

# IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Media West Zny Inc. v. Insurance Corporation of British Columbia*,  
2024 BCSC 625

Date: 20240417  
Docket: 245428  
Registry: New Westminster

Between:

**Media West Zny Inc.**

Plaintiff

And

**Insurance Corporation of British Columbia**

Defendant

Before: The Honourable Justice Branch

## Reasons for Judgment

Counsel for Plaintiff:

K. Gill

Counsel for the Defendant:

J. Milligan

Place and Date of Trial:

New Westminster, B.C.  
March 4-8, 2024

Place and Date of Judgment:

New Westminster, B.C.  
April 17, 2024

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**I. INTRODUCTION**

[1] This is a claim by the plaintiff for insurance coverage for two destroyed vehicles (the “Vehicles”). The defendant insurer (“ICBC”) declined to cover the claims, alleging that the plaintiff:

- a) failed to establish that the Vehicles were stolen; and
- b) misrepresented material facts.

**II. BACKGROUND**

[2] The plaintiff’s principal is Nour-Eddine Zouaoui. He was born on January 29, 2000 and started the plaintiff company in January 2020. Mr. Zouaoui testified that the company was initially created to do event planning work. However, after the COVID-19 pandemic struck, he says that he shifted the company’s focus to delivering paper products, primarily in the Okanagan region. Before purchasing the Vehicles, he borrowed cars from friends to make the deliveries.

[3] Mr. Zouaoui’s description of the company’s operations left a great deal to be desired:

- a) He stated he sourced his paper products through an individual named “Sam,” whom he met in Montreal, but he could not remember his last name, Singh, until his second day of testimony;
- b) He could not recall if Mr. Singh worked for a particular company;
- c) He could not explain why he was sourcing product from a contact in Montreal, given that British Columbia has no shortage of paper suppliers;
- d) He could not name the brand of paper sold;
- e) Although he says that he stored inventory in a warehouse in West Kelowna, he could not recall its address, nor could he provide further details about the warehouse, except that he found it through “a friend of a friend”;

- f) The plaintiff's office and registered address were maintained at a criminal law firm. He was unable to provide details regarding the lease arrangements, including the name of the firm;
- g) He said that he rented space in a law firm because he needed access to a high-end printer, but he was unable to explain why he could not simply have used other commercial services for this task;
- h) He was unable to provide full names for most of the individuals from whom he allegedly borrowed vehicles;
- i) He said he used drivers from Vancouver for his Okanagan shipments because he couldn't find anyone, or at least anyone he knew, in the Okanagan. He was also unable to provide full names for most of his drivers;
- j) He was unable to provide names of his customers;
- k) There was scant evidence of payments coming into the company bank accounts from alleged customers;
- l) He could not explain most of the e-transfers out of the accounts. He could not even identify most of the individuals to whom transfers were sent;
- m) He claimed that he could not provide further details about the company because:
  - a. he kept his paper records in the destroyed Vehicles; and
  - b. his electronic records were unavailable because of the frequent turnover of his phone and computer. Data did not migrate to his new phone because he lost his recovery email and password. He claimed that he did not know how to transfer data to his new computer.

[4] In December 2021, Mr. Zouaoui decided the plaintiff needed its own vehicles. He sourced two trucks from Richmond Chrysler Dodge Jeep Ltd.: a grey 2022

Dodge Ram Limited (the "Grey Ram") and a white 2022 Dodge Ram Limited (the "White Ram").

[5] The Vehicles were open-backed, even though they were allegedly going to be used to transport paper. Mr. Zouaoui suggested that he was going to keep the paper in the cab. If he received larger orders, he was planning to use the cabs of both Vehicles.

[6] Mr. Zouaoui decided to lease, rather than purchase, the Vehicles (the "Leases"). The dealership worked with a related leasing company, RPC Leasing Ltd (the "Lessor"). The base vehicle price for each Vehicle was \$94,070. Mr. Zouaoui made down payments of \$16,382.44 and \$14,203.71, leaving the plaintiff with monthly lease payments of \$1,534.28 and \$1,270.02.

[7] The Leases contained the following term:

**15. DAMAGE, LOSS OR DANGER TO VEHICLE.** If the Vehicle is destroyed, stolen, confiscated by any governmental authority, abandoned, or subject to undue peril, you will notify Lessor as soon as possible and Lessor shall have the right to terminate this Lease. If Lessor terminates this Lease, the amount of your liability will be determined according to Early Termination section C of this contract and you agree to pay Lessor this amount less any insurance loss proceeds Lessor receives. If the Vehicle is declared a total loss by the insurer, regardless of the cause, Lessor shall have the option of terminating the Lease or replacing the Vehicle with another similar vehicle. If Lessor terminates this Lease due to the Vehicle being destroyed or stolen and you have complied with the insurance requirements, paid the deductible required by the insurance, and kept all your other promises under this Lease (including making required payments that become due while awaiting a settlement from your insurance company), Lessor shall be entitled to and will accept the insurance proceeds in full satisfaction of your liability. If your insurance fails to pay where the Lessor is named as co-defendant in any threatened, pending or actual litigation or other claim, you are liable for and indemnify us for any expenses, claims or losses Lessor incurs by reason of such non-payment.  
[Emphasis added.]

[8] Mr. Zouaoui leased the Vehicles beginning in December 2022 even though his driver's licence was suspended from December 15, 2022 to March 16, 2022. He says he took possession of the Vehicles that early because he was concerned about

vehicle shortages. Barry Wingo, an employee of the Lessor, confirmed that there were shortages in the broader market, although his particular dealership had stock.

