

TOWARDS A BETTER CONTROL OF ABUSIVE PROCEEDINGS

On June 4, 2009, the National Assembly adopted *An Act to Amend the Code of Civil Procedure to Prevent Improper Use of the Courts and Promote Freedom of Expression and Citizen Participation in Public Debate*¹. With this Law, the legislator is notably replacing the former articles 75.1 and 75.2 of the *Code of Civil Procedure* (“C.C.P.”), establishing the possibility of obtaining the dismissal of an action if an examination shows that it is frivolous or clearly unfounded, by articles 54.1 through 54.6 C.C.P., which have a much larger range of application.

Indeed, although the initial goal of the legislator was to provide new tools to counter Strategic Lawsuit Against Public Participation (“SLAPP”) lawsuits, these new measures, as adopted, now apply to all types of proceedings.

Essentially, the Courts now have the possibility, at their entire discretion, and at the request of a party or even on its own initiative, to “declare an action or other pleading improper and impose a sanction on the party concerned”². Regarding the notion of “improper”, it has been defined sufficiently large enough to include all proceedings that are clearly unfounded, frivolous or dilatory, or conduct that is vexatious or quarrelsome, excessive, unreasonable, or advanced in bad faith.

An interesting innovation is found in the new article 54.2 C.C.P., whereby a reversal of the burden of proof sends a clear message to the Courts to no longer tolerate the use of the judicial system and proceedings in an abusive manner. Indeed, when a party will have succeeded in summarily establishing that an action or pleading may be an improper use of procedure, as defined above, the burden shall be transferred to the other party to establish that “it is not excessive or unreasonable and is justified in law”.

This being said, we have found nearly forty decisions that apply these new provisions since their adoption in June 2009, and it appears evident that the Courts are still hesitant to give full effect to the text of said articles. Indeed, despite the existence of a reversal of the burden of proof, the majority of the decisions found, in which the Courts were deciding a Motion to Dismiss an Action, considered that the principal of prudence found in the former article 75.1 C.C.P. ought to apply to the new provisions.³

The new provisions of the Code of Civil Procedures also innovate in creating different remedies, apart from the simple dismissal of an action, which can now be applied in cases of improper use of procedures. In fact, article 54.3 C.C.P. notably establishes that

¹ S.Q., 2009, c. 12 (Draft Law no.9)

² Art. 54.1 C.C.P.

³ See notably : *Michalakopoulos v. Lawyers Title Insurance Corporation et al.* (S.Q.), 500-17-038996-074, October 8, 2009, the Honourable Justice Chantal Masse (in appeal); *Centre hospitalier Robert-Giffard v. Gestion Francis Carrier inc.*, AZ-50564721 (S.C.); *9176-1874 Québec inc. (FPG Construction) v. Dion*, JE 2009-1342 (S.C.)

a Court may strike-out a submission, or require that it be amended, and render any other orders that it deems appropriate to ensure the orderly conduct of the proceedings and to obtain a certain equality between the parties.

The most interesting part of this new provision for lawyers and parties is found in the reintegration into Quebec law of a notion which has long since been absent: partial dismissals. We therefore feel it important to underline this return to the past which appears to be completely in sync with the legislators' current preoccupations of reducing the costs associated with an open access to the judicial system and to insure a proper administration of said system.

As an illustration, it is not rare that over-zealous Plaintiffs include in their action, in addition to the damages that they may rightfully have a claim to, an important claim for punitive and exemplary damages, and this, even if there is no legal justification for said damages. In this regard, one will recall that in Quebec law, granting of such damages is only possible in cases where there is a violation of a right protected by the Charter, or if a law establishes specifically such a remedy.⁴

And so, prior to the recent amendments of the Code of Civil Procedures, the Courts had no discretion to summarily strikeout a submission which was seeking such damages, and this, even if the allegations contained in the pleading, or the evidence in the file could not reasonably provide an opening for the granting of punitive or exemplary damages. This same lack of discretion could also be seen in claims having several distinct categories of damages where only certain claims would clearly be time-barred.

This new legislative amendment is more than welcome, and ought to allow practitioners to more adequately limit the debate from the onset of the pleadings, and cease having to consecrate time, efforts and resources on contesting portions of a claim that are clearly destined for failure.

The new article 54.4 C.C.P. essentially copies the old text of article 75.2 C.C.P., although in different terms, and allows the Courts to condemn a party that has acted improperly, to pay damages in reparation for the prejudice suffered by another party, including the fees and extrajudicial costs. This new article 54.4 innovates nonetheless in specifically allowing the granting of punitive damages in cases deemed justifiable.

Finally, when a legal person resorts to improper use of procedure, the directors and officers of said legal person who took part in the decision could be ordered personally to pay damages.⁵

More than just simple modifications of form, upon review of articles 54.1 through 54.6 C.C.P., one notes that the legislator really sought to provide the Courts with better tools to control and sanction all improper use of our judicial system. This being said, only time will tell if the Courts will interpret these new provisions in a large and generous manner,

⁴ As an example, see article 272 of the *Consumer Protection Act*, S.R.Q., c. P-40.1.

⁵ Art. 54.6 C.C.P.

or if they will remain prudent and circumspect, as was the case under the regime of article 75.1 C.C.P.

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