

CANADA
PROVINCE OF QUEBEC
DISTRICT OF MINGAN

SUPERIOR COURT
(Commercial chamber)

No: 650-11-001027-217

PRESIDING: THE HONOURABLE DANIEL DUMAIS, JD 3065

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C.,
1985, C. C-36, OF:

**BIOÉNERGIE AE CÔTE-NORD CANADA
INC.**

Debtor-Plaintiff

-and-

**ENVERGENT TECHNOLOGIES LLC
UOP LLC
A.X.C. CONSTRUCTION INC.**

Respondents-Defendants

-and-

RAYMOND CHABOT INC.

Monitor

NO: (650-17-001215-207)

**BIOÉNERGIE AE CÔTE-NORD CANADA
INC.**

Plaintiff

vs.

ENVERGENT TECHNOLOGIES LLC

-and-

UOP LLC

-and-

HONEYWELL PROCESS SOLUTIONS-

and-

**JIANGSU CHINA NUCLEAR INDUSTRY
LIBERT INC.**

-and-

A.X.C. CONSTRUCTION INC.

-and-

FNX-INNOV INC.

Defendants

**ORIGINATING APPLICATION (Amended)
(Art. 110 and seq. C.C.P.)**

**TO ONE OF THE JUSTICES OF THE SUPERIOR COURT, SITTING IN AND
FOR THE DISTRICT OF MINGAN, PLAINTIFF RESPECTFULLY SUBMITS:**

1. The Plaintiff Bioénergie AE Côte-Nord Canada inc. is a corporation formed to own and operate a biofuel plant in Port-Cartier (the "**Plant**"). Since the introduction of the present Application, the Plaintiff has become the subject of an initial order issued by this Court on May 5, 2021 and renewed thereafter under the *Companies' Creditors Arrangement Act (CCAA)* in the Court docket 650-11-001027-217;
2. In March 2016, the Plaintiff entered into a group of contracts with the Defendant Envergent Technologies LLC ("**Envergent**") for the design, engineering and supply of Units (as defined in the Supply Contract) for a price of \$35,000,000 USD, as it appears from the Amended and Restated Supply Agreement and amendments thereto, **Exhibit P-1**, the Technical Proposal, **Exhibit P-2**, the Guarantee Agreement and amendments thereto, **Exhibit P-3**, and the Second Amended and Restated License Agreement, **Exhibit P-4** (collectively the "**Supply Contract**");
3. The Units were to be the core of the Plant generating liquid fuel from forest feedstock;
4. The Defendant UOP LLC ("**UOP**") performed the design and engineering under the Supply Contract, and was to perform all other professional services for project management and implementation, procurement, quality control and inspection, field operating services, installation support services, start-up and commissioning of the Units;

5. UOP also guaranteed the execution of all of Envergent's obligations under the Supply Contract;
6. The Defendant Honeywell Process Solutions ("**Honeywell**") was to provide the design and engineering services, software and hardware, configuration services, installation and testing of the electronic systems to operate and control the Units, which systems were an integral part of the Units (the "**Control System**");
7. Before entering into the Supply Contract, Envergent, UOP and Honeywell represented to the Plaintiff that they had the expertise, know-how and resources, including approved vendors, to deliver Units performing to the specific requirements set out therein. Envergent, UOP and Honeywell knew at that time that their representations were wrongful;
8. The Defendant Jiangsu China Nuclear Industry Libert Inc. ("**Libert**") manufactured the Units and their related equipment and material. Libert was selected and retained by Envergent and UOP who represented to the Plaintiff that it was one of their approved vendors. Envergent and UOP knew at that time that their representations were wrongful;
9. In May 2016, Bioénergie entered into a contract with the Defendant A.X.C. Construction Inc. ("**AXC**") and AXOR Experts-Conseils Inc., the predecessor of the Defendant FNX-INNOV Inc. ("**FNX**"), for the construction of the Plant, the installation of the Units and their related equipment and material (except the Control System as described above), and the required engineering services for a price of approximately \$53,479,164.52, as it appears from the Design-Build Stipulated Price Contract, **Exhibit P-5** (the "**Design-Build Contract**") and the Service Offers from FNX, **Exhibits P-6 and P-7**;
10. AXOR Experts-Conseils Inc. was amalgamated with FNX in 2019;
11. Before entering into the Design-Build Contract, AXC and FNX represented to the Plaintiff that they had the expertise, know-how and resources, including approved sub-contractors, to deliver the Plant, including the installation of the Units (...);
12. The Plant was to be delivered for start-up and commissioning in January 2018;
13. From May 2016, the Defendants worked to deliver the Plant;
14. Critical information was to be communicated and managed between the Defendants to execute the work in collaboration, including information on equipment and material specifications, building, electrical and other structural requirements, installation instructions, delivery schedules, construction schedules, inspections and approvals, etc.;
15. All of the Defendants were under the obligation towards the Plaintiff to provide precise and accurate information pertaining to their deliverables under each of their respective contracts and the law;