[9] Mr. Zouaoui purchased insurance for the Vehicles from ICBC at the same time as he entered into the Leases (the “Policies”). He represented in his application that he would be the primary driver. When asked why he did not add the other drivers he was working with, Mr. Zouaoui responded that he was still setting up the business. Mr. Zouaoui stated on the Owner’s Certificate that each Vehicle would be used as a “Delivery Vehicle”. In the signed Checklist for Auto Insurance, he represented that the Vehicles would be used for “paper supplies”. The insurance payments were \$530.05 and \$462.70 monthly.

[10] Once he was in a position to take possession of the Vehicles, Mr. Zouaoui did not park the Vehicles at his own home on Telford Street in Burnaby, BC, as (1) the parking garage in his complex only safely accommodated smaller vehicles, and (2) there was a great deal of construction going on in his neighbourhood. As such, he made arrangements with an acquaintance, Justin Rao, to use a parking pad at the rear of his home to park the Vehicles. Mr. Rao lived on Neville Street, in the same general area as Mr. Zouaoui’s home, but not in the same neighbourhood.

[11] Mr. Zouaoui was very vague about how he met Mr. Rao, stating only that it was at a business meeting held at a “hotel or hall”. Nonetheless, he had sufficient confidence in Mr. Rao that he was prepared to leave the Vehicles with him along with a second set of keys. Mr. Zouaoui said Mr. Rao was a solid family man with a wife and children. Mr. Zouaoui gave him a set of keys so that Mr. Rao could move the Vehicles around his parking pad as necessary. Mr. Zouaoui denies permitting Mr. Rao to drive the Vehicles for any other purpose. Mr. Zouaoui kept the other set of keys. Mr. Zouaoui agreed to pay Mr. Rao \$550 per month for parking. A photocopy of a signed contract outlining this arrangement was in evidence. It was impossible to track payments to Mr. Rao from the plaintiff’s banking records, although Mr. Zouaoui indicated that may be explained by the fact that some or all of the payments may have been in cash.

[12] The plaintiff's Royal Bank business account went "under water" when its January 24, 2022, insurance payment was withdrawn, but the plaintiff quickly made a deposit to bring the account back into a positive position. The plaintiff also had inadequate funds to pay the insurance premiums on February 23, 2022, but again corrected the situation the same day. Another transaction that month also resulted in the account going negative. The plaintiff ran into similar difficulties with its February Lease payments. In March, the accounts again went negative when payments were due.

[13] Notwithstanding these insufficient funds problems, Mr. Zouaoui denies that he or the plaintiff were in financial difficulty. He notes that he had a positive balance in his personal securities trading account of about \$300,000. He used this account for day trading and other investments. In terms of explaining the insufficient funds, he suspects he may have simply been in the middle of funding a large trading position, which left his accounts low on cash.

[14] When the plaintiff's lease payments fell into arrears in February 2022, it triggered steps by the Lessor. Mr. Wingo took steps to follow up with Mr. Zouaoui. Mr. Wingo tried to contact Mr. Zouaoui by phone and text, but Mr. Zouaoui was unresponsive. Mr. Zouaoui suggests he must have been in Las Vegas at the time. His banking records do indicate that he was in Las Vegas from at least February 6-11, 2022. He says he went on an extended trip to celebrate his birthday. However, he was strangely unable to confirm exactly when he left or returned. He suggested that there was no record of a more extended visit because he was often "comped" hotel rooms, and he had brought down \$10,000 in cash. He had no satisfactory explanation for his lack of response to Mr. Wingo's inquiries, which presumably would have still reached him in Las Vegas.

[15] By mid-March 2022, given that lease payments remained outstanding, the Lessor began taking steps to try to repossess the Vehicles. When Mr. Zouaoui arrived back in Vancouver, he learned of these efforts and voluntarily brought the Vehicles back into the dealership. Mr. Wingo reviewed the mileage on the Vehicles

at that time. This review showed that there were 4635 km on the White Ram and 902 km on the Grey Ram. (Note that the Vehicles had very little mileage when they were first leased.)

[16] The Lessor decided that if the plaintiff were prepared to pay the arrears and two months' Lease payments in advance, the Lessor would return the Vehicles. The plaintiff paid the amount requested, and the Vehicles were returned to the plaintiff's control on March 22, 2022. Before their release, Mr. Wingo arranged for GPS trackers to be placed on the Vehicles.

[17] Mr. Zouaoui's license suspension had ended on March 16, 2022. He says he began driving the Vehicles after receiving them back from the dealership. However, he could not give details about the customers visited on such trips.

[18] Shortly after that, Mr. Zouaoui decided to visit his brother in Montreal. He left on March 27, 2022. Although he alleges that his plans were established well beforehand, he only purchased his plane ticket on March 26, 2022. He says that before leaving for Montreal, he left the Vehicles at Mr. Rao's home.

[19] Mr. Zouaoui said he was visiting his brother for Ramadan, although Ramadan only started on the evening of April 1, and Mr. Zouaoui returned by April 3. He did not mention in chief that his brother was in prison for murder.

[20] Late in the day Vancouver time on March 28, 2022, Mr. Zouaoui received a phone call from the North Vancouver RCMP advising that the Grey Ram had been found engulfed in flames. Surprisingly, Mr. Zouaoui could not recall if he asked Mr. Rao to determine whether the White Ram was still accounted for. He did call his mother, as he was worried that his family might be at risk. His phone records do indicate a series of calls throughout that evening and early morning.

[21] Police inspected the burned-out Grey Ram and found a child-size baseball cap and a Disney colouring poster with the names "Justin", "Sonam," and "Crunchy," noted thereon. There was also a milk jug containing liquid that smelled like gasoline.



[22] On March 31, 2022, Mr. Zouaoui received a phone call from Mr. Rao advising that the White Ram was also missing. The West Vancouver fire department located the White Ram on fire that same day. Mr. Zouaoui reported this to the Burnaby RCMP just after midnight on April 1, 2022. Later on April 1, 2022, the West Vancouver Police Department confirmed that it was the plaintiff's missing vehicle.

