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CLASS ACTION AND CONSUMER LAW: THE COURT OF APPEAL EXCLUDES NON-CONSUMERS FROM THE APPROVED CLASS IN AN AUTHORIZED CLASS ACTION

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CONSUMER PROTECTION LAW AND THE *CONSUMER PROTECTION ACT* **("CPA")** APPLY FIRST AND FOREMOST TO ECONOMIC ACTIVITIES IN THE RETAIL SECTOR. EXPENDITURES ASSOCIATED WITH THIS SECTOR REPRESENT MORE THAN SIXTY-FIVE PERCENT OF ALL EXPENDITURES IN THE PROVINCE. IT IS ALSO AN AREA OF THE LAW WHICH FREQUENTLY COMES BEFORE THE COURTS. IN MANY CASES, THESE DISPUTES ARISE IN THE CONTEXT OF A CLASS ACTION. MANY BELIEVE THAT CLASS ACTIONS ARE WELL-SUITED AS A PROCEDURAL VEHICLE FOR DEALING WITH SOME OF THE PROVISIONS OF THE *CPA*, SUCH AS, FOR EXAMPLE, THE PROVISIONS RELATING TO PROHIBITED COMMERCIAL PRACTICES.

In the past few months, several judgments have been rendered in this area, shedding a welcome light on some of the merchants' obligations under the *CPA*. The subjects dealt with in these judgments are in the news and relate to products and services widely offered by merchants.

We will be commenting on some of these judgments in a forthcoming series of bulletins. This bulletin discusses a recent judgment of the Court of Appeal dealing with compulsory arbitration clauses.

COMPULSORY ARBITRATION CLAUSES

In the case of *Comtois* v. *Telus Mobilité*, the motion for authorization to institute a class action was granted by the Court of Appeal on March 29, 2010. The authorization allowed the institution of a class action on behalf of clients of Telus who were billed for roaming charges for calls made or received in Quebec after April 24, 2004.

TELUS' MOTION

By way of a motion during the proceeding, Telus asked the Superior Court to change the class for which authorization was granted. In particular, Telus asked that the corporate customers, i.e. non-consumers, be excluded from this class on the grounds that the contracts signed with them contained a compulsory arbitration clause. Telus argued that this clause was valid because it was not covered by the prohibition contained in section 11.1 of the *CPA*, since contracts concluded with corporations are not covered by the *CPA*, and the Superior Court had no jurisdiction to hear the action in relation to these legal persons.

Justice Rochon of the Court of Appeal had written the following regarding the compulsory arbitration clause contained in the contract of the applicant who was seeking authorization:

> [Translation] [54] This contractual provision, which has been unenforceable against consumers since April 1, 2007, is allegedly still enforceable against legal persons.
> I certainly may agree, but I am unable to rule on this issue due to the state of the record. There is no evidence in the file that the respondent has given notice to refer a dispute with a legal person to arbitration. Thus, at this stage, no party has asked to refer the file to arbitration. Where no formal request has been made, the court cannot do so on its own initiative.

THE JUDGMENT AT FIRST INSTANCE

By judgment rendered on November 3, 2010, Justice Mark G. Peacock of the Superior Court refused to grant the application to amend the class for two reasons: (1) Telus had not given notice of arbitration to its corporate customers who were members of the class, so that the principle of the economy of resources laid down in article 4.2 of the *Code of Civil Procedure* ***("CCP")*** applied in favour of resolving all the claims in a single proceeding; and (2) the contracts included a clause of joint and several liability which provided that the natural persons using the telephones in question were jointly and severally liable, with the corporate customers, for the obligations of the latter. As a result, the corporations' obligations were inextricably linked to those of the users. Justice Peacock held that it would be contrary to the interests of justice for the courts to rule on the users' claims while an arbitration tribunal decides the corporations' claims. On December 21, 2010, leave to appeal the judgment of Justice Peacock was granted by Justice Marie-France Bich of the Court of Appeal, and the appeal was heard on November 9, 2011 by Justices Pierre Dalphond, Nicolas Kasirer and Guy Gagnon of the Court of Appeal.

THE COURT OF APPEAL'S DECISION

Justice Pierre Dalphond, writing for the Court of Appeal, rendered judgment on January 27, 2012. He identified the issues as follows: (1) did Telus have to prove the existence of new facts to succeed in its application to amend the class? (2) was it necessary for a notice of arbitration to have been sent to the corporate customers to exclude them from the class? (3) did the judge at first instance err in relying on article 4.2 *CCP* to refuse the amendment? (4) did the judge at first instance err in his interpretation of the joint and several liability clause? and (5) was the arbitration clause contained in Telus's contract clearly abusive?