16. All of the Defendants were under the obligation towards the Plaintiff to deliver their goods and services in accordance with the applicable contractual terms and laws, free of defects or errors, with diligence and competence;
17. All of the Defendants were contractually or legally bound to warrant the Plaintiff that the goods manufactured and sold were free of defects, and the services rendered were free of errors;
18. All of the Defendants were contractually or legally bound by an obligation of result towards the Plaintiff to deliver a fully operational Plant or the components thereof within the agreed delays;
19. However, all of the Defendants have failed under their respective obligations to the extent that the Plant was never delivered for start-up and commissioning in January 2018 and is actually still not operating within the requirements of the applicable contractual terms and laws;
20. The Plant is indeed plagued with multiple deficiencies that were timely denounced in writing and made known to Envergent, UOP, Honeywell, AXC and FNX, as more fully appears from the correspondence, **Exhibit P-8** and the Reports, **Exhibit P-9**;
21. The deficiencies are such that the Plant cannot be efficiently operated and is unfit for the use for which it was intended or which so diminish its usefulness that the Plaintiff would never have entered into the contracts or paid so high a price;
22. The deficiencies existed from the time the goods were manufactured and sold, or the services were rendered, and such deficiencies were known or legally deemed to be known by each Defendant at all relevant time;
23. The deficiencies were caused by the inextricable collective fault of the Defendants in the design, engineering, manufacturing, delivery and installation of the equipment and material assembled to build the Plant, including the Units, and in the execution of the related services of quality control, inspection, supervision, information, advisory, assistance and support;
24. The Defendants' failures are at the core and of the essence of their respective contractual and legal obligations towards the Plaintiff;
25. All of the Defendants have shown gross carelessness and reckless indifference in the face of their obligations such that they cannot exclude or limit their liability under the applicable contractual terms;
26. Envergent and UOP have admitted their liability several times, promised to remedy the deficiencies and reiterated their undertaking to commission the Plant but have neglected or refused to fully perform their obligations until ordered by the Court. Their promises and undertakings were given orally to the Plaintiff in Port-Cartier and in Chicago;

27. Honeywell has also admitted its liability several times in Port-Cartier but neglected to timely remedy the deficiencies of the Control System, which deficiencies have aggravated the physical and structural deficiencies of the Units;
28. After renegeing on their undertakings to commission the Plant, Envergent and UOP have blamed AXC for the deficiencies and the delays in the delivery of the Plant;
29. AXC has itself blamed Envergent and UOP for the same deficiencies and delays;
30. In July 2018, AXC and three of its sub-contractors instituted legal proceedings against the Plaintiff and Arbec, Bois d'oeuvre Inc. to claim the payment of work and damages caused by the deficiencies and delays attributed to Envergent and UOP, as appears from a copy of the said legal proceedings, **Exhibit P-10**;
31. The Plaintiff and Arbec, Bois d'oeuvre Inc. have filed a defence, **Exhibit P-11**, the allegations of which are reiterated herein as if recited at length;
32. The Plaintiff and Arbec, Bois d'oeuvre Inc. have impleaded Envergent and UOP in these proceedings to basically be held harmless against the claims, as appears from a copy of the said proceedings, **Exhibit P-12**. The allegations of these impleading proceedings are reiterated herein as if recited at length;
33. On the merits, Envergent and UOP have denied any liability and actually blamed AXC or the Plaintiff for the deficiencies and delays, as appears from their defence, **Exhibit P-13**.
34. Envergent and UOP have also raised that any legal demand from the Plaintiff should be submitted to arbitration under the Amended and Restated Supply Agreement and amendments P-1;
35. In September 2019, this Court decided that the matter was not arbitrable except for a personal claim the Plaintiff may have formed in its impleading proceedings against Envergent and UOP for which jurisdiction shall be determined by an arbitral tribunal, as appears from the Judgment, **Exhibit P-14**;
36. In June 2020, the Court of Appeal of Québec confirmed this Court's decision, as appears from the Appeal Judgment, **Exhibit P-15**;
37. Since this Court's decision, it has become clear that other causes of action must be joined to the said Plaintiff's claim against Envergent and UOP, that third parties to the Amended and Restated Supply Agreement and amendments P-1 must be joined to the demand, i.e. UOP in its capacity as an engineering firm and service provider to the project as well as Honeywell, Libert, AXC and FNX, and that failure to join these necessary third parties would cause injustice to the Plaintiff;

