IN FACT AND IN LAW

Product Liability

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In the Wake of *Domtar*: Manufacturers' and Professional Vendors' Liabilities - Separate Defences

By Dina Raphaël and Jonathan Lacoste-Jobin

In one of the first decisions in Quebec since the landmark Domtar *case*[1]*, the Québec Court of Appeal has refined the parameters of the liability of a professional vendor and of a manufacturer for a latent defect. In this case,*[2]*, Joseph Élie Limitée (**"Élie"**) had sold an oil tank manufactured by Réservoirs d'acier Granby (**"Granby"**), and supplied the oil to its customer, who was insured by Federation Insurance Company of Canada ("Federation"). When sued by Fédération after the new tank had leaked, Élie called in warranty the subcontractor that had removed the old tank and installed the new one Confort Expert Inc. (**"Confort"**).*

Judgement in first instance

The oil tank had been purchased in 1995 and the leak occurred in January 2001. Following the leak, Federation indemnified its insured and instituted proceedings against the vendor of the tank, Élie, and its manufacturer, Granby.

It was proven at trial that oil tanks similar to those manufactured by Granby have a normal life expectancy of 30 or even 40 years.

In addition, the testimony of the experts revealed the presence of welding residue in the tank and that the leak had resulted from a perforation attributable to corrosion of the inner surface of the tank, which was considered abnormal because it was premature. The trial judge held that the presence of a small amount of hydrochloric acid had caused the perforation.

Three hypotheses were advanced at trial to explain the presence of acid in the tank:

1. At the time of an oil delivery, a contaminant could have been allowed inside the tank because the deliveryman left the hose nozzle lying in the snow;
2. Fumes containing salt could have penetrated into the tank through a vent;
3. The tank installation sub-contractor could have introduced contaminants from the old tank when transferring its contents to the new tank.

The trial judge ruled that the origin of the contaminant remained unknown since none of the hypotheses was probable enough to be accepted. He also rejected the hypothesis to the effect that premature corrosion could have resulted from the presence of welding residue on the inner surface of the tank. The probable origin of the contaminant remaining unknown, the judge concluded that the cause of the perforation was not attributable to any of the defendants and he therefore dismissed the action.

Judgment in appeal

The Court of Appeal reiterated the principles of the legal warranty of quality, which create two distinct presumptions, i.e. a presumption of prior existence of the defect (Article 1729 C.C.Q.) and a presumption of knowledge of the defect (Article 1728 C.C.Q.). The Court of Appeal quotes the following passage from the decision of the Supreme Court of Canada in the landmark decision of *Domtar*:

> **"[41] In the case at bar, the category of sellers that interests us most is that of the manufacturer. Manufacturers are considered to be the ultimate experts with respect to the goods, because they have control over the labour and materials used to produce them: J. Edwards, *La garantie de qualité du vendeur en droit québécois* (1998), at p. 289. Moreover, buyers are entitled to expect that manufacturers guarantee the quality of the products they design and market. Consequently, manufacturers are subject to the strongest presumption of knowledge and to the most exacting obligation to disclose latent defects."**[3]

[1] *ABB Inc. c. Domtar Inc., ABB Inc. v. Domtar Inc.*, 2007 S.C.C. 50, [2007] 3 R.C.S. 461.

[2] *Fédération, Compagnie d'assurances du Canada c. Joseph Élie ltée* 2008 QCCA 582 (C.A.).

[3] *Supra*, note 1, par 41.

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The Court of Appeal thus confirms that Article 1729 C.C.Q. reverses the burden of proof when the conditions necessary for its application are established. In this case, these conditions were present, i.e.: (1) the acquisition of the oil tank in 1995; (2) the normal life expectancy of a tank of this type, which is at least 20 years and probably longer; (3) the leak occurred in 2001, six years after the tank was purchased; and (4) the damages suffered as a result of the leak.

The Court of Appeal concludes as follows:

> [Our translation] **"[31] In my opinion, the Respondents have failed to discharge their burden. With respect, the error of the trial judge consisted in considering the evidence that a corrosive agent had been introduced into the tank after the sale as a complete refutation of the presumption of prior existence (...)**
>
> **[...]**
>
> **[36] I do not believe that we are in the presence of a preponderance of evidence sufficient to rebut the presumption of Article 1729. At most, it is evidence that in its entirety remains equivocal since the hypotheses that were advanced (1° the welding residue had nothing to do with the premature perforation of the tank; 2° the welding residue was a significant factor in the occurrence of the premature perforation of the tank) are of equal validity. [...] In my opinion, this way of presenting the problem reverses the approach imposed by the law: in view of the presumption of Article 1729, it was rather the Respondents who had the burden of demonstrating, on the balance of probabilities, that the surface imperfections could not have contributed to a leak occurring five and a half years after the sale."**

Accordingly, the Court of Appeal ruled that Granby, as manufacturer, could not have been unaware of the defect and was thus liable for all the damages resulting from the leak.

On the other hand, the Court concluded that the professional vendor, Élie, had succeeded in defeating the presumption of knowledge of the latent defect and had to be exonerated. First, it ruled that the evidence demonstrated that the damages had been caused by the conjunction of two factors, i.e., a latent defect inside the tank (presence of welding residue) and the corrosive action of an external agent introduced after the sale. The defects were located inside the tank, which would have had to be cut and opened to determine their presence and location. Basing itself on the leading case of *F. Ménard inc. v. Bernier* [4], which held that a professional vendor may defeat the presumption of Article 1729 C.C.Q. if the product sold was not intended to be opened by anyone other than the purchaser-user, the Court of Appeal confirmed the rebuttal of the presumption as follows:

> [Our translation] **"[47] [...] Furthermore, the evidence demonstrated that Réservoirs [Granby] was one of the principal manufacturers of this type of product in eastern Canada and that at the relevant time, Élie had no reason to suspect that the products of Réservoirs had this weakness."**

Comments

Following the judgment issued by the Supreme Court in *Domtar* [5], the Court of Appeal has confirmed the essential criteria for the application of the presumption of knowledge provided for in Article 1729 C.C.Q. As in the *Domtar* case, the Court of Appeal confirms that a manufacturer has a heavy burden to overcome when the product it manufactured is defective.

However, this judgment also shows that a professional vendor (or a distributor) may nevertheless defeat the presumption of knowledge by demonstrating that the product sold was not intended to be opened by anyone other than the purchaser-user, although, evidence must be adduced to support this. The manufacturer and the professional vendor are therefore not necessarily in the same boat!

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4 J.E. 85-257 (C.A.).

5 *Supra*, note 1.

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