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NOVEMBER 2015

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ON APPEAL FROM A JUDGMENT ON A WELLINGTON-TYPE MOTION

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THE COURT OF APPEAL OF QUEBEC RULED ON A LEAVE TO APPEAL FROM AN INTERLOCUTORY JUDGMENT DISMISSING A WELLINGTON-TYPE MOTION SEEKING TO ORDER AN INSURER TO TAKE UP THE DEFENCE OF ITS INSURED.

The decision of the Court in *Technologies CII inc.* v. *Société d'assurances générales Northbridge*[1] follows the one issued on April 21, 2015 by the Honourable Michel A. Pinsonnault, dismissing a motion of this type in the context of litigation opposing the Attorney General of Quebec (hereinafter, the **"AGQ"**) and the Commission scolaire de la Rivière du Nord (the **"School Board"**) and, among others, Technologies CII Inc. (**"CII"**) and its liability insurer Northbridge General Insurance Corporation (**"Northbridge"**).

After analysis, Ms. Justice Marie-France Bich concluded that an interlocutory judgment dismissing a Wellington-type motion must still be recognized as a judgment contemplated in second paragraph of the first alinea of article 29 *Code of Civil Procedure* (Quebec) (**"CCP"**).

[1] 2015 QCCA 1246.

THE DISPUTE

CII is a business specializing in the installation of heating and air conditioning systems. It was sued, solidarily with other defendants, for an amount of $16,537,687.00 by the AGQ and the School Board for a fire which occurred on September 21, 2011. The plaintiffs alleged that the fire was caused by the negligence of CII while performing its work, since it failed to comply with the legal requirements and standards of care applicable to welding activities.

After it conducted a statutory examination of a CII representative, Northbridge refused to take up the defence of its insured on the ground that the coverage provided under the insurance policy was suspended at the time the events took place. It argued that CII had failed to comply with an endorsement, thus contravening to article 2412 of the *Civil Code of Québec* (**"CCQ"**) which provides that a breach of warranty aggravating the risk suspends the insurance coverage.

The endorsement in question set out specific conditions for the control of sparks during welding activities, such as the use of protective screens or canvases.

Therefore, Northbridge blamed CII for having breached what it considered to be a warranty by carrying out welding work in a closed environment without using any form of fire protection.

For its part, CII argued that the endorsement did not constitute a warranty, but an endorsement modifying the terms of the policy. It added that this endorsement could not be held against CII because it had not been brought to the attention of a person in authority, that it did not form part of the original policy and because Northbridge would not have complied with the provisions of article 2405 CCQ.

Hence CII filed a Wellington-type motion with the Superior Court to force Northbridge to take up its defence in the proceedings against the AGQ and the School Board.

THE JUDGMENT ON THE WELLINGTON-TYPE MOTION [2]

The Superior Court concluded that, based on the allegations of the proceedings, the insurance policy, the exhibits filed and the statutory examination, CII had clearly breached the terms of the endorsement. According to the Court, [TRANSLATION] "there is no doubt that when the work was performed by its employees [CII's] on the day the fire occurred, the employees did not use any protective screen or asbestos canvas to limit the spread of sparks (...)."

The Court added that the endorsement indeed constituted a warranty incurred in the original policy, dismissing CII's arguments and thus, its Wellington-type motion.

THE LEAVE TO APPEAL FROM THE JUDGMENT OF THE SUPERIOR COURT

On the basis of article 511 CCP, CII applied for a leave to appeal from the judgment of the Superior Court. From the outset, the Court of Appeal reiterated the two conditions which are necessary to obtain a leave to appeal from an interlocutory judgment, namely:

- the judgment is one that is contemplated in article 29 CCP; and
- the pursuit of justice requires that the leave be granted.

The Court of Appeal wondered whether the case law prior to 2012, according to which a judgment dismissing a Wellington-type motion is a judgment contemplated in the second paragraph of the first alinea of article 29, still applied in the wake of the case of *Elitis Pharma inc.* v. *RX Job inc.*[3] In this last case, Justices Rochon and Kasirer wrote that the sole economic harm or the financial or business inconvenience arising from an interlocutory judgment was not sufficient to consider same as a judgment ordering the doing of something which cannot be remedied by the final judgment.

The Court concluded that it must still be recognized that an interlocutory judgment dismissing a Wellington-type motion may be appealed on the basis of this provision. Indeed, in addition to the economic harm caused to the insured by the dismissal of this type of motion, the Court was of the view that the insured is also deprived of one of the substantive rights provided in his insurance policy and by article 2503 CCQ.

The second criteria, which relates to the pursuit of justice is not discussed in detail in this decision. The Court simply mentioned that this condition weighed in favour of granting the leave to appeal. In the end, the Court, reiterated that a judgment which dismisses a Wellington-type motion is a judgment contemplated in the second paragraph of the first alinea of article 29 CCP.

WHAT ABOUT THE LEAVE TO APPEAL A JUDGMENT GRANTING A WELLINGTON-TYPE MOTION?

If it seems henceforth clear that a judgment dismissing a Wellington-type motion is a judgment contemplated in the second paragraph of the first alinea article 29 CCP, such is not necessarily the case of a judgment granting such a motion.

Indeed, the issue remains as to whether the harm suffered by an insurer who is required to take up the defence of its insured is purely economic and may be remedied by the final judgment.

In the judgment rendered in the *Lloyd's Underwriters* v. *4170831 Canada inc.*[4], on August 12 last, Justice Kasirer accepted, for discussion purposes only, that an interlocutory judgment allowing *in part* a Wellington-type motion satisfies the conditions of section 29 CCP., but denied the leave to appeal from on the basis of the pursuit of justice criteria.

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[2] 2015 QCCS 1988.

[3] 2012 QCCA 1348.

[4] 2015 QCCA 1333.

However, referring to the decision of Ms. Justice Bich, Justice Kasirer wrote the following:

> [TRANSLATION]
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> "One may wonder, in circumstances where the harm suffered by the insurer is purely economic and may be redressed on the merits, whether article 29 CCP is truly satisfied in all cases. I note the relevance of the discussion of this issue by my colleague Ms. Justice Bich in the context of the dismissal of a Wellington-type motion in *Technologies CII inc.* v. *Société d'assurances générales Northbridge*, 20015 QCCA 1246, par.[9] (sitting alone). This being said, in view of my conclusion respecting the criteria set out in article 511 CCP, I reckon that it is not necessary to rule on the issue for the purposes of this motion."

Having determined that the pursuit of justice did not weight in favour of granting the leave to appeal, the Court preferred not to deal with the issue of whether the judgment allowing a Wellington-type motion is a judgment contemplated in the second paragraph of the first alinea of article 29 CCP. We'll take a raincheck!

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