IN FACT AND IN LAW

Class Actions

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Watering down class actions?
Not really...

By Guy Lemay, Jean Saint-Onge and Jean-Philippe Lincourt

On October 18th, 2006, the Quebec Court of Appeal rendered a much-awaited decision regarding class actions. In Bouchard v. Agropur Coopérative et al,[1] *the province's highest court was called upon to rule on the issue of whether, when there is a multiplicity of defendants, it is necessary that a legal relationship exist between the petitioner applying for authorization to bring a class action and each defendant.*

Earlier this year, in this same publication[2]*, we expressed our concerns about the drift in the law that might result from the jurisprudential current according to which there would be no obstacle to class action suits alleging contractual liability against entities with which the petitioner has never contracted, solely because the suit is a class action.*

Recently, in the Bouchard case, by affirming ***the necessity of a legal relationship between the petitioner and all of the entities he wishes to sue****, the Court of Appeal finally dispelled the uncertainty prevailing in Quebec on this issue.*

The facts

Mr. Bouchard, as a consumer, wanted to institute a class action against several dairy companies and against the Attorney General of Quebec. He alleged that the milk marketed in Quebec by these milk- processing businesses sometimes contains less butterfat than the percentage indicated on the containers in which it is offered to consumers.

According to Mr. Bouchard, this situation, perpetuated by all the respondent dairy companies, which exercise a virtual monopoly in his opinion, contravenes the regulatory standards. The members of the proposed class thus would suffer damages equal to the difference in the real value of the milk, which would vary to the same extent as the shortages in butterfat content.

The damages were quantified at $89,078,000, representing $44,539,000 in compensatory damages and an equal amount in punitive or exemplary damages.

It should be noted that the petitioner sued twelve dairy companies but it was proved within the context of the motion for authorization that he only purchased milk processed by one of the respondents to the motion. Hence the debate on his interest in suing the other eleven.

The first judgement

Justice Viens, the judge who heard the motion for authorization to institute the class action, dismissed it on the following grounds:

- The petitioner does not have sufficient legal interest to act on behalf of purchasers of dairy products not processed by the respondent Nutrinor Inc. Indeed, Mr. Bouchard indicated in his examination that he consumed only milk processed by that respondent;
- Nothing in the evidence submitted allows the court to attribute the shortage of butterfat in certain dairy products to a fault, an illegality or bad faith on the part of the respondents, since the variations result only from the degree of precision of the measuring tools used by them;
- The facts alleged cannot serve as a basis for a conclusion of enrichment of the dairy companies and a corresponding impoverishment of consumers;

[1] C.A. (Mtl) 200-09-005067-050 (October 18, 2006) (Gendreau, Mailhot, Pelletier).

[2] See *Are the Courts Distorting the Nature of Class Actions?*, In Fact and in Law, January 2006, by Guy Lemay, Jean Saint-Onge and Catherine Lamarre-Dumas.

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BARRISTERS AND SOLICITORS

- Compensation does not make sense in view of the extremely small amounts at stake for each consumer; the collective reparation sought, in this instance a credit in favour of consumers, is not a solution in this case because consumers buy milk from retailers, not from the respondent companies.

The Court of Appeal's judgement

The Court of Appeal, in a decision authored by Justice Pelletier, concluded on different grounds that *"the motion does not satisfy the requirements of paragraphs (a), (b) and (d) of article 1003 C.C.P., with regard to all of the respondent processing companies"* [3]. However, although it would have been sufficient for the Court to limit itself to that conclusion in order to dismiss the appeal, it nonetheless tackled the thorny issue of multiple defendants, in the hope of ending the debate once and for all.

The Court of Appeal expressed its view on this crucial question in the following terms:

> **"The class action regime established by the legislature is one of private law. The concept of standing must therefore be considered in this context and not that of public law. A person who has lost nothing does not have the required standing.**
>
> **It must be borne in mind that before the authorization judgment, "the action does not exist, at least as a class action". Thus, the petitioner's individual recourse alone must fulfill the conditions of article 1003 C.C.P., including the condition of appearance of right, because all the rest is still only hypothetical.**
>
> **In cases of class actions involving multiple respondents, our Court has implicitly confirmed the necessity for the petitioner to show a cause of action against each of them. Moreover, this jurisprudence follows the same direction established in Ontario and the United States. It is appropriate, in my opinion, to dispel any ambiguity on this subject and clearly reaffirm the principle of the necessity for a representative to establish a cause of action against each of the parties contemplated by the action.**
>
> **[...]**
>
> **In conclusion, I believe that the intervenor is right to affirm that the appellant cannot, as representative, bring a class action against parties with whom he has no legal relationship."** [4] [references omitted] (our underlining) [TRANSLATION]

In our view, this puts an end to the era when several companies involved in the same sector of activity could be sued together in a class action by a customer who had only transacted with one of them.

A return to examination at the authorization stage?

It is also interesting to note Justice Pelletier's comments regarding the relevance and usefulness of examinations conducted prior to the hearing on the motion for authorization.

