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Murphy c. Grid Solutions Canada: A Quebec's motion to dismiss is not intended to replace the trial

March 12, 2019

By Marie-Pier Nadeau

Recently, WeirFoulds Associate Marie-Pier Nadeau and local counsel successfully opposed a motion seeking the dismissal of our clients' claim for abuse of procedure in *Murphy* c. *Grid Solutions Canada*, 2019 QCCS 563. The motion was brought under section 51 C.C.P., which reads as follows:

51. *The courts may, at any time, on an application and even on their own initiative, declare that a judicial application or a pleading is abusive.*

Regardless of intent, the abuse of procedure may consist in a judicial application or pleading that is clearly unfounded, frivolous or intended to delay or in conduct that is vexatious or quarrelsome. It may also consist in a use of procedure that is excessive or unreasonable or that causes prejudice to another person, or attempts to defeat the ends of justice, particularly if it operates to restrict another person's freedom of expression in public debate.

Our clients, the co-owners of the Massif du Sud windfarm and their subrogated property insurers, are jointly advancing a claim in excess of $16 million against, among others, the manufacturer of the windfarm's main step-up transformer, Grid Alstom Canada ULC ("**Grid**"). The transformer failed several months after construction of the windfarm was completed. An improperly secured cable within the transformer, which was manufactured and assembled by Grid at its plant, is alleged to be the main culprit. The transformer's breakdown resulted in the whole wind farm being inoperative, causing significant property damages, extra expenses and business interruption losses.

Grid sought to have the claim dismissed at a preliminary stage, even before discoveries could be completed. Grid argued among other things that it was a subcontractor during construction, and that it would therefore be an unnamed insured under a builder's risk policy. This was despite the fact that subrogation is being pursued under a distinct operational all-risk policy. Nevertheless, Grid contended that the co-owners' insurers had no right to sue, and also relied upon various contractual clauses in an attempt to establish that the co-owners, too, had waived their right to sue. As a result, the court was presented with a myriad of insurance policies, contracts and other documents, and was being asked to interpret them in the favour of the manufacturer Grid, in the absence of any discovery evidence.

Under section 51 C.C.P., it must be summarily demonstrated that the claim is abusive. The Court must be convinced, with a degree of practical certainty, that the claim has no hope of success. Section 52 C.C.P. outlines the applicable procedure to be followed:

*"**52.** The application is presented and defended orally, and decided by the court on the face of the pleadings and exhibits in the record and the transcripts of any pre-trial examinations. No other evidence is presented, unless the court considers it necessary."*

A motion to dismiss for abuse under section 51 C.C.P. is not meant to be a mini-trial. Only the clearest case, the one which lacks legal

foundation or which revolves around an undisputed fact, will be dismissed at a preliminary stage. Any questions of facts, or any mixed questions of facts and law, must be deferred to the trial judge.

This was in essence the main reason why Grid's motion to dismiss was denied. The Honourable Justice Brodeur of the Quebec Superior Court reminded that section 51 C.C.P. calls for a "summarily" demonstration that the claim has no practical chance of success. Grid's motion to dismiss contained 141 paragraphs on 38 pages, along with 32 documents filed in its support. Grid's book of authorities contains no fewer than 63 documents, summarized in 124 pages of notes. The evidence was exhaustive and detailed, such that a trial would be necessary to determine the issues.

Interestingly, the Honourable Justice Brodeur also noted in her concluding remarks that Grid is being sued for breach of its warranty of quality. In *Axa Assurances inc.* c. *Valko Électrique inc.*, 2008 QCCA 2414, the Quebec Court of Appeal refused to dismiss a subrogated claim under a builder's risk policy against a manufacturer who also happened to be a subcontractor for other portions of the construction project. Even though the manufacturer was a subcontractor and therefore an unnamed insured under the builder's risk policy, it was not being sued for any of its construction work. It was, instead, being sued in its capacity as a manufacturer.

Overall, a motion to dismiss was simply not appropriate under the circumstances, especially at such an early stage of the litigation. As the Quebec Court of Appeal previously noted in *Acadia Subaru* c. *Michaud*, 2011 QCCA 1037:

"(…) the traditional cautiousness evinced by courts before dismissing claims completely, especially early in the proceedings, remains an appropriate approach in some circumstances, notwithstanding the renewed resolve to prevent abuse of process. Courts must even guard against article 54.1 C.C.P. [now 51 C.C.P.] itself being invoked abusively by defendants who are inclined to cry wolf in the absence of any palpable threat of impropriety. After all, proper access to the courts is a value to be preserved for both sides to a dispute."

The decision in *Murphy* c. *Grid Solutions Canada* is a good illustration of how the practice of law can differ in Quebec compared to other provinces such as Ontario. In Ontario, a summary judgment motion can be decided on an exhaustive evidentiary record and must be granted whenever there is no genuine issue requiring a trial. The plaintiff facing a summary judgment motion must "lead trump or risk losing" and cannot rely on the possibility that other evidence will be adduced at trial to support his claim. In Quebec, contested factual issues will instead be deferred to the trial judge, rather than being decided on a motion to dismiss.

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