IN FACT AND IN LAW

Class Actions

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The Superior Court Dismisses Three Motions for Authorization to Institute a Class Action

By Catherine Dumas

In December 2004 and more recently in March 2005, the Superior Court rendered three significant judgments respecting motions for authorization to institute class actions. In the first case, **Bouchard *v.* Laiterie et Boulangerie Parmalat Inc.**[1]*, the motion was denied for the absence of interest and of rights of the applicant. In the second case,* **Citoyens pour une qualité de vie *v.* Aéroports de Montréal**[2]*, the motion was denied for lack of identical, similar or related questions of law or fact. Finally, in the case of* **Dorion *v.* Compagnie des chemins de fer nationaux du Canada (CN) and Autopart Ltd.**[3]*, the motion was denied for failure to meet any of the four criteria necessary to obtain authorization.*

The Parmalat Case

The Facts

The applicant, André Bouchard, sought to institute a class action against twelve dairy enterprises on the grounds that they had sold milk containing less fat than what was required under regulatory standards respecting the composition of dairy products. He alleged that since November 27, 1999, dairy enterprises

overcharged all Quebec consumers by $44,539,000 by systematically and knowingly producing and marketing milk that contained less fat than what was required under regulations. Punitive damages in the same amount were also sought.

Parmalat challenged the applicant's assertions according to which the milk it transformed contained less fat than what was required under regulatory standards. It also challenged the assertion according to which it knowingly had, through the use of its automatic fat control devices, systemized the production and marketing of milk containing up to 5% less fat than what was required under regulations. The infrared analyzer that Parmalat used to analyse the percentage of fat in raw milk was one of the most efficient in the market, having a degree of precision of 0.05%. While the analyzed fat percentage could not be absolute, the difference, if any, was minimal.

Analysis

Article 1003 C.C.P. requires that the following four conditions be respected before an authorization to institute a class action may be granted: (a) the recourses of the members raise identical, similar or related questions of law or fact; (b) the facts alleged seem to justify the conclusions sought; (c) the composition of the group makes the application of the articles pertaining to the mandate or the joinder of actions difficult or impracticable; and (d) the member to whom the Court intends to ascribe the status of representative is in a position to represent the members adequately.

In the Parmalat case, the Court only addressed the criteria pertaining to the common issues and the applicant's legal interest and rights and denied the motion for lack of legal relationship between the applicant and 11 of the 12 respondent dairy plants. Indeed, during the various out-of-Court examinations, the applicant acknowledged that he did not buy milk from each and every of the dairy

Mtres Guy Lemay and Jean Saint-Onge of Lavery, de Billy represented Parmalat, ADM and CN in these three cases.

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1 (December 14, 2004), Abitibi 150-06-000004-028 (S.C.), Appeal filed on January 10, 2005 (hereinafter "Parmalat").

2 (December 14, 2004), Montreal 500-06-000151-023 (S.C.), Appeal filed on January 13, 2005 (hereinafter "ADM").

3 (March 1st, 2005), Quebec 200-06-000029-028 (S.C.) (hereinafter "CN").

plants he was suing. Consequently, he did not have an individual claim to enforce against all the respondents and, more particularly, had no legal nexus with some of the respondent dairy plants. In this respect, the Court stated the following:

> **[Our translation] "In our opinion, the respondents rightly assert that the fact that the applicant wants to institute a "class action" does not give him any additional substantive right. He does not acquire the rights of the other members of the proposed group. Thus arises the issue of the serious appearance of right on which the applicant relies to enforce a claim against dairy transformers from whom he did not buy any products."**

The Court added that the infringement of a public law, such as the *Regulation respecting the composition, packing and labelling of dairy products* did not provide the applicant sufficient legal interest to institute an action against the dairy plants from whom he did not buy products since such a prerogative generally belongs to the Attorney General of the Province and any person he or she authorizes. The conditions prescribed in Article 1003 (a) and (b) C.C.P. not being met, the Court concluded that the motion for authorization had to be denied.