[23] The Burnaby RCMP records note that a third vehicle was "burnt out at Rao's address" and that "Rao seems to be related to all three files". Mr. Zouaoui did hear about this third stolen vehicle, but he confirmed that it had no connection to the plaintiff.

[24] Mr. Zouaoui reported the destruction of the plaintiff's two Vehicles to ICBC on April 6, 2022. In his report, he described Mr. Rao as the plaintiff's "business manager" or "fleet manager" and said he rented parking space from Mr. Rao. He said he was just a young businessman and did not know how to describe Mr. Rao's limited role properly. Mr. Zouaoui reconfirmed for ICBC at that time that the Vehicles were being used to deliver paper supplies.

[25] After being advised of the fires, the Lessor (through Mr. Wingo) extracted GPS data from the Vehicles, including the following:

**Grey Ram:**

Map Date: March 22, 2022 8:33 pm 6669 Telford Ave., Burnaby

Map Date: March 23, 2022: 4:25 pm 6669 Telford Ave., Burnaby

Map Date: March 23, 2022 9:22 pm 5658 Neville St., Burnaby

Map Date: March 24, 2022 6:25 pm 5658 Neville St., Burnaby

Map Date: March 25, 2022 7:25 am 5658 Neville St., Burnaby

Map Date: March 25, 2022 7:41 pm 5647 Neville St., Burnaby

Map Date: March 26, 2022 9:26 am 5647 Neville St., Burnaby BC

Map Date: March 26, 2022 8:47 pm 312 Bewicke Ave., North Vancouver

Map Date: March 27, 2022 10:42 am 310 W 1<sup>st</sup> St., North Vancouver

Map Date: March 27, 2022 8:28 pm 1401 Bewicke Ave., North Vancouver

Map Date: March 28, 2022 1:26 pm 1404 Bewicke Ave., North Vancouver

**White Ram:**

Map Date: March 22, 2022 6:24 pm 5713 Byrne Rd., Burnaby

Map Date: March 23, 2022 5:17 am 6669 Telford Ave., Burnaby

Map Date: March 23, 2022 8:24 pm 6669 Telford Ave., Burnaby

Map Date: March 23, 2022 11:59 pm 6669 Telford Ave., Burnaby

Map Date: March 24, 2022 10:24 pm 3965 Mt. Lehman Rd., Abbotsford

Map Date: March 25, 2022 1:24 am 6669 Telford Ave., Burnaby

Map Date: March 25, 2022 11:35 pm 678 Columbia St., New Westminster

Map Date: March 26, 2022 6:15 am 6669 Telford Ave., Burnaby

Map Date: March 27, 2022 2:23 am 9-4429 Kingsway, Burnaby

Map Date: March 27, 2022 12:59 pm 5654 Neville St., Burnaby

Map Date: March 27, 2022: 11:04 pm 5658 Neville St., Burnaby

Map Date: March 28, 2022 5:25 pm 5658 Neville St., Burnaby

Map Date: March 28, 2022 8:41 pm 5916 McKee St., Burnaby

Map Date: March 30, 2022 8:25 am 5957 McKee St., Burnaby

Map Date: March 30, 2022 7:58 pm 1621 Bewicke Ave., North Vancouver

Map Date: March 31, 2022 10:25 am 1621 Bewicke Ave., North Vancouver

[26] Mr. Wingo recalls Mr. Zouaoui asking him if the plaintiff would be receiving any monies from ICBC because of the thefts. Mr. Wingo replied that the insurance company usually pays the Lessor. Mr. Zouaoui disputes that the conversation happened in this way. He says he understood that the plaintiff would not receive any funds. He says that the plaintiff launched this litigation because it understood that it was its obligation to do so.

[27] None of the police departments decided to proceed with charges against Mr. Zouaoui, Mr. Rao or any other individual.

[28] The plaintiff submitted Proof of Loss forms to ICBC on June 3, 2022.

[29] On August 10, 2022, Mr. Zouaoui attended an Examination Under Oath (“EUO”). At the EUO, Mr. Zouaoui clarified that the plaintiff did not actually have a formally employed “fleet manager” and that the plaintiff simply rented parking space from Mr. Rao. He confirmed that no one else had driven the Vehicles between January 2022 and March 2022.

[30] Mr. Zouaoui was examined for discovery on September 13, 2023. He claimed to have suffered a stroke just before this examination, but indicated that he was nonetheless prepared to proceed. There was no evidence presented of this stroke other than his oral testimony.

[31] Mr. Zouaoui was in a major car accident on January 1, 2024, which he claims has affected his memory. However, no medical report was provided to substantiate this assertion of memory difficulties.

[32] By at least January 26, 2024, Mr. Zouaoui had purchased a new phone from the one he had at the time of the fires. He claimed that before switching over to the new phone, he had reviewed his old phone for relevant messages with Mr. Rao, but since his messages application was set to delete messages after a certain period, he could not produce anything.

[33] On February 6, 2024, ICBC confirmed that it was denying the plaintiff's insurance claims on the grounds set out above.

[34] At trial, ICBC tendered an expert report from a retired locksmith, Kevin Jewell. In his report, Mr. Jewell opined that it is impossible to drive the Vehicles without a programmed key fob. However, Mr. Jewell acknowledged that it is possible to program a vehicle to accept a new, previously unknown fob. This process would require the purchase of specific electronic equipment and a new compatible key fob, costing collectively in the range of \$700-\$4,000. The equipment and fob are available for purchase on the Internet. The thief would also need to be able to access the vehicle's interior. Once inside, the programming would take as little as 5-10 minutes.

### **III. ANALYSIS**

#### **A. Introduction**

[35] The plaintiff seeks a declaration that it is entitled to insurance coverage for the destroyed Vehicles, as well as an order that ICBC pay the amount required under the *Insurance (Vehicle) Act*, R.S.B.C. 1996, c. 231 [Act] jointly to himself and the Lessor.

