well to the medication changes, was more stable and had greatly improved. Medications had been decreased but continued after discharge.

(h) Exhibit Book 1 Tab 11: On March 30, 2006 I note a report from Lydia MacIsaac, a nurse at the day centre program, mental health services. She reviews all of Mr. Linden's past and present health concerns, including issues of depression, anxiety, past abuse of alcohol as well as eating disorder. Mr. Linden indicates in this report that he feels his depression is worsening. Page 3 of the report notes:

> Patrick also has a history of abusing Benzodiazepines that are prescribed for him (i.e. Rivotril, 10-11 tablets at one time). He stopped abusing this after he was admitted to 1B and spent three weeks with there (sic) withdrawing. He presently admits to abusing gravol, reportedly taking 10-15 tablets of 50 mgs. After consultation with Dr. Milligan he was instructed to half the dose on a weekly basis until discontinued, which he agreed with.

It is unclear to me when the three week admission, referred to in this report, occurred. It may be the same attendance noted in the April 1996 report, or another. Diagnostic impression noted by Nurse MacIsaac, were "major depressive disorder, recurrent, moderate Bulimia Nervosa, purging type."

On June 16 2006, in Day Centre progress notes, relating to a therapy program being attended by Mr. Linden, notes indicate:

> Patrick attended regularly this wk. On Monday he appeared sedated with eyes ½ closed and speech slightly slurred. His wife left a very detailed message reporting a crisis that occurred over the weekend that resulted in Patrick taking pills as a suicidal gesture.

(i) Exhibit Book 1 Tab 12: A March 2006 Day Centre Discharge Summary, confirms that Mr. Linden began group therapy the week of April 7, 2006, and was discharged from the program August 25, 2006.

(j) Exhibit Book 1 Tab 13: In June 2008 a gastroscopy was performed on Mr. Linden, as a result of his complaints of "epigastric discomfort". No abnormalities were seen. It is unclear whether this procedure was performed on an in-patient or outpatient basis.

In October 2008 Mr. Linden had an appointment with psychiatrist Dr. Rogers. Plan is noted as: "1. This patient has been encouraged to cease abusing Diphenhydramine and to cease purging by vomiting and the use of laxatives."

(k) Exhibit Book 1 Tab 16: In February 2011, Mr. Linden attended the Sydney Mental Health Clinic. He indicated that he had stopped taking his medication and wished to speak to somebody. On February 22, 2011, Mr. Linden presented at the emergency department, noting "tremulous while having OPD EKG, profound weakness, eating disorder, no clonazepam, no Effexor x two weeks, tremors since Sunday."

On March 1, 2011, Mr. Linden attended for a follow up appointment. He seemed better than in February, noted feeling fatigued, but mood is good, sleeping well, seemed more vigorous and engaged. He was seen again on March 16, 2011, when he again seemed to be doing well. The report noted that he is now taking Venlafaxine. Also noted is the need for a follow-up appointment in 4 weeks.

[14] In June 2013, Ms. Linden filed a Notice of Application for an order that CUMIS pay the insurance benefits. CUMIS' Notice of Contest asserted that the coverage was voidable because of Mr. Linden's material misrepresentation.

[15] On February 3 and 4, 2014, Justice Boudreau heard the application. Ms. Linden filed an affidavit and was not cross-examined. CUMIS filed affidavits of Jon-David Reid, CUMIS' disability claims examiner, and Shelly Boyd, CUMIS' underwriter. Ms. Linden's counsel cross-examined Mr. Reid and Ms. Boyd.

[16] Ms. Linden's counsel tendered a supplementary affidavit of Ms. Linden, sworn February 3, 2014, the opening day of the hearing. The judge declined to accept it because of its lateness.

[17] On April 4, 2014, the judge issued a written decision that dismissed Ms. Linden's application (2014 NSSC 115), followed by an Order on May 28, 2014. The judge found that Mr. Linden's SHQ had materially misrepresented his medical history. Later I will discuss the judge's reasons.

[18] On May 12, 2014, Ms. Linden appealed to the Court of Appeal.

## *Issues*

[19] Ms. Linden factum submits that the judge erred (1) in her interpretation of the "contractual documents", (2) by finding that Mr. Linden made a material misrepresentation, (3) by not drawing an adverse inference from CUMIS' failure to call Ms. Kaine as a witness, and (4) by refusing to admit Ms. Linden's supplementary affidavit. I will discuss the first two points together as - whether the judge made an appealable error by determining that there was a material misrepresentation.