The ADM Case

The Facts

The applicant, *Citoyens pour une qualité de vie* (CQV) sought to represent a group that included approximately 100,000 individuals residing or having resided since April 1st, 2000 within a territory extending from Villeray, St-Michel and Parc Extension in the east, up to Senneville in the west and Ile-Bizard in the north up to the western part of Montreal in the south, the acoustic environment of which is exposed to the noise produced by planes that take off or land at the Montreal-Trudeau Airport between 1 a.m. and 7 a.m., more precisely, those which take off daily between 6 a.m. and 7 a.m.

The applicant requested that the members be indemnified for the trouble and inconvenience allegedly suffered as a result of: (1) the failure of ADM to comply with the applicable regulations governing the control and minimization of noise, namely, the *Canadian Aviation Regulations* and the *Canada Air Pilot*; (2) the failure of ADM to comply with the provisions of the *Environment Quality Act* and respect the fundamental rights of the members of the group, including the rights to security and to inviolability guaranteed under the *Charter of Human Rights and Freedoms*; and (3) the failure of ADM to comply with the provisions imposed on it under the *Civil Code of Quebec*, particularly Articles 6, 7, 952, 976 and 1457. The applicant also sought to obtain a permanent injunction to order ADM to carry out its activities at Montreal-Trudeau Airport in accordance with the above mentioned regulatory measures respecting the control and minimization of noise.

Analysis

The Court took great care in emphasizing that at the authorization stage, it must ascertain the existence of the four conditions set out under Article 1003 C.C.P. which are cumulative – meaning that the failure to satisfy any of them results in the dismissal of the application. In the present case, the absence of identical, similar or related questions of law or fact resulted in the dismissal of the motion.

CVQ intended to represent a group of persons residing within a territory extending 32.5 km in its northeastern / southwestern axis and 17 km in its east-west axis. According to the Court, the territory proposed by CQV was so vast that it was as if there were no geographical reference: [our translation] "The least that can be said is that the vast geographical territory used by CQV to define the group very significantly increases the possibility of very diversified individual claims, which goes against the fundamental objective sought by a class action."

The Court added that the proposed definition of the group required that it determine whether any given member lived in an environment exposed to noise. Such determination cannot be made without referring to the evidence on the merits of the action, since the judge hearing the case should decide in each case whether the environment of the concerned persons is truly exposed to noise and, in the affirmative, to which degree. The Court therefore declared that the criteria set out in Article 1003 (a) C.C.P. was not met and dismissed the motion for authorization.

The CN Case

The Facts

The applicant, Raymond Dorion, sought authorization to institute a class action on behalf of [our translation] "all individuals, landlords or tenants who reside near the CN Joffre Yard, that is to say the districts known as the Secteur de la Musique, the Secteur des Fleurs and the Secteur des Oiseaux, whose civic numbers begin respectively with 5000, 6000 and 7000, including the avenue des Générations, and are inconvenienced by the railway operations conducted therein."

The applicant sought compensation for the trouble and inconvenience allegedly suffered since 1998 and resulting from an increase in railroad traffic at the Joffre Yard and the resulting noise, such as vibrations, locomotive engine noise, the coupling of cars and the noise from bells and whistles. The applicant also sought to obtain a permanent injunction to force CN to carry on its activities so as to avoid any unusual neighbourhood annoyances.

CN did not dispute the fact that its operations cause noise. It stated that this was the inescapable reality when dealing with activities carried out in any yard, and that this annoyance was foreseeable, considering that the Joffre Yard has been in operation for more than 100 years.

Analysis

In his analysis of the conditions required by Article 1003(a) C.C.P., pursuant to which the recourses of the members must raise identical, similar or related questions of law or fact, Justice Jacques concluded that Mr. Dorion's action essentially raised individual questions given the subjective nature of noise-related annoyances. Since the tolerance to noise varies from one person to another, assessing the normal character of neighbourhood annoyances that neighbours owe each other according to the nature or location of their land, as required by Article 976 C.C.Q., calls for a separate review of each situation. The applicant himself admitted, during his examination on affidavit, that the annoyances suffered by each member of the group are varied and dependent on a series of factors (the location of their land within the area, the prevailing winds).

The Court added that this analysis illustrated that the group on whose behalf the applicant sought authorization could not be adequately defined using an objective criterion, since this group's composition depends on the outcome of the litigation. In these circumstances, the Court concluded that the individual questions outweigh any joint issue to be adjudicated by the Court, and that there was no benefit in proceeding with a class action.

