IN FACT AND IN LAW

Class Actions

May 2005

The Court of Appeal Rules on the Constitutionality of the *Code of Civil Procedure* Amendments Governing Authorizations to Institute Class Actions

On April 29, 2005, the Court of Appeal rendered a judgment in Pharmascience Inc. *v.* Option Consommateurs et Piro[1] *on the constitutionality of the amendments made to the* Code of Civil Procedure *on January 1, 2003 regarding authorizations to institute class actions. Contrary to the arguments of the appealing pharmaceutical companies, the Court of Appeal held that the amendments are constitutional and do not violate the Quebec* Charter of Human Rights and Freedoms *in any way*.

The Facts

The respondents instituted a class action against Pharmascience and other pharmaceutical companies following a news report denouncing the policy of generic drug companies giving pharmacists kickbacks, discounts, rebates and other benefits. They allege that this practice is illegal and that it not only increases the price of drugs sold to the Régie de l'assurance-maladie du Québec but further raises the mandatory financial contributions of consumers to the province's drug insurance scheme. On behalf of all consumers of the products manufactured by these companies since January 1st, 1995, the respondents claim as damages the value of the reduction in kickbacks, deductibles and co-insurance to which purchasers would have been entitled had drug prices excluded these benefits for pharmacists.

Prior to the hearing of the motion for authorization, Pharmascience and the other defendant pharmaceutical companies opposed a number of preliminary exceptions, one of which requested that the new Article 1002 C.C.P. be declared unconstitutional. More specifically, the pharmaceutical companies alleged that they were deprived of their right to a full and equal defence within the meaning of Section 23 of the Quebec *Charter of Human Rights and Freedoms* because of amendments to three major procedural conditions:

1. the applicant need no longer execute a sworn statement (affidavit) in support of the facts alleged in the motion for authorization;
2. the motion may only be contested orally; and
3. the respondent may adduce relevant evidence at the authorization hearing only if the judge deems it appropriate.

The two versions of Article 1002 C.C.P. read as follows:

Code of Civil Procedure

Former text	New text
A member cannot institute a class action except with the prior authorization of the court, obtained on a motion.	A member cannot institute a class action except with the prior authorization of the court, obtained on a motion.
The motion states the facts giving rise thereto, indicates the nature of the recourses for which authorization is applied for, and describes the group on behalf of which the member intends to act; **the allegations of the motion are supported by an affidavit.** It is accompanied with a notice of at least 10 days of the date of presentation and is served on the person against whom the applicant intends to exercise the class action. (our emphasis)	The motion states the facts giving rise thereto, indicates the nature of the recourses for which authorization is applied for, and describes the group on behalf of which the member intends to act. It is accompanied with a notice of at least 10 days of the date of presentation and is served on the person against whom the applicant intends to exercise the class action; **the motion may only be contested orally and the judge may allow relevant evidence to be adduced**. (our emphasis)

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[1] (April 29, 2005), Montreal 500-09-014659-049 (C.A.) [hereinafter *Pharmascience*]; similar decisions were rendered in the related files *Apotex Inc.* v. *Option Consommateurs et Piro* (April 29, 2005), Montreal 500-09-014663-041 (C.A.) and *Genpharm Inc* v. *Option Consommateurs et Piro* (April 29, 2005), Montreal, 500-09-014662-043 (C.A.).

The Superior Court

The Superior Court deferred its decision on the issue of constitutionality and concluded that it should be decided at the authorization hearing.

The Court of Appeal

Justice Gendreau, writing for the Court of Appeal, dismissed the appeal of the pharmaceutical companies and held that the amendments to Article 1002 C.C.P. did not deprive the parties of any fundamental rights at the authorization stage. On the one hand, the Court stated that the authorization procedure was only a filtering and verification mechanism which did not require evidence in all cases. On the other hand, the Court held that the action was not yet formulated at this stage and that the rights and obligations of the parties were not determined as a result.

The Authorization Procedure is a Control Mechanism not Requiring Evidence in all Cases

The Court held that the class action *per se* should not be mistaken with the authorization procedure. In the first case, the judge must rule on the merits of the action and the ordinary rules of procedure are applied. In the second case, the judge must only ascertain whether the four conditions listed in Article 1003 C.C.P. are met, namely:

(a) the facts alleged seem to justify the conclusions sought;

(b) the recourses of the members raise identical, similar or related questions of law or fact;

(c) the composition of the group makes the application of articles governing mandate or 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.