[36] ICBC denies that the Vehicles were stolen in circumstances unknown to the plaintiff. Alternatively, ICBC argues that the plaintiff's claim is forfeited because the plaintiff knowingly misrepresented material facts. Specifically, ICBC alleges that at the time he was applying for the Policies, Mr. Zouaoui made the following misrepresentations:

- a) that Mr. Zouaoui would be the principal driver; and
- b) that the Vehicles were leased for use in a paper delivery business.

[37] ICBC also alleges that Mr. Zouaoui made the following misrepresentations during the subsequent claims adjustment process:

- a) that no one drove the Vehicles off Mr. Rao's property between January and March 16, 2022; and
- b) that the plaintiff employed Mr. Rao as a fleet manager.

**B. Burden and Standard of Proof**

[38] The applicable burdens are helpfully summarized in *Hughes v. ICBC*, 2010 BCPC 222:

[13] ... as refracted through the lens recently held up by the Supreme Court of Canada in its decision in *McDougall* -- compels two legal conclusions concerning the case at bar. They are that:

- (a) Mr. Hughes must tender evidence sufficient to prove, on a balance of probabilities and nothing less, that his alleged losses and damage fall within the scope of his policy coverage. If he succeeds in discharging that onus, then;
- (b) ICBC must tender evidence sufficient to prove, on a balance of probabilities and nothing more, that Mr. Hughes made wilfully false statements and misrepresentations in connection with his indemnity Claims in order to have its affirmative defences succeed.

[39] In summary, the plaintiff bears the burden of proving that there was a covered loss under the Policies (rather than an arson organized by the plaintiff). If satisfied, the burden shifts to ICBC to show that the plaintiff made wilfully false statements material to the claim: *Serown v. ICBC*, [1999] B.C.J. No. 2045, 1999 CanLII 6446 (S.C.) at para. 13.

[40] The next issue is the standard of proof. In *F.H. v. McDougall*, 2008 SCC 53, the Supreme Court confirmed that the standard of proof in all civil cases is the balance of probabilities. Before the decision in *F.H.*, there had been some suggestion that the burden was heightened when criminal or morally blameworthy conduct was alleged. This was rejected in *F.H.*:

[39] I summarize the various approaches in civil cases where criminal or morally blameworthy conduct is alleged as I understand them:

- (1) The criminal standard of proof applies in civil cases depending upon the seriousness of the allegation;

(2) An intermediate standard of proof between the civil standard and the criminal standard commensurate with the occasion applies to civil cases;

(3) No heightened standard of proof applies in civil cases, but the evidence must be scrutinized with greater care where the allegation is serious;

(4) No heightened standard of proof applies in civil cases, but evidence must be clear, convincing and cogent; and

(5) No heightened standard of proof applies in civil cases, but the more improbable the event, the stronger the evidence is needed to meet the balance of probabilities test.

[40] Like the House of Lords, I think it is time to say, once and for all in Canada, that there is only one civil standard of proof at common law and that is proof on a balance of probabilities. Of course, context is all important and a judge should not be unmindful, where appropriate, of inherent probabilities or improbabilities or the seriousness of the allegations or consequences. However, these considerations do not change the standard of proof. I am of the respectful opinion that the alternatives I have listed above should be rejected for the reasons that follow.

...

[44] ... In my view, the only practical way in which to reach a factual conclusion in a civil case is to decide whether it is more likely than not that the event occurred.

...

[49] In the result, I would reaffirm that in civil cases there is only one standard of proof and that is proof on a balance of probabilities. In all civil cases, the trial judge must scrutinize the relevant evidence with care to determine whether it is more likely than not that an alleged event occurred.

[Emphasis added.]

### **C. Credibility**

[41] Mr. Zouaoui was the key witness. Unfortunately for the plaintiff, I find that he was neither reliable nor credible. He admitted that his memory was poor, which he attributed to his recent motor vehicle accident. That alone undercuts his reliability. However, there were difficulties and inconsistencies that raised concerns beyond his memory failings:

- a) He gave his evidence in a highly defensive manner. He engaged in frequent and unhelpful verbal sparring with ICBC counsel, even after being cautioned several times.

- b) He purported to have no memory of the most basic facts and events that one would reasonably expect him to recall, even accepting that his memory has been somewhat affected by his recent accident.
- c) He suggested that he was so tech-obsessed that he bought every year's new iPhone, while simultaneously asserting that he was not tech-savvy enough to transfer his contacts and business records to his new phone. He suggested that he could not perform the necessary data transfer because he lost both his password and his recovery email. Losing one or the other may have been credible, but both? Far less so.
- d) He told a similar story about his laptop: He frequently updated to the latest model, but he did not know how to transfer his records to the new computer. Mr. Zouaoui is in his early 20s, making him a child of the disposable electronics generation who could reasonably be expected to know better.
- e) He did not take steps to contact Apple to see if there was still a way to recover or transfer the data on his earlier phone or computer - a logical next step.
- f) As noted above, his evidence regarding his alleged paper business lacked credibility, logic, or common sense.
- g) In chief, Mr. Zouaoui made much of the fact that he went to Montreal to see his brother for the holy month of Ramadan, while failing to mention that (a) his brother was in prison for murder and (b) he only stayed in Montreal for one day of Ramadan before returning to British Columbia.
- h) Mr. Zouaoui sought to attribute his memory problems to his recent accident, but the extent of his memory difficulties ebbed and flowed dramatically depending on whether more direct answers could hurt him or help him. His frequent sparring with defence counsel also showed a nimbleness of thought inconsistent with a head injury. There were no medical records or reports

produced to support his assertion that his accident could explain the difficulties with his testimony.

