LAVERY, DE BILLY
BARRISTERS AND SOLICITORS

IN FACT AND IN LAW
EXPRESS

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LAVERY, DE BILLY WINS TWO CLASS ACTION LAWSUITS

We are pleased to advise you of recent Quebec Superior Court judgments rendered in favour of our clients. Two motions for authorization to institute a class action were recently denied by the Court, which should be a matter of interest to decision-makers and lawyers dealing with issues involving competition, environment and natural resources as well as class actions generally.

Class actions and competition law: prejudice must be shown

To be authorized to institute a class action based on section 36(1) of the *Competition Act*[1], the petitioner must show not only that there is a *prima facie* colour of right, but also that he and the members of the class have suffered a loss as a result of the alleged wrongdoing.

This is what the Honourable Hélène Poulin, J. of the Quebec Superior Court held in a highly anticipated judgment handed down on February 12, 2007.

In that action, the Petitioner, André Harmegnies, alleged that **Toyota Canada Inc.** and 37 dealers from the Montreal region conspired to unduly restrict competition and unreasonably increase the price of the automobiles they sold. He sought authorization from the Court to institute a class action on behalf of any person[2] who in Québec, purchased and/or leased one or more automobiles pursuant to the Access Toyota Program between April 2002 and April 2003.

Of the four conditions for authorizing a class action set out in the Code of Civil Procedure, only those relating to the colour of right[3] and the existence of common issues[4] were contested by the Respondents.

With respect to the colour of right, Justice Poulin held that, although the Petitioner had *prima facie* shown that the Respondents had infringed certain provisions of the *Competition Act*, he had failed in his attempt to show, also *prima facie*, the existence of prejudice for himself and the consumers he wished to represent. On this issue, the Judge said that [Translation] "it does not suffice to identify a fault and to then allege that damages arise therefrom to satisfy the conditions for authorization of a class action".

Finally, with respect to the existence of common issues to all class members, the Court was of the opinion that, if authorization were granted, the situation of each of the 37,000 class members would have to be examined and evaluated on a case-by-case basis, including but not limited to each person's ability to negotiate a better price than what was actually paid, as well as the effect of the inclusion in the price of accessories, warranties, options, services offered by the dealer and a series of other subjective factors which tended to individualize each class member's situation. In the words of the Court, this situation would surely *degenerate into a multitude of mini-trials*.

This case clearly illustrates the inherent difficulties that arise when a class action which requires the Court to deal with a series of fundamentally subjective questions made up of extremely diversified elements. With respect to the question of the common issues, the reasons of Justice Poulin are similar to those adopted in Ontario in the case of *Panasonic*[5] which also involved a class action under the *Competition Act*.

It is the first judgment in Quebec that has specifically discussed this issue in the context of a class action.

*In this case, **Guy Lemay** and **Jean Saint-Onge**, partners at Lavery, de Billy, represented the interests of Respondent Toyota Canada as well as the 37 Respondent dealers.*

Another class action win

Lavery, de Billy also recently won another class action case. After four days of hearing on the Motion for Authorization, Quebec Superior Court judge Pierre Isabelle refused to authorize a class action to be instituted[6] against our clients **James MacLaren Industries Inc., Brascan Power Corporation** and **Nexfor Inc.**

This class action was brought on behalf of residents along the Rivière du Lièvre affected by the level of water of the Rapides des Cèdres storage dam in the Outaouais region.

The Court confirmed that our clients were neither the owners nor the managers of the storage dam, as their role was limited to using hydraulic power from the river to produce electricity. It therefore held that the facts alleged against our clients in the Motion for Authorization did not appear to justify the conclusions sought.

However, the institution of the class action was authorized against the Attorney General of Quebec, as owner/manager of the storage dam, but was also denied against the Attorney General of Canada.

***Michel Yergeau** and **Jean Saint-Onge** were retained and were assisted by **Jean-Philippe Lincourt** in the preparation of the case as well as at trial.*

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[1] *Competition Act*, R.S.C., c. C-34 (See in particular the offences described in sections 45, 52 and 61 of the *Act*.)

[2] The exact definition of the class as described in the motion for authorization was the following:[Translation] "Any legal person established for a private interest, any partnership or association which, at any time between April 1, 2002 and April 1, 2003, had under its management or control no more than fifty (50) persons bound to a contract of employment, as well as any natural person, who purchased and/or leased one or more automobiles pursuant to the Access Toyota Program."

[3] 1003 (b) C.C.P.

[4] 1003 (a) C.C.P.

[5] *Price* v. *Panasonic Inc.*, [2002] O.J. No. 2362 (Shaughnessey, J.)

[6] *Association des résidents riverains de la lièvre inc. et al* v. *Procureur général du Canada et al*, S.C. Labelle, 560-06-000001-032 (December 28, 2006) (Pierre Isabelle, J.S.C.)