In the *Bouchard* case, these examinations took place due to the application of the old rules of procedure, which required the petitioner to produce a detailed affidavit in support of his motion for authorization. This obligation to produce an affidavit had the direct consequence of allowing an examination of the petitioner on his affidavit. The obligation to produce an affidavit was eliminated by the civil procedure reform in 2002, thereby taking away the possibility of examining the petitioner as of right. Such an examination is now permitted only if the court specifically authorizes it pursuant to a motion under article 1002 C.P.C. for production of *appropriate* evidence.

Now that the Court of Appeal has upheld the constitutional validity of this new legislative regime [5], Justice Pelletier is clearly implying that the reform might have been interpreted too restrictively by the courts, thus depriving the parties - and the court - of the practical benefit of conducting examinations before the hearing on the motion for authorization. It is relevant to quote Justice Pelletier's remarks in this regard:

> **"In passing, it should be said that the matter under study illustrates the importance that an examination on the evidence can take on at the motion for authorization stage. In this instance, it allowed the addition of details that proved useful in examining the conditions established by law. In the current state of the law, now that the legislature has eliminated the obligation for the petitioner to provide a sworn declaration, judges will often find it in their interest to give favourable consideration to the motions presented to them to conduct an examination or examinations."** [6] [TRANSLATION]

So, it will be appropriate in the months ahead to observe how much attention the Superior Court will pay to this recommendation made by the Court of Appeal regarding requests made through these motions for presentation of appropriate evidence.

3 *Supra* note 1, p. 20, para. 100.

4 *Supra* note 1, p. 21-22, para. 108-109 and 112.

5 *Pharmascience inc.* v. *Option Consommateurs*, [2005] QCCA 437.

6 *Supra* note 1, p. 8, para. 45.

Inclusion of a fifth authorization criterion?

Finally, let's examine this other important aspect of the *Bouchard* decision, which undoubtedly will have a significant influence on Quebec class action law. In paragraphs 39 and following of the decision, Justice Pelletier cites, with approval, a well-known judgement of the Supreme Court of Canada: *Western Canadian Shopping Centres*[7]. The passage quoted refers to the exercise of discretion by the judge hearing a motion for authorization, which allows him to refuse access to the class action regime despite the presence of the basic conditions. This Supreme Court decision, originating from Alberta, a province in which no legislation governing class actions existed at the time, aroused a debate on its applicability in Quebec. Traditionally, the Quebec courts consider that if the criteria of article 1003 C.C.P. are all fulfilled, the court no longer has the option to refuse authorization to bring the class action.

In our opinion, the *Bouchard* decision deals a fresh hand in that the Court of Appeal is now telling us that there is judicial discretion, or *room for manoeuvre*, in Justice Pelletier's terms, in analyzing the criteria of 1003 C.C.P. Let us quote the relevant passages regarding this aspect:

> **Here the legislature has established signposts, and it is at the stage of examination of each condition, rather that at the time of the final decision whether or not it is appropriate to grant permission, that it has chosen to allow the judge the room for manoeuvre necessary for effective screening.**
>
> **[...]**
>
> **As we can see, the language used in article 1003 C.C.P. calls for the exercise of judicial discretion in many regards. This deserves deference and does not give rise to intervention by our Court unless it is shown to be manifestly unfounded or the underlying analysis is invalidated by an error of law.**
>
> **The existence of this room for manoeuvre is also necessary when one considers that the authorization stage serves, among other purposes, the putting aside of frivolous or simply inappropriate actions.**[8] [TRANSLATION]

It is also interesting to note that the Court of Appeal refers to the rule of proportionality, codified in article 4.2 C.C.P., as the criterion justifying the exercise of this discretion by the court in considering the criteria of 1003 C.C.P.

Thus, it will be particularly interesting to follow the developments in this matter and see whether the courts will perceive the inclusion of a *fifth* discretionary criterion of authorization, the consideration of the rule of proportionality, as exists in the class action legislation of several other Canadian provinces.

Conclusion

In our opinion, the Court of Appeal has set a serious course correction relating to how motions for authorization to bring class actions will be treated from now on in Quebec.

In the first place, the debate about *multiplicity of defendants* seems permanently closed, in that the *Bouchard* decision formally prohibits this way of proceeding in the future. Having a restrictive effect on the number of respondents and thereby simplifying and shortening the debates, this decision will have the advantage of accelerating the hearing process for motions for authorization.

Secondly, businesses welcome Justice Pelletier's remarks about the advantages of conducting examinations at the authorization stage because they see the pendulum swinging back in terms of the range of measures at their disposal to contest a motion for authorization to institute a class action.

Finally, the inclusion of the rule of proportionality at the authorization stage, coupled with the Court's remarks regarding the existence of judicial discretion in the consideration of the authorization criteria, certainly represents progress in relation to the traditional perception of this crucial stage.

All that remains is to follow closely what the Superior Court judges will make of the Court of Appeal's new teachings and the effect that the *Bouchard* decision will have on class action stakeholders in Quebec.

N.B. *Lavery, de Billy* represented Parmalat Dairy & Bakery Inc. one of the main defendants in these proceedings.

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[7] *Western Canadian Shopping Centres* v. *Dutton*, [2001] 2 S.C.R. 534.

[8] *Supra* note 1, p. 8, paras. 39-44.

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