- i) It was clear from the extracts invoked from his earlier examination for discovery that he routinely applied the “I don’t remember” approach to answering questions, even before his recent accident. While he attempted to attribute his memory problems on the earlier discovery to a stroke allegedly suffered the day before the examination, (1) there were no medical records provided to support the stroke allegation, (2) he displayed the same selective recall during the earlier EUO, and (3) there was a discussion about his alleged stroke at the discovery, and he freely decided to proceed in any event.

[42] Collectively, these evidentiary difficulties leave me in a position where I can place little weight on Mr. Zouaoui’s evidence. But is Mr. Zouaoui’s lack of credibility and reliability sufficient to justify dismissing the plaintiff’s claim for coverage? That question is more complex.

#### **D. The Theft**

[43] Again, the plaintiff’s initial burden is to show that the Vehicles were destroyed without the plaintiff’s knowledge. In establishing a covered loss, the burden always remains with the insured. If an insurer puts forward evidence that the insured was involved in orchestrating their own loss, that raises the tide of evidence the insured must meet to satisfy their burden. However, the initial coverage burden never shifts to the insurer.

[44] Two cases help illustrate the proper approach to such cases.

[45] In *Serown*, the Court found that the insured had not met the initial coverage burden in a case where it was alleged that the insured had participated in the theft. The Court found as follows:

[17] The onus lies on the plaintiff to prove that a theft occurred and in order to accept the plaintiff’s claim, I would have to find that Harpreet Serown’s



explanation is believable and that he had nothing to do with the theft of the Mustang.

[18] I am not satisfied, given the various difficulties with his evidence and, in particular, his evidence relating to the number of keys for the Mustang, that the plaintiff has established, on a balance of probabilities, that a theft occurred. A key was apparently used to operate the Mustang prior to it being burned and, given the evidence, such a key would have to have been obtained by a member of Mr. Serown's family and such loss, as a result, would not be covered by the insurance policy. *Bhullar v. Insurance Corp. of British Columbia* (1996) BCJ 1401, paragraph 35. Further, given the report of Mr. Martin about the probable use of a key to operate the Mustang prior to it being burned, I conclude that the statements provided to I.C.B.C. regarding the number of keys for the vehicle amounted, in the circumstances, to a wilfully false statement which was material to the claim advanced for indemnity under the insurance policy.

[Emphasis added.]

[46] In *Singh v. ICBC*, 2014 BCSC 797, the plaintiff brought a claim for coverage after his vehicle was allegedly stolen and burned. Only forty minutes passed between the time the plaintiff last saw his car and the time of the fire. An expert locksmith opined that there was insufficient time between the alleged theft and the fire for someone else to hack the immobilizer system by swapping modules or producing a new key. The Court found that Mr. Singh's evidence was untruthful and that he had feigned a lack of memory as an excuse not to answer questions. The trial judge also questioned the plaintiff's failure to call certain key individuals as witnesses. The Court dismissed Mr. Singh's claim for coverage because he had not discharged his initial burden of proof. The Court noted that, "the fact that it is unknown who participated in the theft and the destruction of the Mercedes by fire, is of no consequence": para. 127.

[47] Turning to the present case, notwithstanding Mr. Zouaoui's credibility and reliability difficulties, I am satisfied that the plaintiff has established, on a balance of probabilities, that a theft occurred that the plaintiff did not orchestrate. Notably, the following facts were either not in dispute, or were not dependent on Mr. Zouaoui's evidence alone:

- a) Most notably, Mr. Zouaoui was not in British Columbia when the Vehicles were destroyed. Although ICBC suggested that his absence alone is

suspicious, there is no evidence that Mr. Zouaoui arranged for the Vehicles' destruction before he left. The fact that he purchased his plane ticket shortly before his departure provides little support for ICBC's theory. People are entitled to buy tickets up to their departure date, particularly if they are not concerned about cost (as seems to have been the case for Mr. Zouaoui);

- b) The Vehicles were found burnt in different municipalities from where they were typically stored;
- c) Although several police forces were involved in the investigation of the fires, none chose to lay charges against Mr. Zouaoui;
- d) There was evidence that someone other than Mr. Zouaoui had keys to the Vehicles: Mr. Rao. Given the items found in the Grey Ram, there was also evidence that Mr. Rao was using at least one of the Vehicles. ICBC did not argue or establish that any acts by Mr. Rao could or should be attributed to the plaintiff;
- e) There was expert evidence that, with the appropriate equipment, skill and time, the Vehicles could be stolen without using one of the two known sets of keys; and
- f) There was no evidence that the plaintiff would benefit financially from the destruction of the Vehicles, given that they were being leased, and the plaintiff appears to be responsible to the Lessor for any shortfall in the available insurance. ICBC suggests that Mr. Zouaoui's question to Mr. Wingo about the insurance indicates that Mr. Zouaoui (wrongly) assumed there would be an insurance windfall to the plaintiff. However, I do not think that is the only way to interpret Mr. Zouaoui's state of mind. Another way to interpret the discussion is that Mr. Zouaoui wanted to understand the next steps concerning the insurance claims.

[48] Putting this case in the context of the two authorities discussed above:

- a) Unlike the situation in *Serown*, there was evidence from an expert that stealing the Vehicles without the two known sets of keys was possible. Furthermore, in the present case, it was not only Mr. Zouaoui’s family that had control over the keys – Mr. Rao also held a set.
- b) Unlike the situation in *Singh*, there is no evidence that a third-party thief would have been under an unrealistic time pressure. Mr. Rao clearly would not have been, as the Vehicles were stored at his home. Nor did Mr. Zouaoui have the same easy access to the Vehicles that Mr. Singh had; he was thousands of kilometres away at the time of their destruction.

