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REFORM OF THE QUEBEC CODE OF CIVIL PROCEDURE – THE NEW CLASS ACTION

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ON FEBRUARY 20, 2014, THE QUEBEC NATIONAL ASSEMBLY PASSED BILL 28, *AN ACT TO ESTABLISH THE NEW CODE OF CIVIL PROCEDURE*.

This is a watershed moment in a process that began in 2003 and was the subject of a review by the Minister of Justice in 2006. Notably, promoting cooperation by the parties on the conduct of proceedings and increasing reliance on case management conferences are meant to improve access to justice.

In a brief filed in 2011[1], the Quebec Bar underscored that high costs and long delays constituted significant barriers to justice in many cases.

It goes without saying that class actions constitute a preferred measure for accessing justice and an effective way to enforce one's rights, particularly for small claims, as they are both effective and efficient.

In this new interation of the *Code of Civil Procedure* (C.C.P.), the *Special rules for class actions* are found in Book VI, title III, articles 571 to 604. They will replace current articles 999 through 1051 C.C.P.

Here is an overview.

[1] Brief of the Quebec Bar on the Draft Bill instituting the new *Code of Civil Procedure*.

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THE CLASS ACTION (ARTICLE 571 C.C.P.)

Looking to the English moniker, the legislator has opted for the name "*action collective*". The Bar had suggested that it would be better to retain the current notion of "*recours collectif*" because it is known to the public and will yield more results in web searches. We share this opinion and are also of the view that keeping the name would have ensured consistency, as it is very familiar to both the public and practitioners and has been in use since 1978.

CLASS MEMBERS: THE "NO MORE THAN 50 EMPLOYEES" RULE IS GONE

Among the significant new features, the new article 571 C.C.P. does away with the condition found in article 999 C.C.P. whereunder a legal person established for a private interest, partnership or association may only be a member of a class if at all times during the 12-month period preceding the motion for authorization, it had no more than 50 employees.

> " 571. A class action is a procedural means enabling a person who is a member of a class of persons to sue, without a mandate, on behalf of all the members of the class and to represent the class.
>
> In addition to natural persons, legal persons established for a private interest, partnerships and associations or other groups not endowed with juridical personality may be members of the class.
>
> A legal person established for a private interest, a partnership or an association or another group not endowed with juridical personality may, even without being a member of a class, ask to represent the class if the director, partner or member designated by that entity is a member of the class on behalf of which the entity is seeking to institute a class action, and the designee's interest is related to the purposes for which the entity was constituted."

Quebec is currently the only Canadian jurisdiction which prevents businesses with more than 50 employees from being part of a class action, thereby depriving them of the opportunity to exercise their rights in this way. This is unfortunate, particularly in respect of claims based on section 36 of the *Competition Act* alleging anti-competitive practices or in the area of securities class actions. In the past, since they were barred from instituting class actions, some small and medium-sized businesses and cooperatives had to choose between filing their own proceedings or joining a class action outside Quebec.

The new Code will allow a legal person established for a private interest, a partnership or an association to be a class representative on the sole condition that it be a member of the class. In addition, even if it isn't a class member, it will be allowed to act as a representative if one of its directors, partners or a member it designates is a class member and the designee's interest is related to the purposes for which the legal person, partnership or association was constituted. This is how a consumer advocate such as Option Consommateur can bring a class action to enforce the *Consumer Protection Act*. All it needs is a designated person who states his or her personal cause of action against the respondent, as article 1048 C.C.P. currently requires.

MULTI-JURISDICTIONAL CLASS ACTIONS (ARTICLE 577 C.P.C.)

Another new feature: the legislator deemed it useful to make rules for multi-jurisdictional class actions, which involve an often complex assortment of overlapping claims that are sometimes concurrent and, on other occasions, filed by the same law firm in more than one Canadian jurisdiction. They often involve the same parties, cause and object, which can lead to a situation of international *lis pendens*, not to mention the risk of contradictory judgments.