## *Standard of Review*

[20] This Court's standard of review of a decision of a judge, in insurance cases as in other matters, is correctness for extractable issues of law and palpable and overriding error to both issues of fact and issues of mixed fact and law with no extractable legal error: *Trisura Guarantee Insurance Company v. Belmont Financial Group Inc.*, 2008 NSCA 87, para. 23; *Travelers Guarantee Company v. Hants Realty Ltd.*, 2014 NSCA 69, para. 19.

[21] Ms. Linden's grounds in her Notice of Appeal include "[t]he learned judge erred in construing the contractual documents including the Supplemental Health Questionnaire". Her factum repeats that submission and says "[t]he contractual documents in this suit consist of the Group Policy, the Certificates of Insurance, the Application and the SHQ." The Policy says that the "entire insurance contract"

includes the application documents (above, para. 8). The critical document in this case is the SHQ, that both parties accept to be a contractual document. The SHQ was unsigned by Mr. Linden and drafted from a telephone interview. Ms. Linden's submission involves the consideration of how the use of extrinsic evidence in contractual interpretation affects the appellate standard of review.

[22] In *United Gulf Developments Ltd. v. Iskandar*, 2008 NSCA 71, para. 5, Justice Cromwell said:

> 1. Contractual interpretation is a question of law and therefore the judge's construction of the November 12th document should be reviewed for correctness: …
>
> 2. In interpreting a contract, the judge is entitled to consider, where appropriate, the surrounding circumstances. These are matters of fact and the judge's findings in relation to them should be reviewed for palpable and overriding error …

[23] Historically, the appropriate use of "surrounding circumstances" to interpret a written contract was somewhat limited. In *Eli Lilly & Co. v. Novopharm Ltd.*, [1998] 2 S.C.R. 129, para. 54, Justice Iacobucci for the Court said that contractual intent is "possibly read in light of the surrounding circumstances which were prevalent at the time". The judicial reticence accompanied the application of the parol evidence rule to preclude extrinsic evidence when the contractual wording was unambiguous. Ambiguity in the written word opened the door to extrinsic evidence, whose assessment by the trial judge was reviewed deferentially on appeal.

[24] In *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53, para. 60, Justice Rothstein for the Court said that "[t]he parol evidence rule does not apply to preclude evidence of the surrounding circumstances", and such evidence is "an interpretive aid for determining the meaning of the written words chosen by the parties" but "not to change or overrule the meaning of those words". Justice Rothstein (paras. 43-53, 56-61) elaborated on how the enhanced availability of evidence of the surrounding circumstances, or factual matrix, may assist with contractual interpretation.

[25] *Sattva* affects the appellate standard of review in contract cases. The parol evidence rule is not a bright line of exclusion for evidence of surrounding circumstances. That evidence is admitted and entertains a textured application to aid the interpretation, but not alteration, of the written contractual text.

Consequently, contractual interpretation will more often be a question of mixed fact and law, reviewable for palpable and overriding error unless there is an extractable issue of law. In this respect, Justice Rothstein said:

> [50] With respect for the contrary view, I am of the opinion that the historical approach should be abandoned. Contractual interpretation involves issues of mixed fact and law as it is an exercise in which the principles of contractual interpretation are applied to the words of the written contract, considered in light of the factual matrix.
>
> [51] The purpose of the distinction between questions of law and those of mixed fact and law further supports this conclusion. One central purpose of drawing a distinction between questions of law and those of mixed fact and law is to limit the intervention of appellate courts to cases where the results can be expected to have an impact beyond the parties to the particular dispute. It reflects the role of courts of appeal in ensuring the consistency of the law, rather than in providing a new forum for parties to continue their private litigation. …
>
> [52] … The legal obligations arising from a contract are, in most cases, limited to the interest of the particular parties. Given that our legal system leaves broad scope to tribunals of first instance to resolve issues of limited application, this supports treating contractual interpretation as a question of mixed fact and law.
>
> [53] Nonetheless, it may be possible to identify an extricable question of law from within what was initially characterized as a question of mixed fact and law (*Housen*, at paras. 31 and 34-35). Legal errors made in the course of contractual interpretation include "the application of an incorrect principle, the failure to consider a required element of a legal test, or the failure to consider a relevant factor" (*King*, at para. 21) [*King v. Operating Engineers Training Institute of Manitoba Inc.*, 2011 MBCA 80]. Moreover, there is no question that many other issues in contract law do engage substantive rules of law: the requirements for the formation of the contract, the capacity of the parties, the requirement that certain contracts be evidenced in writing, and so on.

