

# WEB OF LIES

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## You've got mail!

Opposing counsel just sent a long awaited email responding to his client's undertakings from a hard fought pre-trial examination. You scan the brief email, and find your frustration rising.

To set the scene, a couple of weeks ago, during said pre-trial examination, the representative of the company you are suing mentions the existence of a "document" that could make or break your case. Counsel meticulously dissects these surprising allegations and requests numerous undertakings to find out whether there is evidence to support the representative's assertions.

Fast forward to today, you receive the above-mentioned frustrating email bearing the title "Response to Undertakings". The email informs you that the representative has told his lawyer, "I do not have any other information for the list of undertakings." No additional information is given; there is no indication that the representative attempted to find the information. You have a feeling the representative is hiding something.

How do you deal with what seems to be an un-cooperative, evasive witness?

The first step is to not get frustrated. Why? Quebec Courts have provided litigants with an easy frustration-proof method of turning a hostile witness into a cooperative one.

It is common practice in Quebec for parties to respond to pre-trial undertakings with an informal email or letter. Answers like the one given in our example are often unacceptable and run contrary to the spirit of co-operation and information that are deeply embedded in Quebec's *Code of Civil Procedure*.<sup>[1]</sup> In *Luxme International Ltd. v. Lasnier*<sup>[2]</sup> ("**Luxme**"), the Superior Court of Quebec, amongst other things, stated that such a practice unfortunately allows parties to shirk their responsibilities and creates inconveniences during trial – such as a witness stating at trial, "I didn't write that" or "I don't know why it was written in that way, I would have said it differently".

When you find yourself in a situation such as the one described above, follow the Court's advice in *Luxme*. Request from opposing counsel an affidavit from the witness attesting to their inability to respond to the undertakings made during pre-trial examinations and describing the steps taken to fulfil the undertaking.

Most witnesses should be far more inclined to provide accurate and useful information in a sworn affidavit rather than in an informal email sent by their lawyer.

As the Superior Court of Quebec mentioned, requiring a sworn affidavit from a witness encourages them to undertake the necessary verifications and considerations before declaring that the document or information cannot be retrieved.<sup>[3]</sup> The answers will often be more complete, nuanced or precise than “I do not have any other information for the list of undertaking.”

In 2019, the Court of Quebec in *Pietraroia v. Clinique Chiropratique St-Léonard*<sup>[4]</sup> dealt with exactly this situation and reminded the parties of the Superior Court's ruling in *Luxme*. The Court stated that an affidavit from the witness is the perfect solution in cases where the witness is unable to answer questions immediately during a pre-trial examination.<sup>[5]</sup> Such a formality was found not to significantly burden the file and, to the contrary, confirms for the requesting party that the undertakings have been properly dealt with.

When dealing with an un-cooperative or evasive witness in Quebec, keep your calm and follow the advice of the courts. Simply request a detailed affidavit.

by Eric Stachecki & Wendy Belisle

[1] C-25.01 - Code of Civil Procedure

[2] 2016 QCCS 6389

[3] *Ibid*, para 43

[4] 2019 QCCQ 3675

[5] *Ibid*, para 10

### **A Cautionary Note**

The foregoing provides only an overview and does not constitute legal advice. Readers are cautioned against making any decisions based on this material alone. Rather, specific legal advice should be obtained.

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