Furthermore, in its analysis of the serious color of right criterion (art. 1003(b) C.C.P.), the Court was of the opinion that Article 976 C.C.Q. did not apply, since the applicant had failed to demonstrate that CN's operations caused unusual annoyances that were beyond the limits of tolerance that neighbours owed each other, according to the nature or location of their land. The pre-existence of CN's operations can be a means of defence if the disturbance is not deliberate and does not go beyond tolerable annoyances which need to be examined in their context. Justice Jacques went on to say that even if the no-fault scheme established in *Barrett* v. *Ciment du St-Laurent*[4] were to be applied, the facts alleged did not justify CN being held liable:

> **[Our translation] "[118] The mere fact that a citizen moves next to a yard and claims to be bothered by the noise and the vibrations does not confer upon that citizen a right of action.**
>
> **[119] To agree to such claim would be equivalent to granting a right of action to anybody residing near a railroad, an airport or a highway.**
>
> **[120] The review of the applicant's situation reveals that the applicant, who has lived in Charny since 1993, chose, in July 1999, to rent an apartment next to the yard, which, it should be remembered, has been in operation for over 100 years. […]**
>
> **[122] Given the prior existence of CN's facilities and given the foreseeable nature of the annoyances linked to its activities, noise and vibrations cannot be considered as unusual neighbourhood annoyances […]."**

Moreover, the Court added that the annoyances caused by the yard were covered by an additional means of defence, that is the defence of statutory authority. The activities of the yard have been going on for more than 100 years in accordance with applicable federal legislation and regulations. Consequently, usual and unavoidable consequences including, of course, the noise resulting therefrom are implicitly covered by such legislator's authorization.

Finally, the Court stated that the applicant had failed to demonstrate that the composition of the group made the application of the articles pertaining to the mandate or the joinder of actions difficult or impracticable. The first three conditions of Article 1003 C.C.P. not having been met, the Court rejected each of the arguments put forward by the applicant and dismissed the motion for authorization.

4 [2003] R.J.Q. 1883 (S.C.), Appeal filed on June 9, 2003.

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Conclusion

We may conclude from the Parmalat case that the criteria applicable to class actions comprising multiple defendants under which an applicant seeks to institute proceedings against a whole industry without having an interest or a cause of action against each respondent have been clarified. Justice Viens rightly concluded that the class action process gives the applicant no additional substantive right since he does not acquire the rights of the other members of the group; the applicant himself must have a legal relationship with the defendants.

On the other hand, in the ADM case, the Court took great care in emphasizing that the underlying condition to the common issues requirement is the existence of a group that is identifiable through an objective criterion. In that particular case, the determination of the group could not be made without referring to the evidence on the merits of the action. Further, the applicant sought to represent a group of persons living across a territory so vast that any common issue was insignificant in relation to the individual issues and posed the risk of giving rise to a myriad of "mini-trials" that have no place in the context of a class action.

In the CN case, the comments of Justice Jacques on the pre-existence of railroad activities in assessing the normal character of neighbourhood annoyances linked to noise and vibrations are particularly interesting since Justice Jacques accepted the defence based on the anteriority of activities that have been going on for over 100 years. In addition, Justice Jacques dealt with the defence of statutory authority and felt that it applied since the activities were carried out in accordance with the relevant legislation.

Finally, one can see when examining the Parmalat, ADM and CN cases, how important it is for the motion judge to be provided with the right information in order to determine whether or not the criteria of Article 1003 C.C.P. have been met. In these three actions, the evidence submitted by the respondents and the examinations on affidavit of the applicants were determining factors in the Superior Court's decision to dismiss the motions for authorization to institute a class action. However, following the amendments made on January 1st, 2003 to the *Code of Civil Procedure*, the respondents have lost their right to cross-examine the applicant on the facts alleged in the motion and the motion judge now has the power to reject any relevant evidence which would not otherwise be deemed "appropriate". The hearing regarding the constitutionality of these amendments was held in March 2005 before the Court of Appeal in the case of *Piro* v. *Novapharm*[5]. The judgment to be rendered in this case could play a decisive role in establishing the procedural requirements regarding motions for authorization.

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5 J.E. 2004-1742 (S.C.), Motion for authorization to appeal allowed on August 30, 2004.

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