

SUPERIOR COURT

CANADA
PROVINCE OF QUEBEC
DISTRICT OF LONGUEUIL

N° : 505-06-000020-144

DATE : September 23, 2014

PRESIDING : THE HONORABLE THOMAS M. DAVIS, J.S.C.

PASCAL DUPUIS

Applicant

C.

POLYONE CANADA INC.

Respondent

JUDGMENT

INTRODUCTION

[1] At the authorization stage the Respondent, Polyone Canada Inc. (**«Polyone»**) asks the Court to authorize the examination of the Applicant, Pascal Dupuis, (**«Dupuis»**) as well as the production of a written engineering report.

THE PROCEEDINGS

[2] In order to determine whether or not the Court should exercise its discretion to allow either the examination of Dupuis, or the production of the engineering report a review of the proceedings is required.

[3] Dupuis, a lawyer, is a resident of Saint-Rémi and also works there.

[4] Polyone is a corporation, which manufactures plastics in Saint-Rémi. In order to carry out the manufacturing process, it draws water from Saint-Rémi's potable water supply.

[5] Dupuis' motion alleges the failure of a valve in the water management system of Polyone's cooling tower on December 18, 2013. As a result of the failure Dupuis alleges that contaminated water from the cooling tower was mixed in with Saint-Rémi's potable water. Some 2,000 buildings were affected, including Dupuis' residence.

[6] The contamination of the water supply led the town to post advisory notices proscribing the drinking of water on its web site on December 19 and to distribute notices to the residents (exhibit R-3). On January 4, 2014, an advisory remained in effect, strongly recommending that the citizens boil their water prior to drinking it (exhibit R-4). This boil water advisory remained in effect on January 9, 2014 (Exhibit R-5).

THE PARTIES' RESPECTIVE POSITIONS

DUPUIS' STATUS AS A REPRESENTATIVE

[7] Polyone alleges that the Motion for Authorization contains little information on Dupuis' ability to act as a representative of the group. Hence, Polyone's desire to examine him.

[8] Dupuis' motion sets out his qualifications in some detail. He is both a resident of Saint-Rémi and works there. He alleges having consumed contaminated water on December 18, and 19, 2013. From December 19 to 23, 2013 he alleges being unable to consume the town's water and, therefore, being required to buy bottled water or to use the water distributed by the town. Subsequent to December 23, he was required to boil the water prior to consumption.

[9] Referring to *Infineon Technologies AG v. Option consommateurs*,¹ Dupuis argues the grounds for excluding a representative are limited. The allegations of his motion on their face demonstrate that he is in a position to adequately represent the group. Therefore, the examination is unnecessary and unwarranted.

THE CH2M HILL REPORT

[10] Polyone argues that the allegations of his motion, regarding the responsibility of Polyone are vague and imprecise. In addition, they are based on hearsay and third-party information.

1. [2013] 3 S.C.R. 600, 2013 SCC 59 (CanLII) par. 149.

[11] Polyone refers in particular to paragraph 2.9 of the motion. It refers to a valve malfunction in Polyone's cooling tower, which led to a reverse flow of water, allowing it to enter the town's water system.

[12] The allegation is not supported, other than by an article appearing in an Internet publication on December 20, 2013, quoting a representative of the town (exhibit R-6).

[13] The report concludes that there was no pathway for the water from Polyone's cooling tower to enter the Saint-Rémi water system. Therefore, it should be accepted at the authorization stage to allow the Court to determine whether or not Dupuis' claim is frivolous.

[14] Dupuis argues that the allegations of his motion are sufficient and, moreover, that the report is flawed in that it is primarily based on observations of Polyone's personnel, which were reported to the authors of the report.

DISCUSSION

[15] Article 1002 C.C.P. allows the judge to permit the production of relevant evidence, even at the authorization stage. However, the scope of this discretion is limited. The Court must guard against turning the hearing at the authorization stage into a sort of preliminary inquiry on the merits of the action.² This is all the more the case, given that at the authorization stage, the facts alleged by the Applicant are taken to be true.³

[16] Looking first at Polyone's request to produce CH2M Hill report, the Court must ask itself whether or not, at this stage, it is relevant to the task of determining whether or not the criteria of article 1003 C.C.P. are satisfied. More particularly, in the present matter, Polyone disputes that the facts alleged in the motion support the conclusions sought. In fact, it argues that the report demonstrates the falsity of the allegations.

[17] A number of judgments of this Court have allowed the production of an expert report at the authorization stage.