[26] This Court has applied *Sattva*'s principles to the standard of review from the decision of a judge in the interpretation of a written contract: *Halifax (Regional Municipality) v. Canadian National Railway Company*, 2014 NSCA 104, paras. 31 and 35.

[27] To the extent that the issues involve the interpretation of contractual documents and the surrounding circumstances pertain to their interpretation, I will apply *Sattva*'s approach.

### *Material Misrepresentation*

[28] The *Insurance Act*, R.S.N.S. 1989, c. 231, says:

> **185 (1)** An applicant for insurance and a person whose life is to be insured shall each disclose to the insurer in the application, on a medical examination, if any, and in any written statements or answers furnished as evidence of insurability, every fact within his knowledge that is material to the insurance and is not so disclosed by the other.
>
> **(2)** Subject to Section 186, a failure to disclose, or a misrepresentation of, such a fact renders the contract voidable by the insurer.

Section 185 applies to life insurance and, by ss. 3(o)(vi) and 65(3)(c) of the *Insurance Act*, to disability insurance. Section 186(2) says that, if the contract has been in effect for two years, then the contract is not voidable unless there has been fraud. In Mr. Linden's case, as the policy had been in effect for under two years, it was unnecessary that CUMIS establish fraud.

[29] As to the meaning of "material", the judge (para 27) cited *Henwood v. Prudential Insurance Co. of America*, [1967] S.C.R. 720. Justice Ritchie (page 727) for the majority applied the test:

> … it is a question of fact in each case whether, if the matters concealed or misrepresented had been truly disclosed, they would, on a fair consideration of the evidence, have influenced a reasonable insurer to decline the risk or to have stipulated for a higher premium.

[30] Justice Boudreau (para 28) correctly noted:

> [28] … The burden is on the insurer to show, on a balance of probability, that had certain facts been disclosed, those facts would have caused an insurer to decline the risk or request a higher premium …

[31] Mr. Linden answered "No" to question #16 – "Have you ever been a patient in a hospital, medical facility or treatment centre?"

[32] Of question #16, the judge said:

> [47] … I see no confusion or ambiguity in the question. It clearly means what it says, admission as a patient to a hospital or treatment facility. In this particular case, Mr. Linden had truly experienced the full gamut of types of medical intervention; he had visited doctors, he had been an outpatient in a medical facility, he had been an in-patient at a hospital and he had been a patient at a

> treatment facility. No matter his interpretation of this question, he should have answered yes. By any standards, the evidence shows that Mr. Linden had been, in fact, "a patient" numerous times in his life.

[33] The judge recited those instances (quoted above, para. 13). There is evidence of numerous occasions when Mr. Linden was a patient in a hospital, medical facility or treatment centre. The correct answer would have been "yes".

[34] Question #30 of Mr. Linden's SHQ noted, as "*Application Comments:*", that Mr. Linden had a "[f]ollow up visit with his psychiatrist to see how is doing off the medication" (above, para. 6). From this, Ms. Linden's factum submits that "Mr. Linden was to have a follow up 'visit' with a psychiatrist, implying that he would go to some sort of facility to have that visit", which means it was "patently obvious that Mr. Linden had disclosed that he was a patient and that he had been to a hospital or a medical or other treatment facility", and consequently "it is illogical and even absurd that the SHQ underwriter recorded a 'no' answer to question #16." At the appeal hearing, Ms. Linden's counsel submitted that the answer to question #16 should have been recorded as "yes".

[35] With respect, I cannot accept this submission. The SHQ was admitted by agreement for the truth of its contents (see below, para. 47). Mr. Linden answered "no" to question #16. That Mr. Linden elsewhere reported a "follow up visit" to a psychiatrist does not mean that his "no" about being a hospitalized patient really is "yes".

[36] The judge did not err in her finding that Mr. Linden's answer to question #16 was a misrepresentation.

[37] I will turn to Mr. Linden's answer of "No" to question #20: "Have you received or been advised to have treatment for the use or abuse of drugs?"

[38] The judge found:

> [49] … At the time he answered these questions, Mr. Linden had received treatment for the use/abuse of prescription drugs. The evidence discloses numerous discussions between Mr. Linden and health care professionals, over the course of years, regarding his drug use/misuse, as well as recommendations and treatment plans. For example, in 2004 Mr. Linden spoke to Dr. Khan about his concerns regarding his possible misuse of prescription medication (which concern he spoke of many times). On this occasion he was advised to attend detox.