> " 577. The court cannot refuse to authorize a class action on the sole grounds that the class members are part of a multi-jurisdictional class action already under way outside Québec.
>
> If asked to decline jurisdiction, to stay an application for authorization to institute a class action or to stay a class action, the court is required to have regard for the protection of the rights and interests of Québec residents.
>
> If a multi-jurisdictional class action has been instituted outside Québec, the court, in order to protect the rights and interests of class members resident in Québec, may disallow the discontinuance of an application for authorization, or authorize another plaintiff or representative plaintiff to institute a class action involving the same subject matter and the same class if it is convinced that the class members' interests would thus be better served."

In principle, a Quebec court cannot deny an application for a class action for the sole reason that members of the class are involved in a class action pending outside Quebec. That is consistent with the approach generally taken by Quebec courts.

The legislator now sets out criteria the court must take into account prior to making a decision, thus linking up with articles 3135 and 3137 of the *Civil Code of Québec* (C.C.Q.), which set out the private international law rules respecting jurisdiction and *lis pendens*.

In addition, the court is required to take into consideration the protection of the rights and interests of Quebec residents if and when it is asked to decline jurisdiction or suspend a motion for authorization to institute a class action in Quebec. This new requirement of article 577 C.C.P. is intended to further circumscribe the discretion of the judge dealing with a motion to stay.

It is apparent that the legislator wishes to favour proximity justice by causing a judge from Quebec to rule on the rights of class members who are Quebec residents, all the more so when such rights involve the application of public interest rules in fields such as insurance law, labour law and consumer law. In fact, the legislator wants to avoid a situation where a judge from another jurisdiction would rule on the rights of Quebec residents subject to such legislation and grouped in a subclass, which may be the case if a Quebec class action were stayed in favour of proceedings conducted elsewhere in Canada.

Judges of the Quebec Superior Court already enjoy broad discretion in this regard. They may even, under certain circumstances, deny a motion to stay the Quebec proceedings if they are of the view that the interests of the Quebec members, even in an international *lis pendens* situation, will be better served if the motion is denied. This was recently the case in *Choquette* c. *Atlantic Power Corporation*.[2]

[2] 2013 Q.C.C.S. 6617.

Similarly, per article 577, parag. 3 C.C.P., the court will grant a motion for the discontinuance of an application for authorization filed in Quebec (to make way for proceedings instituted elsewhere) only if it is convinced that the interests of Quebec residents who are members of the class will be better served thereby. Note that such discretion already exists since current article 1016 C.C.P. provides that the representative cannot discontinue the class action without permission from the court.

The Quebec Bar expressed doubt regarding the need for C.C.P. article 577 and the usefulness of adopting rules on multi-jurisdictional class actions. It noted that the court now has all the powers it needs to suspend review of a motion for authorization, particularly pursuant to the international private law rules found in C.C.P. articles 3076 and following. But the legislator obviously wishes to more clearly circumscribe the discretion of the judge, who will henceforth not be allowed to grant a motion to stay a class action brought in Quebec or the discontinuance thereof unless it is demonstrated that such an application is not contrary to the interests of justice and that the interests of the Quebec members will be better served if the class action is allowed to proceed in a jurisdiction other than Quebec.

RIGHT OF APPEAL AT THE AUTHORIZATION STAGE (ARTICLE 578 C.C.P.)

Current article 1010 C.C.P. prevents a respondent from appealing a judgment authorizing a class action, while the applicant may appeal as of right a judgment dismissing its application. This is a major irritant for respondents, particularly since they used to have a right of appeal and it was taken away in 1982.

For many years the Quebec Bar expressed the wish that respondents be given the right to apply for leave to appeal from judgments authorizing the institution of a class action, such applications to be subject to the rules governing appeals from interlocutory judgments. This wish has now been granted.

Although the right of appeal remains asymmetric, this new rule will promote equitable access to the Court of Appeal to any party having an issue to be decided which is important and of interest.

> " 578. A judgment authorizing a class action may be appealed only with leave of a judge of the Court of Appeal. A judgment denying authorization may be appealed as of right by the applicant or, with leave of a judge of the Court of Appeal, by a member of the class on whose behalf the application for authorization was filed.
>
> The appeal is heard and decided by preference."