38. Under such circumstances, the present demand is not arbitrable against Envergent, and is excluded from the arbitration clause contained in the Amended and Restated Supply Agreement and amendments P-1;
39. Since this Court's decision, none of the Plaintiff or Envergent or UOP have indeed initiated arbitration proceedings against one another;
40. The fact is that the determination of liability among the Defendants is impossible without joining all of them in the same proceedings before one forum;
41. This Court is already seized of several of the issues raised in the present case as mentioned above and it would be against justice to force the bifurcation of all these intertwined causes of action;
42. The liability of the Defendants is governed by the laws of Québec for the following reasons: (i) as for Envergent, the Supply Contract specifically refers to the Units having to comply with the codes and regulations applicable in the province of Québec; (ii) as for UOP, Honeywell and Libert, the sale was negotiated and made in the province of Québec, the goods were acquired and were to be delivered in the province of Québec, the prejudice was suffered in the province of Québec and it was foreseeable that any prejudice would be suffered by the Plaintiff in that jurisdiction; and (iii) as for AXC and FNX, it is specifically set forth in the Design-Build Contract;
43. This Court has jurisdiction given that the Plant is located in the district of Mingan, the faults, injurious acts or omissions occurred in Québec, the prejudice of the Plaintiff was suffered in Québec, the obligations arising out of the applicable contractual terms and laws were to be performed in Québec, including the pre-contractual duty to inform, and some of the Defendants have their domicile in Québec. Moreover, the Court sitting under the CCAA has determined that it has jurisdiction over the present application pursuant to an order rendered on November 19, 2021 in the Court docket 650-11-001027-217;
44. As mentioned above, the arbitration clause in the Amended and Restated Supply Agreement and amendments P-1 does not apply given the exceptions set forth therein. The arbitration clause in the Design-Build Contract is not binding and, in any event, has been waived by AXC when filing legal proceedings before this Court against the Plaintiff;
45. The prejudice suffered by the Plaintiff (...) consists of the operating costs in the amount of \$16,132,157 (as of October 31, 2021) incurred from the date the Plant was to begin operation (January 1, 2018) to the date when the Plant is delivered free of deficiencies and ready for production, and, in the case of Envergent only, a contractual penalty of \$9,100,000 for late delivery of the Units and a contractual penalty of \$9,100,000 for failing to meet the performance specifications within the delays set out in the Guarantee Agreement, the whole as appears from the summary of costs, Exhibit P-16;

46. The Plaintiff also asks that the invoices from Envergent and UOP 200322354 dated June 29, 2018, 200326620 dated October 19, 2018 and 200326621 dated October 19, 2018, Exhibit P-13, be canceled for they pertain to services that were to be included in the Supply Contract or resulted from Envergent and UOP's own contractual breach and negligence;
- 46.1 Under the CCAA proceedings, the Court issued an order on May 19, 2021 against Envergent for specific performance of work required to remedy the deficiencies and deliver the Units for start-up and commissioning. As of this date, the Units have not been delivered yet;
- 46.2 Depending on the outcome of Envergent's work under this order, the specific performance originally sought under the present Application may be varied;
47. The present Application is well founded in fact and in law.

FOR THESE REASONS, MAY IT PLEASE THE COURT TO:

- A. GRANT** the present Originating Application;
- B. CONDEMN** the Defendants solidarily (jointly and severally) to pay the Plaintiff a sum of \$16,132,157, to be perfected, plus legal interests and the additional indemnity provided by the law from the date of summons;
- C. ORDER** the Defendants solidarily (jointly and severally) to remedy all deficiencies of the Plant and perform all work to deliver the said Plant for start-up and commissioning in accordance with their respective contracts within 120 days from the judgment to be rendered, save and except any work that may have been already performed by the Defendants Envergent Technologies LLC and UOP LLC pursuant to the order from this Court under the CCAA proceedings;
- D. CONDEMN** the Defendants Envergent Technologies LLC and UOP LLC solidarily (jointly and severally) to pay the Plaintiff a sum of \$18,200,000, plus legal interests **and** the additional indemnity provided by the law from the date of summons, minus the damages for late delivery included in the condemnation (...) under Conclusion B above;
- E. SUBSIDIARLY CANCEL** the Supply Contract and **CONDEMN** the Defendants Envergent Technologies LLC and UOP LLC solidarily (jointly and severally) to reimburse the price paid thereunder, plus the sum of \$16,132,157, plus legal interests and the additional indemnity provided by the law from the date of summons;
- F. IF NEED BE, CANCEL** Articles 10.5.2, 10.6, 10.8, 10.9, 10.10 and 10.11 of the Amended and Restated Supply Agreement and amendments P-1;

- G. CANCEL** the invoices from the Defendants Envergent and UOP 200322354 dated June 29, 2018, 200326620 dated October 19, 2018 and 200326621 dated October 19, 2018, Exhibit P-13;
- G1. SUBSIDIARLY SET OFF** any sum owed by the Plaintiff to Envergent with any monetary condemnation under the present Application;
- H. THE WHOLE** with legal costs, including expert fees and disbursements.