> [50] Mr. Linden answered "no" to both of these simple, unambiguous questions. These are, clearly, misrepresentations on the part of Mr. Linden. …

[39] The judge summarized Mr. Linden's history of abuse of various prescription drugs, and his participation in a detox program (above para. 13).

[40] Ms. Linden's factum on the appeal (para. 49) says: "I accept that there is sufficient evidence of advice or treatment concerning the use or abuse of prescription drugs" (underlining in factum). But the factum contends (para. 36) that, in question #20, "the meaning of the term 'drugs' is not clear", and "could reasonably be construed as referring to illicit drugs only and if so, there would be no misrepresentation".

[41] Respectfully, I am unpersuaded. Question #18 specifically asked "Have you ever used illegal drugs?" There was no need to repeat that question in #20. Question #20's reference to "the use or abuse of drugs" pointed more broadly than to just illegal drugs. The judge did not err by determining that Mr. Linden's answer to question #20 was a misrepresentation.

[42] As to materiality of these misrepresentations, the judge found:

> [48] Of course, these occasions [Mr. Linden's attendance as a patient in a hospital, medical facility or treatment centre re question #16] took place due to a number of health difficulties, including depression, anxiety issues, drug use, suicide attempts, eating disorders, and so on. In that sense, all of these difficulties are again made relevant, in the assessment of the importance of that one question and answer. In other words, had Mr. Linden answered that question truthfully, details about many or all of these conditions would have surfaced; furthermore, their seriousness and long-standing nature would have been clarified.
>
> …
>
> [52] … I note the case of *Henwood v. Prudential* …, where the Supreme Court of Canada held that senior officials from the insurance company itself could also testify as to their practice and policies in relation to certain information, as to whether it would affect their premium or acceptance of the contract.
>
> [53] This was the case here, and the court did have the benefit of that evidence. The court must also consider whether the insurer's position is objectively reasonable in the circumstances. I find that the misrepresentations noted here were clearly material. They were the subject of specific questions on the form, thereby objectively demonstrating their importance to the respondent. They related to fundamental issues relating to a person's health, i.e. hospitalization and treatment, and the use/abuse of drugs. Accurate answers to these questions would have led the respondent to details and information relating to the extent of Mr.

> Linden's health difficulties. Had Mr. Linden answered those questions accurately, there is no doubt that the respondent would have been assessing a very different application. It is my conclusion that a reasonable insurer, given this information, would clearly have required a higher premium or declined the risk. It is on that basis that I find the contract was voided by Mr. Linden's misrepresentations, and I dismiss the applicant's claim.

[43] The judge's findings on materiality are well-supported by the affidavits and cross-examinations of Mr. Reid and Ms. Boyd.

[44] The judge applied the correct legal principles. She correctly characterized questions #16 and #20 as unambiguous, and Mr. Linden's answers as clear and inaccurate, *i.e.* misrepresentations. Because the policy had been issued within two years, a finding of fraud was not required. The judge's assessments of surrounding circumstances and materiality bear neither an extractable error of law nor a palpable and overriding error of fact.

[45] I would dismiss the first two grounds of appeal.

### *Adverse Inference*

[46] Ms. Linden's factum (para 54) submits that the judge "made an error in law in not drawing an adverse inference in respect of the Respondent's failure to produce Alexis Kaine, the tele-underwriter who spoke with Mr. Linden while completing the SHQ". Ms. Kaine's role had been to record Mr. Linden's answers on the SHQ. The suggested adverse inference would impugn the accuracy of the SHQ that she had completed.

[47] Again, I must disagree. In the preliminary discussion between the trial judge and counsel, the parties repeatedly agreed that the SHQ would be entered for the truth of its contents:

> **THE COURT:** So everyone is agreeing that those documents are admitted as business records essentially for the truth of their contents as I understand it.
>
> **MS. MCGINTY:** Yes.
>
> **MS. BENNETT-CLAYTON:** Yes, My Lady.
>
> …

> **THE COURT:** … But really I'm referring to every attachment of every affidavit. Is everyone agreeing that those are being introduced as business records for the truth of their contents?
>
> **MS. MCGINTY:** Yes, My Lady.
>
> …
>
> **THE COURT:** So you're agreeing that all of the exhibits that are provided as exhibits to affidavits and as well the exhibits in the Joint Book of Exhibits are being introduced as business records.
>
> **MS. MCGINTY:** Yes, they are.
>
> **THE COURT:** All of them in their entirety.
>
> **MS. MCGINTY:** Yes, My Lady.