[49] This case is more akin to the situation in *Boyle v. Insurance Corporation of British Columbia*, 2017 BCSC 1762, where there were admittedly suspicious circumstances, but not enough to overwhelm the fundamental evidence supporting the theory that the vehicle was subject to a third-party theft. While this case may be closer to the line, the totality of the evidence – most of which is not in dispute or is supported by witnesses other than Mr. Zouaoui – leads me to conclude that the plaintiff has done enough to satisfy its burden.

[50] Rabbi Harold Kushner famously asked: “Why do bad things happen to good people?”: Harold Kushner, *When Bad Things Happen to Good People* (New York: Schocken Books, 1981). This case arguably raises a slightly different question: “Can bad things happen to bad people?”. Clearly, the answer is “yes”. In the present context, even if ICBC could establish that the plaintiff was most likely engaged in an illegal enterprise, that does not mean that the Vehicles could not have been stolen by someone else.<sup>1</sup> Indeed, one could reasonably assume that a criminal organization is more likely to be the target of such criminal activity, particularly at the hands of rivals. Mr. Zouaoui himself raised such a concern when he sought to explain why he was worried about his mother’s safety after being advised that the first Vehicle was the subject of an arson: he was afraid that his family might be being targeted. Compared to other aspects of his evidence, Mr. Zouaoui’s concern for his

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<sup>1</sup> Note that ICBC did not rely on broader principles of illegality to invalidate the insurance contract.

mother appeared genuine. If he were involved in the theft, there would have been little reason for such concern.

[51] ICBC suggested that the Court should draw an adverse inference because the plaintiff did not call Mr. Zouaoui's mother as a witness. I disagree that this calls for an adverse inference. In Sopinka, Lederman & Bryant, *The Law of Evidence in Canada*, 3rd ed. (Markham: LexisNexis, 2009), the authors state at p. 377:

In civil cases, an unfavourable inference can be drawn when, in the absence of an explanation, a party litigant does not testify, or fails to provide affidavit evidence on an application, or fails to call a witness who would have knowledge of the facts and would be assumed to be willing to assist that party. In the same vein, an adverse inference may be drawn against a party who does not call a material witness over whom he or she has exclusive control and does not explain it away. Such failure amounts to an implied admission that the evidence of the absent witness would be contrary to the party's case, or at least would not support it.

[Emphasis added.]

[52] Drawing an adverse inference is discretionary: *Dutton v. Schwab*, 2021 BCSC 1314 at para. 36.

[53] There is insufficient evidence that the mother would have had evidence germane to the material issues. As set out in the *Law of Evidence in Canada*, (in a passage cited with approval by our Court of Appeal in *Rohl v. British Columbia (Superintendent of Motor Vehicles)*, 2018 BCCA 316, para. 1), the adverse inference analysis depends on the witness knowing relevant facts. ICBC did not suggest that Mr. Zouaoui's mother was involved in the theft, nor is the mother alleged to have made any of the impugned representations. I find that there is insufficient materiality to her potential evidence to warrant the drawing of an adverse inference: *Houston v. Kine*, 2010 BCSC 1289 at paras. 75-78.

[54] The defendant says an adverse inference should also be drawn because the plaintiff did not call Mr. Rao. I find that an adverse inference should not be drawn in this respect either, as:

- a) Mr. Rao was on ICBC's witness list, so the plaintiff could reasonably assume he would be called at trial: *Azuma-Dao v. MKA Leasing Ltd.*, 2012 BCSC 10 at paras. 39.45; *Mann Engineering Ltd. v. Desai*, 2021 ONSC 7580 at para. 30; and
- b) ICBC filed an affidavit illustrating its own failed efforts to serve Mr. Rao with a subpoena. It is reasonable to infer that the plaintiff would have faced similar difficulties, particularly given that the plaintiff would presumably be examining Mr. Rao in the hope that they could extract an admission that it was Mr. Rao who engaged in the criminal activity without Mr. Zouaoui's knowledge: *R. v. Nosworthy*, 2003 CanLII 4940 (O.N.S.C.) at para. 58; *Davidson v. Wawanesa Insurance Company*, 2015 BCSC 1383 at paras. 145-155; *Chou (Re)*, 2022 BCSC 783 at para. 65. Counsel for the plaintiff advised the Court that Mr. Rao was unwilling to speak with him about his potential testimony. This highlights how Mr. Rao's evidence was effectively (un)available to both sides, a decisive factor weighing against the drawing of any adverse inference.

[55] ICBC suggested that the GPS readings were such that there is no way that Mr. Zouaoui could have left both Vehicles at Mr. Rao's home before leaving for Montreal and not noticed that at least one of the Vehicles was already missing. This required a cumbersome review of the data outlined above. From my review, I do not think this conclusion is as clear as ICBC suggested. It appears there were windows of time in which each Vehicle could have been dropped off without any knowledge of the other Vehicle being missing. Specifically, in their analysis, ICBC seems to have assumed that any drop-offs must have happened on March 27, whereas it appears possible that they could have occurred on March 26.

[56] In summary, notwithstanding Mr. Zouaoui's credibility problems and the presence of certain suspicious circumstances, I find that the plaintiff has done enough to demonstrate on a balance of probabilities that the Vehicles were stolen.

### E. The Alleged Misrepresentations

[57] Given that the Court has concluded that the plaintiff has satisfied its initial burden on coverage, we must go on to consider whether ICBC has met its burden to show that there were misrepresentations that should nonetheless invalidate the claim. I conclude that ICBC has done so.

[58] ICBC relies on s. 75 (a)(ii) and (c) of the *Act* which provide as follows:

All claims by or in respect of the applicant or insured are invalid and the right of an applicant, an insured, or a person claiming through or on behalf of an applicant or insured or of a person claiming as a dependant of the applicant or the insured, to insurance money under the plan or an optional insurance contract, is forfeited if

(a) the applicant for coverage under the plan or the optional insurance contract

...