Justice Gendreau went on to say that the burden of proof at the authorization level is one of demonstration and not of proof, as the judge has the task of [our translation] "verifying that the serious appearance of right criterion is met in light of the facts alleged, without regard to the well-foundedness of the recourse."[2] The judge's evaluation of the appearance of right criterion in light of the facts alleged for the authorization does not always require evidence:

> **[our translation] "Since, under the filtering and verification mechanism, the judge will allow the motion and authorize the recourse if the facts alleged seem to give rise to the rights claimed, evidence will not be needed in every case. Also, the contention that the petitioner should submit to a type of preliminary inquiry about the merits does not comply with the stipulations of the *Code of Civil Procedure* as interpreted by case law."[3]**

Consequently, the Court concluded that the amendments to Article 1002 C.C.P. did not fundamentally change the Quebec class action regime, especially since it allows a contestation and the adduction of relevant evidence that the judge deems appropriate.

The New Article 1002 C.C.P. Does not Contravene Section 23 of the Quebec *Charter of Human Rights and Freedoms*

Section 23 of the Quebec *Charter of Human Rights and Freedoms* grants every person the right to a public and impartial hearing. The right to an impartial hearing encompasses the procedural guarantees usually referred to as the rules of natural justice. In the present case, like in all authorization hearings, the motion to institute a class action was not intended to determine the rights and obligations of Pharmascience given that the action *per se* had not yet been instituted, rendering Section 23 of the *Charter* inapplicable. Instead, the objective of the authorization hearing is only to grant an individual a mandate to represent a group of persons and verify the application of the four conditions of Article 1003 C.C.P. The Court concluded that in any event, Article 1002 C.C.P. allows the respondent's oral contestation and leaves unchanged and applicable the rules of civil procedure once the action is instituted.

[2] *Pharmascience*, *supra* note 1 at p. 7.
[3] *Pharmascience*, *supra* note 1 at p. 8.

In this regard, Justice Gendreau cited the recent Court of Appeal decision in *Crane Canada inc*. v. *Sécurité nationale, compagnie d'assurances et Procureur général du Québec*[4] in which an amendment to the *Code of Civil Procedure*, which eliminated examinations on discovery in cases amounting to less than $25,000, had been judged constitutional. In this case, the Court held that the examination on discovery was not part of the case file or trial and that the amendment could not deprive the parties of a public hearing of their case. Justice Gendreau emphasized that [our translation] "these affirmations are fully applicable in this case because the motion for authorization is not the trial on the merits or a part thereof, but is merely a preliminary condition of the action."[5]

Conclusion

The new rules which came into force on January 1, 2003 regarding authorizations to institute class actions were held to be constitutional by the Court of Appeal. The Court noted that the authorization procedure was solely a filtering and verification mechanism which did not require evidence in every case, as the judge has the task of ascertaining whether the facts alleged seem to justify the conclusions sought using the serious appearance of right criterion.

However, the Court failed to consider that, in addition to the appearance of right criterion, it also needed to ascertain the other three conditions of Article 1003 C.C.P., i.e., the similarity of the issues, the impossibility of proceeding by mandate or by joinder of actions and the status of the representative, which are questions of fact requiring some sort of evidence. It is of importance to note that the four conditions set out in Article 1003 C.C.P. are cumulative and the failure to satisfy one of them results in the dismissal of the motion for authorization.

By submitting the right of a party to adduce evidence at the authorization hearing to the Court's discretion and by withdrawing the respondent's right to examine the petitioner, the authorization procedure risks of becoming a pure formality. The judge hearing the motion for authorization could, solely based on well-drafted allegations, authorize a class action that should not have been authorized otherwise because the respondent's evidence and the cross-examination of the petitioner would have shown that the action did not meet the *Code of Civil Procedure* requirements.

The respondents will probably be seeking leave to appeal the decision before the Supreme Court of Canada. By an administrative directive dated May 2004, the Associate Chief Justice of the Superior Court had suspended all hearings of motions for authorization until the judgment was rendered by the Court of Appeal in *Pharmascience*. The newspapers recently reported that the Associate Chief Justice had allowed the hearings for authorization to proceed given that the Court of Appeal had confirmed the constitutionality of the new provisions. It remains to be seen if a new administrative directive will be issued should Pharmascience and the other pharmaceutical companies seek leave to appeal the decision to the Supreme Court of Canada.

The Class Action Group

This text has been written by Catherine Dumas.

[4] [2005] R.J.Q. 56 (C.A.).
[5] *Pharmascience, supra* note 1 at p. 11.

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