This appeal upon leave will allow better screening of class actions since respondents will be in a position to make their case to the Court of Appeal as to why the proceedings are doomed to fail. The position of the Court of Appeal will thus be known sooner, without having to go to trial on the merits as is currently the case, which may translate into savings on judicial resources. This will also allow for greater harmonization with the class action legislation of the other Canadian provinces, particularly that of Ontario, where the same rule applies, that is, an appeal upon leave [3], and that of British Columbia, where there is an appeal as of right for both parties [4].

We believe that the reinstatement of the right to appeal for the respondent is unlikely to hinder the legislator's objective of timeliness, all the more so since article 578 C.C.P. provides that the appeal, if authorized, must be heard and decided by preference. The argument whereunder granting the respondent the right to appeal upon leave will slow down class actions is weakened when one considers that in Quebec, class actions are automatically referred to case management by a Superior Court judge, which practically eliminates any risk of things getting bogged down.

INDEMNITY TO THE REPRESENTATIVE PLAINTIFF (ARTICLE 593 C.C.P.)

In ruling on the merits of a class action or an application for approval of a settlement, the court will award the representative plaintiff, if successful, an indemnity for disbursements, legal costs and his or her lawyer's professional fees out of the amount recovered collectively and before payment of individual claims. If the action is dismissed, the rules applicable to the party losing the case apply. Therefore, in theory, the representative bears the expenses and the fees of his or her legal counsel. In reality, though, the representative is generally not charged anything by the law firm acting on behalf of the group. When the action is funded by the Class Action Assistance Fund, the fund covers payment of court costs in accordance with the usual rules governing cost awards.

> " 593. The court may award the representative plaintiff an indemnity for disbursements and an amount to cover legal costs and the lawyer's professional fee. Both are payable out of the amount recovered collectively or before payment of individual claims.
>
> In the interests of the class members, the court assesses whether the fee charged by the representative plaintiff's lawyer is reasonable; if the fee is not reasonable, the court may determine it.

[3] Section 30(2) of the *Class Proceedings Act*, 1992, S.O. 1992, c. 6.

[4] Section 36(1)(a) R.S.B.C.1996 c. 50.

> Regardless of whether the Class Action Assistance Fund provided assistance to the representative plaintiff, the court hears the Fund before ruling on the legal costs and the fee. The court considers whether or not the Fund guaranteed payment of all or any portion of the legal costs or the fee."

Article 593 C.C.P. is inspired by case law and current practice. The legislator now expressly provides that the representative, if successful, is entitled to the reimbursement of the professional fees of the lawyer who represented him or her, the court having to ensure that such fees are reasonable and set the amount. This new provision will also allow the representative to receive financial compensation in recognition of time spent and efforts made in the conduct of the class action for the benefit of all members. It thus formalizes a common practice, especially in out-of-court settlements, of paying a sometimes rather substantial amount to the representative, with such indemnity having to be approved by the court. With article 593 C.C.P., the legislator has silenced the protestations of the Class Action Assistance Fund, which regularly intervened in settlement hearings to object to the representative receiving any form of monetary compensation.

CONCLUSION

These amendments clarify the rules of the game for class actions by codifying current practice and making significant innovations, such as opening the door to appeals upon leave from judgments granting motions for authorization to institute a class action, thereby eliminating what was considered by some to be a major breach of procedural fairness.

The main conditions for instituting a class action, currently set out in article 1002 C.C.P., will now be found in C.C.P. article 574 and on the whole they remain the same. The same is true of conditions for authorization, which will henceforth be found in subparagraphs 1 through 4 of C.C.P. article 574.

The Quebec Bar would have liked to see the legislator further condition the possibility of presenting relevant evidence at the authorization stage pursuant to current article 1002 C.C.P. or recognize agreements entered into between the parties in this respect, but this provision has not been modified by section 574 C.C.P. The choice has been made not to intervene in view of the fact that case law is now sufficiently established as to the criteria justifying the presentation of relevant evidence at the authorization stage.

The reform does not make fundamental changes to the ground rules for class actions, but it codifies certain practices and approaches while making the Quebec class action regime a little more attractive in the face of a growing number of multi-jurisdictional class actions involving Quebec residents. That is a good thing.

The new Code of Civil Procedure is expected to come into force in the fall of 2015.

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