[48] The judge had no reason to draw an inference to question the SHQ's accuracy.

[49] Whether a trial judge should have drawn an inference is an issue of fact. This Court has no basis to say that the judge committed a palpable and overriding error.

### *Supplementary Affidavit*

[50] On February 3, 2014, the opening day of the hearing in the Supreme Court, Ms. Linden swore and tendered a supplementary affidavit. The affidavit said that Ms. Linden's counsel had requested from CUMIS a digital recording of the telephone conversation of April 1, 2011 between Mr. Linden and Ms. Kaine, and that CUMIS had replied that no such recording was available, that recordings were kept for six months, then deleted by an automated process. Ms. Linden's supplementary affidavit said:

> 11. … We do not know if these notes were accurate, if there was any additional discussion, what the tone of the conversation was, if Patrick asked any questions or needed anything explained to him. We also do not know if the tele-underwriter followed her script exactly.

[51] CUMIS objected to the admission of the supplementary affidavit. After hearing submissions, the judge declined to accept it. Her oral reasons included:

> … this information is also some months back in time from today's date. The document also provides Ms. Linden's concerns about certain aspects of this

> matter, her thoughts with respect to a new affidavit that has been brought forward, et cetera.
>
> It's my view, having reviewed it, that this is not something that we should be having today. It is my view that if this information was something of importance that it should have been raised prior to February 3rd, 2013 [*sic* 2014].
>
> Some of the information I don't find of particular relevance. But in any event, I'm not going to permit this affidavit to be presented today and I'm going to provide that back to the Applicant.

[52] Ms. Linden submits that the judge's exclusion of the supplementary affidavit is an appealable error. Ms. Linden's factum says:

> 51. … The applicant respectfully submits that this was an error of law. While I acknowledge the lateness of the filing, Justice Boudreau had the discretion to permit same and such discretion should have been exercised in the interests of justice. …
>
> 53. … In the alternative, if the decision of Justice Boudreau in relation to the affidavit is upheld, the applicant submits that adverse inference should have been drawn from the absence of information.

[53] Civil Procedure Rule 5.15(1) states that, unless the judge permits, the parties may "only file an affidavit within the deadlines under this Rule or set by a judge giving directions". Rule 5.15(2) directs the judge to exercise her discretion by weighing the prejudice to both parties, and the public interest in wasted court facilities if an adjournment is necessary.

[54] A judge's discretion is reviewable by the Court of Appeal either for error of law or for causing a patent injustice. *Innocente v. Canada (Attorney General)*, 2012 NSCA 36, paras. 22-29. As it is assumed that the delegating legislation did not authorize a patent injustice, "causing a patent injustice" is a subset of error in law. In my view, neither condition exists here.

[55] The absence of a recording was apparent long before the hearing. Ms. Linden could have expressed her concerns in her initial affidavit that was filed within the scheduled time. The accuracy of the SHQ could have been explored on a discovery of Ms. Kaine. Ms. Linden could have declined to agree that the SHQ be admitted without Ms. Kaine's appearance for cross-examination. Ms. Linden could have subpoenaed Ms. Kaine.

[56] Instead, the parties agreed to enter the SHQ for the truth of its contents without Ms. Kaine's appearance. So the suggestion on appeal that the absent recording inferentially impugns the accuracy of the SHQ is somewhat sterile.

[57] The absence of the recording was apparent to the judge, without Ms. Linden's supplementary affidavit to point it out. During the submissions by counsel, the judge said:

> … I will make decisions based on the evidence that's put before me. Clearly I don't have the tape and I won't. Clearly I won't have, as I understand it, the tele-underwriter. And at the end of the day, that will be clear to me.
>
> I will have what I have, and I will have to make findings based on what I have. So that's not going to be news to me at the end of the day that there is no tape and no tele-underwriter. …

[58] Ms. Linden's supplementary affidavit was provided provisionally to the Court of Appeal. I have read it. It would not have advanced Ms. Linden's case.

[59] The judge's refusal to admit the late affidavit neither erred in law nor led to a patent injustice.

## *Conclusion*

[60] I would dismiss the appeal with costs of $2,000, including disbursements, payable to the respondent.

Fichaud, J.A.

Concurred: Saunders, J.A.

Hamilton, J.A.