(ii) knowingly misrepresents or fails to disclose in the application a fact required to be stated in it,

(b) ... or

(c) the insured makes a wilfully false statement with respect to the claim.

[59] In *Petersen v. Bannon* (1993), 84 B.C.L.R. (2d) 350, 1993 CanLII 4719 (C.A.), the Court of Appeal discussed the meaning of a wilfully false statement. Justice Finch, as he then was, stated:

[46] A wilful act is one done intentionally, knowingly and purposely, without justifiable excuse. A wilful act is to be distinguished from an act done carelessly, thoughtlessly, heedlessly or inadvertently. A wilful act differs essentially from one done negligently: see *Gill v. Insurance Corp. of British Columbia*, [1989] I.L.R. 1-2529 (B.C.S.C.).

[47] The onus is on the insurer to prove on a balance of probabilities that the statements in question were wilfully false. Because the allegations are serious, the judge is justified in scrutinizing the evidence carefully, and cogent evidence will be required to support an allegation of dishonesty.

[60] In *Petersen*, Finch J.A. (as he then was) also held that “a wilfully false statement will invalidate an insured’s claim only if the statement is material to the claim at risk of forfeiture”: para. 59. In *Inland Kenworth Ltd. v. Commonwealth Insurance Co.* (1990), 48 B.C.L.R. (2d) 305, 1990 CanLII 548 (C.A.) [*Inland*]. Chief

Justice McEachern stated at p. 8: “the classic test of materiality in insurance law is whether a statement is capable of affecting the mind of the insurer.” He continued:

A contract of insurance is one of utmost good faith and one cannot commit frauds or make wilfully false statements about the subject matter of the claim for any purpose without risking the loss of the right to indemnity if it turns out to be material on any issue.

[61] In *Boyle*, the Court summarized the general principles on misrepresentation as follows:

[73] An allegation that an insured has made a wilfully false statement is founded in fraud, and the court will not find fraud where the person making the false statement has an honest belief in its truth: *Skuratow v. Commonwealth Insurance Co.*, 2005 BCCA 515, at para. 16.

....

[75] Mere speculation of fraud will not suffice, and there are cases where even very strong speculation and circumstantial evidence have not been sufficient to establish fraud: *Lexis Holdings Int'l Ltd. v. I.C.B.C.*, 2009 BCSC 344, at paras. 27 and 28.

[62] In *Boyle*, the plaintiff conceded that several statements about her keys were factually incorrect, but argued that these statements were not wilfully false or were immaterial. The Court concluded in Ms. Boyle’s favour:

[80] I am not persuaded that Ms. Boyle’s incorrect statements about her car keys were made wilfully, that is intentionally, knowingly and purposely. I accept her evidence that her errors were the result of confusion or mere imprecision on her part. Her errors were therefore inadvertent and not deliberate. On this point I rely on the evidence generally as well as on my earlier comments concerning Ms. Boyle’s credibility. As to the defence comments about lack of care or diligence, Ms. Boyle’s errors were the result of negligence at most, which does not suffice as proof of willfulness, as Peterson confirms (“a wilful act differs essentially from one done negligently”, at para. 46).

[63] The question of whether there has been a knowing misrepresentation is to be determined based on the circumstances that existed at the time the policy of insurance was issued: *Booth v. I.C.B.C.*, 2009 BCSC 1346 at para. 9.

[64] ICBC does not have to prove that the plaintiff was aware of the consequences of a misrepresentation concerning the insurance. As noted, a contract of insurance

is one of utmost good faith. One cannot commit fraud or make wilfully false statements about the subject matter of the claim without risking the loss of the right to indemnity: *Lau v. Insurance Corporation of British Columbia*, 2012 BCSC 1226 at para. 7; *Inland* at p. 9.

### **1. Principal Operator**

[65] For this first alleged misrepresentation, ICBC must show that when he applied for insurance coverage, Mr. Zouaoui knew that he would not be the principal operator of the Vehicles: *Lexis Holdings Int'l Ltd. v. Insurance Corporation of British Columbia*, 2009 BCSC 344, paras. 24-26.

[66] It was not disputed that the identity of a vehicle's intended principal operator is a fact required to be stated in the application for coverage and that the identity of the principal operator is a material fact.

[67] There was no eyewitness testimony about others driving the Vehicles. Some physical evidence suggested that Mr. Rao may have been driving the Vehicles. However, Mr. Zouaoui's evidence is that he did expect Mr. Rao to at least drive the Vehicles around his own property. There is no evidence that Mr. Zouaoui knew that Mr. Rao was going to be, or may have been, moving the Vehicles off his property. Further, there is no evidence that Mr. Zouaoui gave Mr. Rao permission to drive the Vehicles off his property.

[68] I find that the defendant has not proven that Mr. Zouaoui was aware that someone other than Mr. Zouaoui would be the Vehicles' principal operator when he applied for the Policies: *Rai v. ICBC*, 2005 BCSC 92 at paras. 13-14. No subsequent pattern of use by others was established that would undermine Mr. Zouaoui's stated status as the principal operator. In *Prasad v. ICBC*, 2008 BCSC 1855, a father and son gave variable, unrealistic and unreliable explanations as to the identity of the principal driver. The Court found that these explanations, assessed against the objective evidence in the case, amounted to clear and cogent evidence that the son was actually the principal operator (despite the father declaring otherwise): paras. 51-53. In this case, ICBC has not presented similar clear and cogent evidence



undercutting the plaintiff's assertion: speculation and suspicious circumstances are not enough.

## **2. Drivers between January and March 2022**

[69] During the claims adjustment process, Mr. Zouaoui represented that no one else drove the Vehicles between January and March 2022. I find that ICBC has not met its burden of showing that this representation is a proper basis for avoiding coverage.