Montréal, December 3, 2021



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SUMMONS
(articles 145 and following C.C.P.)

Take notice that the plaintiff has filed this originating application in the office of Superior Court in the judicial district of Mingan.

You must answer the application in writing, personally or through a lawyer, at the courthouse of Sept-Îles situated at 425, boulevard Laure, Sept-Îles, Québec, G4R 1X6, within 15 days of service of the application or, if you have no domicile, residence or establishment in Québec, within 30 days. The answer must be notified to the Plaintiff's lawyer or, if the Plaintiff is not represented, to the Plaintiff.

If you fail to answer within the time limit of 15 or 30 days, as applicable, a default judgment may be rendered against you without further notice and you may, according to the circumstances, be required to pay the legal costs.

In your answer, you must state your intention to:

- negotiate a settlement ;
- propose mediation to resolve the dispute ;
- defend the application and, in the cases required by the Code, cooperate with the Plaintiff in preparing the case protocol that is to govern the conduct of the proceedings. The protocol must be filed with the court office in the district specified above within 45 days after service of the summons or, in family matters or if you have no domicile, residence or establishment in Québec, within 3 months after service;
- propose a settlement conference.

The answer to the summons must include your contact information and, if you are represented by a lawyer, the lawyer's name and contact information.

You may ask the court to refer the originating application to the district of your domicile or residence, or of your elected domicile or the district designated by an agreement with the Plaintiff.

If the application pertains to an employment contract, consumer contract or insurance contract, or to the exercise of a hypothecary right on an immovable serving as your main residence, and if you are the employee, consumer, insured person, beneficiary of the insurance contract or hypothecary debtor, you may ask for a referral to the district of your domicile or residence or the district where the immovable is situated or the loss occurred. The request must be filed with the special clerk of the district of territorial

jurisdiction after it has been notified to the other parties and to the office of the court already seized of the originating application.

If you qualify to act as a plaintiff under the rules governing the recovery of small claims, you may also contact the clerk of the court to request that the application be processed according to those rules. If you make this request, the plaintiff's legal costs will not exceed those prescribed for the recovery of small claims.

Within 20 days after the case protocol mentioned above is filed, the court may call you to a case management conference to ensure the orderly progress of the proceeding. Failing this, the protocol is presumed to be accepted.

In support of the originating application, Plaintiff intends to use the following exhibits :

Exhibit P-1	Amended and Restated Supply Agreement and amendments
Exhibit P-2	Technical Proposal
Exhibit P-3	Guarantee Agreement and amendments
Exhibit P-4	Second Amended and Restated License Agreement
Exhibit P-5	Design-Build Stipulated Price Contract
Exhibit P-6	Service Offer from FNX
Exhibit P-7	Service Offer from FNX
Exhibit P-8	Correspondence
Exhibit P-9	Reports
Exhibit P-10	Legal Proceedings of Contractors and Subcontractors against Bioénergie AE Côte-Nord Canada inc. and Arbec, Bois d'oeuvre inc.
Exhibit P-11	Defence of Bioénergie AE Côte-Nord Canada inc. and Arbec, Bois d'oeuvre inc.
Exhibit P-12	Forced intervention of Bioénergie AE Côte-Nord Canada inc. and Arbec, Bois d'oeuvre inc.
Exhibit P-13	Defence of Envergent and UOP
Exhibit P-14	Judgment of the Honourable Daniel Dumais dated September 30, 2019

Exhibit P-15 Judgment of the Court of Appeal dated June 19, 2020
Exhibit P-16 Summary of Costs

These exhibits are available upon request.

If the application is an application in the course of a proceeding or an application under Books III, V, excepting an application in family matters mentioned in article 409, or VI of the Code, the establishment of a case protocol is not required; However, the application must be accompanied by a notice stating the date and time it is to be presented.

GOVERN YOURSELVES ACCORDINGLY.

Montréal, December 3, 2021



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N°	650-17-001215-207 (650-11-001027-217)
COURT	SUPERIOR (Civil Division)
DISTRICT	MINGAN

BIOÉNERGIE AE CÔTE-NORD CANADA INC.

Plaintiff

v.

ENVERGENT TECHNOLOGIES LLC

et al.

Defendants

**ORIGINATING APPLICATION (Amended)
(Art. 110 and seq. C.C.P.)**

ORIGINAL

Ref.: Mtre Yves Robillard
Our File : 0128346.0067

BP0363



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