

COURT OF APPEAL

CANADA
 PROVINCE OF QUEBEC
 REGISTRY OF MONTREAL

No: 500-09-018146-076
 (500-17-036850-074)

MINUTES OF THE HEARING

DATE: DECEMBRE 21, 2007

CORAM: THE HONOURABLE J.J. MICHEL ROBERT, C.J.Q.
 ANDRÉ BROSSARD, J.A.
 NICOLE DUVAL HESLER, J.A.

APPELLANT(S)	ATTORNEY(S)
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HI-LEX CORPORATION

Mtre PATRICK GIRARD
 STIKEMAN, ELLIOTT

RESPONDENT(S)	ATTORNEY(S)
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BOMBARDIER RECREATIONAL PRODUCTS INC.

Mtre MARTIN F. SHEEHAN
 FASKEN MARTINEAU

RESPONDENT(S)	ATTORNEY(S)
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On appeal from a judgment rendered on October 11, 2007 by the Honourable Ms. Justice Marie Gaudreau of the Superior Court District of Montreal

NATURE OF THE APPEAL: DECLINATORY EXCEPTION

Clerk: MARC LEBLANC	Court Room: PIERRE-BASILE-MIGNAULT
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HEARING

- 9 h 34 Argument of Mtre Girard.
- 10 h 19 Suspension of the hearing.
- 10 h 50 Resumption of the hearing.
- 10 h 50 Mtre Sheehan is not required to argue.
- Judgment rendered – See page 3.
- 10 h 55 The hearing is concluded.

(s) Marc Leblanc

Court Clerk

BY THE COURT

JUDGMENT

[1] As per the terms of the Agreement between the parties, Hi-Lex, a supplier of parts to Bombardier, is bound to hold Bombardier harmless against any claim for damage, liability or expense arising out of defects in the parts.

[2] The parties have also agreed that each irrevocably and unconditionally submits to the jurisdiction of the appropriate courts located within the district of Montreal, province of Quebec.

[3] The parties disagree as to whether or not the contract was renewed. The judge of first instance found that it had been. Without deciding the issue, which will be finally adjudicated on the merits, the Court considers that the finding suffices for the purposes of the present appeal.

[4] On January 17 2007. Mr. and Ms. Chew sued Bombardier in the state of New York.

[5] In May 2007, Hi-Lex, which is based in Michigan, asked the Michigan courts to declare that it does not have the obligation to assume Bombardier's defence in the New York case.

[6] A few days later, Bombardier filed a motion for declaratory judgment in which it asked the Quebec Superior Court to declare that Hi-Lex is bound to take up its defence in the Chew proceedings.

[7] On June 21 2007, Bombardier filed before the Michigan court a motion to dismiss Hi-Lex's proceedings on the basis of *forum non conveniens*. No date of hearing has yet been determined.

[8] On August 3 2007, Hi-Lex filed a Motion to dismiss the Quebec proceedings before the Superior Court, alleging international *lis pendens*. The judgment dismissing that Motion is the one under appeal.

[9] The Quebec proceedings only concern Hi-Lex and Bombardier, and is

independent from the Chew claim in the state of New York, which, however, triggered it.

[10] In addition, the motion for declaratory judgment instituted by Bombardier in the Superior Court of Quebec is a *Wellington* type motion which is quite distinct from the New York Chew proceedings.

[11] As to the Michigan proceedings, the judge of first instance rightly concluded that that they could not be declared enforceable in Quebec under articles 3155 C.c.Q. and 3168 C.c.Q.

[12] In *Wellington*, this Court distinguished between the action in warranty which is an incident of the principal suit and the motion to compel an insurer to defend its insured:

Le but ou l'objectif général de l'appel en garantie est, comme l'a défini notre Cour, de permettre « [...] une solution complète du litige puisque la partie cherche à obtenir que le tiers soit appelé par le même jugement qui la condamne à l'indemniser de la somme qu'elle sera elle-même appelée à verser » (Caisse populaire de St-Casimir c. Therrien dit Arbour, (1992) R.J.Q. 317, à la page 319). L'appel en garantie vise donc essentiellement à permettre à l'assuré d'être indemnisé lorsqu'une condamnation est prononcée contre lui par jugement final. Or ici, il ne s'agit pas pour l'assuré d'opposer à l'assureur un jugement final rendu sur la demande principale, mais plutôt de le forcer, alors qu'il nie couverture, à assumer son obligation de défendre. Le but recherché par l'assuré n'est donc pas le même que celui poursuivi par l'appel en garantie, lequel ne prévoit pour l'assuré que le moyen d'exercer son droit à être indemnisé à la fois du montant auquel il pourrait être condamné et de tous les frais afférents à sa défense, non pas celui d'être défendu.¹

[13] Such motions are frequent in insurance matters. They are in the nature of a motion for declaratory judgment and analogous to the present one.

[14] Hi-Lex is not a party to the principal action instituted by the Chews. It is therefore possible to use the motion for declaratory judgment provided under article 453 C.C.P. without impleading the principal plaintiffs, Mr. and Mrs. Chew, who have no interest in the determination of Hi-Lex's contractual obligations towards Bombardier. The questions in issue are not the same.

[15] Both suits, the New York one and the Quebec one, may therefore proceed independently before two different forums and the judge of first instance, for the reasons she gave, was right in dismissing Hi-Lex's Motion.

¹ *Wellington c. MEC Technologie inc.*, [1999] R.J.Q. 443 (C.A.), paragr. 29.

[16] FOR THESE REASONS, THE COURT

[17] DISMISSES the appeal with costs.

J.J. MICHEL ROBERT, C.J.Q.

ANDRÉ BROSSARD, J.A.

NICOLE DUVAL HESLER, J.A.