[70] I accept that Mr. Zouaoui's representation may not have been accurate given the substantial mileage readings recorded by the Lessor.<sup>2</sup> However, there is insufficient evidence to suggest that Mr. Zouaoui wilfully misrepresented the facts. Specifically, it is possible that Mr. Rao was using the Vehicles more extensively than the plaintiff expected without the plaintiff's knowledge. ICBC has not established that someone else was driving the Vehicles to such an extent with Mr. Zouaoui's knowledge. ICBC must do more than prove a statement is false; it must prove it was wilfully false: *Venkataya v. Insurance Corporation of British Columbia*, 2015 BCSC 1583 at para. 108.

[71] As discussed above, in *Boyle* the defendant insurer sought to avoid coverage by pointing to various misrepresentations the plaintiff made about her keys and their whereabouts. The Court, however, found that any incorrect statements about the keys were not made wilfully—i.e., intentionally, knowingly and purposely. Ms. Boyle's errors were found to be inadvertent rather than deliberate, as they were the result of "confusion or mere imprecision": para. 80. Given the lack of evidence provided by ICBC to support their assertion that Mr. Zouaoui deliberately misrepresented the Vehicles' drivers, I find myself in a similar position to the Court in *Boyle*: ICBC has not met its burden to show that this was a wilful misrepresentation.

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<sup>2</sup> There were small discrepancies in the mileage readings between the various documents, but I do not find that these were sufficiently material to undermine the thrust of ICBC's submission on this specific issue.

[72] In *Savaia v. Stellinga*, 2020 BCSC 156, the Court concluded that Ms. Stellinga made wilfully false statements that pertained to the identity of a driver who fled the scene of an accident. The Court was able to come to this conclusion by scrutinizing the statements on the record to find inconsistencies and illogical jumps that undermined Ms. Stellinga’s credibility. Justice Warren went on to say:

[122] ... Ms. Stellinga knew that Mr. Lafferty was driving the Range Rover at the time of the accident. She knew this before getting into Mr. Gill's cab, and she did not forget it. She knew it when she signed the March 21, 2017 statement. There is no other reasonable conclusion on the evidence.  
[Emphasis added]

[73] While Mr. Zouaoui was undoubtedly not a credible or reliable witness in general, ICBC has not pointed me to comparably strong evidence or an analytical path demonstrating that Mr. Zouaoui made wilfully false statements. While Mr. Zouaoui was not forthright, ICBC has not shown sufficiently connected inconsistencies or illogical jumps about the Vehicles’ drivers. Most notably, there is another “reasonable conclusion” for the mileage readings – that Mr. Rao was driving the Vehicles off his property without Mr. Zouaoui’s knowledge or permission.

### **3. Fleet Manager**

[74] The defendant agrees that he made a mistake in referring to Mr. Rao as a fleet manager during the claims adjustment process. However, I find that, notwithstanding all the other problems with Mr. Zouaoui’s evidence, there is a reasonable, innocent explanation for his use of this term. Mr. Zouaoui, as a young man and very junior entrepreneur, did not know the proper terminology for the role Mr. Rao was playing within the plaintiff’s new, small start-up operation.

### **4. Use of the Vehicles for Paper Delivery**

[75] The plaintiff accepted that any misrepresentation as to the use of the Vehicles would be material. However, the plaintiff denies making any such misrepresentation.

[76] I find that there was a wilful and material misrepresentation in this respect. At the time of securing the Policies and throughout the claims adjustment process, Mr.

Zouaoui represented that he was engaged in a legitimate paper delivery purpose. ICBC has met its burden to show that this was not the case and that it is more likely than not that Mr. Zouaoui knew this was not the case.

[77] Admittedly, the Court is not able to declare precisely what the plaintiff was doing with the Vehicles. But whatever it was, it is clear that it was not the paper delivery business asserted by Mr. Zouaoui.

[78] I come to this conclusion given that the weight of the evidence is that there was no such paper delivery business. I have already reviewed the highly problematic nature of Mr. Zouaoui's evidence in this respect above. To summarize, the plaintiff did not produce:

- a) a single scrap of paper (pun intended), or any electronic records, reflecting the operation of this business; or
- b) a single customer, employee, driver, or supplier witness.

[79] The yawning void of documentary evidence coupled with the serious credibility problems discussed above strongly suggests that the plaintiff was engaged in something other than paper delivery.

[80] There is a distinct lack of logic or common sense associated with the assertion that the plaintiff was engaged in paper delivery. Why would the plaintiff source product from a Montreal contact rather than from more densely forested British Columbia? How was the plaintiff able to borrow vehicles from individuals he now struggles to identify by name? Why would the plaintiff have drivers travel to the Okanagan from the Lower Mainland rather than hiring locally? Why would the plaintiff purchase open-back trucks even though he was intending to transport paper? Why would the plaintiff keep all its paper business records in the Vehicles rather than in its leased criminal law office or Mr. Zouaoui's home?

[81] The more logical inference arising from the evidence (and the lack of evidence) is that the plaintiff was engaged in something other than paper delivery, a

business which the plaintiff wants to avoid ICBC or the Court knowing about. Although materiality is not contested, it is clear that ICBC would have been less likely to agree to insure the Vehicles if the plaintiff were engaged in a less reputable business than paper delivery.

[82] In the case at bar, I also conclude that there are too many problems with the plaintiff's evidence regarding the nature of its operations. I conclude that the lack of documents, personal recall, and witnesses was not accidental or unfortunate, but intentional. The Court is left in a position where the most logical inference is that the plaintiff was using the cover story about the existence of a paper delivery business to hide something else. This clear misrepresentation is independently sufficient to negate coverage.

#### **IV. CONCLUSION**

[83] The plaintiff's claim is dismissed due to the plaintiff's material misrepresentation as to the nature of its business.

[84] If the parties are unable to agree on costs, they may arrange for a further hearing before me to resolve the issue.

"The Honourable Mr. Justice Branch"