On the first issue, Justice Dalphond distinguished the case before him from the decision of the Court of Appeal in the case of *Syndicat des employés de l'Hôpital St-Ferdinand* in which it held that an application to amend a class must be supported by new facts, pursuant to article 1022 *CCP*. However, in the present case, although the application by Telus referred to article 1022 *CCP*, it was in fact based on article 940.1 *CCP*, since it asked the Court to decline jurisdiction and refer the parties to arbitration. It dealt primarily with a jurisdictional issue.

On the second issue, Justice Dalphond held that it was not necessary for an arbitration notice to have been sent for the Superior Court to decline jurisdiction. The courts have no power to hear a claim where there is a valid and enforceable arbitration clause between the parties. In such a case, the Superior Court cannot decide the rights of a person in the context of a class action any more so than it can in the context of an individual action.

Justice Dalphond noted that, in Quebec, where the contract governing the parties' relationship contains an arbitration clause, the only competent forum to hear a dispute governed by this clause is the arbitration tribunal. The courts of law can acquire jurisdiction only when the parties agree to waive the application of the arbitration clause. Thus, even in the absence of an arbitration notice, the Superior Court must decline jurisdiction in respect of the members who are linked to Telus by a valid arbitration clause. Furthermore, Justice Dalphond added that he questioned why a party would be forced to give notice of arbitration where he considers that there is no dispute with his co-contracting party?

He concluded that the law cannot lead to such an absurd result. It is true, in the context of the exercise of an action to assert a personal right, that the courts have never required a defendant to give notice of arbitration in order to grant a request to refer a file to arbitration. Nor does the law provide for such a requirement.

Regarding the application of article 4.2 *CCP*, Justice Dalphond noted that, in the case of *Marcotte* v. *Ville de Longueuil*, the Supreme Court determined that this provision does not create substantive law and is only to be used as a principle for guiding the courts with respect to case management. To use article 4.2 *CCP* to disregard a legal principle, such as that contained in article 2638 of the *Civil Code of Québec* regarding a jurisdictional issue, is an error in law. The result is that article 4.2 *CCP* only applies if the court has jurisdiction to hear the dispute.

With respect to the interpretation of the joint and several liability clause contained in Telus's contracts, Justice Dalphond found that Justice Peacock had erred in using the criterion of convenience to refuse to dissociate the remedies of the consumers from the remedies of the corporate customers. To thereby refuse to apply a clear and valid arbitration clause is an error in law.

Finally, with respect to the validity, *per se*, of the arbitration clause, firstly, Justice Dalphond noted that the *CPA* did not apply to Telus's corporate customers, as this was not a consumer contract. Regarding the allegedly abusive nature of the arbitration clause on the grounds that the clause contained a waiver of the right to participate in a potential class action, Justice Dalphond noted that the arbitration tribunal has the primary jurisdiction to decide this issue, as the Supreme Court has held on numerous occasions.

CONCLUSION

This decision of the Court of Appeal highlights the fact that there are two types of customers that are quite distinct from each other using the services and products of cellphone suppliers. This decision raises, but does not clearly address, the following issue: under what circumstances is a cellphone contract a consumer contract as opposed to a commercial contract? Where it is a commercial contract, the new provisions of the *CPA* on contracts involving sequential performance for a service provided at a distance would not apply.

This raises the further issue: when a cellphone is used exclusively (or to a large extent) for business purposes (or, in the terms of the *Civil Code of Québec*, for the operation of an enterprise), are the terms of use of the service governed by the provisions of the *CPA*? The answer to this question must lie in the definition of consumer contained in section 1(e) of the *CPA*: a consumer means *"a natural person, except a merchant who obtains goods or services for the purposes of his business."* Legal persons are therefore excluded ipso facto. But what about natural persons who use cellphone services for their business? On the face of it, it seems that a contract for a cellphone used for the operation of a business would not be a consumer contract and that, in such a case, the conditions for the use of the service and the terms governing the acquisition or rental of the phone are quite possibly not subject to the *CPA*. Thus, for these types of customers, the prohibitions against a fixed term, the stipulations dealing with the termination of the contract, the applicable indemnities, and the other specific terms contained in the *CPA* would have no effect.

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