[18] In *Bélair v. Bayer* Justice Paquette allowed the production of an expert's report, explaining her decision to do so as follows:

Plus précisément, l'éclairage d'un expert sera utile pour interpréter les informations contenues aux dossiers médicaux communiqués et ainsi déterminer, même prima facie, si les effets secondaires que M. Bélair allègue peuvent être reliés à sa prise d'une dose unique d'Avelox.⁴

2. *Allstate du Canada, compagnie d'assurances v. Agostino*, 2012 QCCA 678 (CanLII), par. 34.

3. *Option Consommateurs v. Banque Amex du Canada*, 2006 QCCS 6290, par. 20.

4. 2012 QCCS 5497 (CanLII), par. 29.

[19] It is apparent that the factual issues were significantly more complex than the issues in the present matter. In addition, Justice Paquette acknowledges that the production of an expert's report at the authorization stage is exceptional.

[20] Applying these principles to the present matter, the Court agrees with Polyone that the allegations in the motion concerning the cause of the water contamination are somewhat summary. However, taken as true, they appear to be sufficient to meet the criteria of article 1003 C.C.P.

[21] Firstly, it is not disputed that the water system of Saint-Rémi was compromised during the period in question. Secondly, the cooling tower from which the contamination is alleged to have occurred is connected to the town's water supply. Thirdly, paragraph 2.17 of the motion makes reference to a statement by a representative of Polyone, which would have been unnecessary, but for the potential responsibility of Polyone. Finally, exhibit R-6 also alludes to the potential responsibility of Polyone.

[22] In the Court's view, the allegations meet the test of being "*des allégations de faits palpables*".⁵ They go beyond mere speculation or hypothesis,⁶ and permit "*une compréhension minimale convenable du litige*."⁷

[23] In addition, the CH2M Hill report does not allow the Court to arrive at the conclusion, proposed by Polyone: that the allegations of Dupuis on its responsibility are false.

[24] Firstly, the report acknowledges a water loss from the cooling tower.

[25] Second, it also refers to a 15 minute timeframe between 12 P.M. and 12:15 P.M. on December 19, 2013, where there may have been a potential pathway for the water from the cooling tower to enter the potable water supply. That the process water might have taken this pathway was excluded based on the reports of the plant operator reviewed by the report's authors.

[26] Finally, the conclusions of the report are based solely on a post event inspection and rely heavily on the observations of Polyone's representatives. Therefore, the assumptions of the report can only be adequately verified by cross-examination of these representatives.

[27] The Court concludes that while the information contained in the report may well be relevant at the hearing of the merits of the motion, should it be authorized, that its production is not appropriate at this juncture.

5. *Perreault v. McNeil PDI inc.*, 2012 QCCA 713 (CanLII), par. 37.

6. *Lorrain v. Pétro-Canada* 2011 QCCS 4803 par. 96.

7. *Carrier v. Québec (Procureure générale)* 2009 QCCS 5260 (CanLII), par. 26.

[28] Moving now to the request to examine Dupuis, the Court has the discretion to permit same. In the matter of *Piro c. Novopharm Ltd*, the Court allowed for the examination of the Applicants because:

Le Tribunal est incapable d'évaluer, sur simple lecture de la requête, si madame Piro possède la capacité pour représenter les membres et si monsieur Gendron remplit les conditions pour devenir membre désigné. En fait, le Tribunal, comme il l'a souligné à l'audience, ignore même, à la lecture de la requête, si monsieur Gendron et madame Piro ont la capacité juridique nécessaire pour ester en justice.⁸

[29] The context was, however, very different. No proof of purchase on the impugned products was submitted with the motion. No facts attesting to the applicants' ability to represent the group were alleged either.

[30] In the matter of *Labelle v. Agence de développement de réseaux locaux de services de santé et de services sociaux - Région de Montréal*,⁹ Justice Lefebvre also allowed the examination of the Applicant. However, the decision was motivated by the evidence of her psychiatric antecedents.

[31] In the present matter the Court is not faced with a similar dearth of information or with evidence of the questionable capacity of the Applicant. He lives in Saint-Rémi. He works there as a lawyer. He is a user of water from the town's water system. He suffered the inconvenience caused by the contaminated water; no doubt an inconvenience similar to the one experienced by other Saint-Rémi residents.

[32] The Court concludes that his examination would not enhance its evaluation of whether the criteria of article 1003 C.C.P. are satisfied.

[33] **FOR THESE REASONS, THE COURT:**

[34] **DISMISSES** Respondent's motion;

[35] **THE WHOLE WITH COSTS.**

THOMAS M. DAVIS, J.S.C.

Me James R. Nazem
James R. Nazem, Attorney

8. 2004 CanLII 13549 (QC CS) par. 29.

9. 2007 QCCS 1113 (CanLII).

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Date of hearing : August 7, 2014