IN FACT AND IN LAW

Class Actions

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Are the Courts Distorting the Nature of Class Actions?

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The courts have always considered Quebec's class action legislation to be strictly procedural and not modifying substantive law. Normally a person can only sue if he has a legal relationship with the defendant, meaning that he has a personal right of action.

Thus, in the case of *Bouchard* v. *Agropur coopérative et al*,[1] Mr. Justice J. Viens refused to authorize Bouchard to institute a class action against dairies from which he had not purchased milk.

However, Mr. Justice M. Delorme recently authorized a class action against 19 automobile manufacturers and related finance companies in favour of automobile buyers and lessees who would have paid charges not mentioned in the respondents' advertising[2].

The Facts in the *Billette* Case

Petitioner Lucie Billette applied for permission to institute a class action against automobile manufacturers who would not have mentioned in their print media advertising that registration fees at the Register of personal and movable real rights would be billed to buyers or lessees of a vehicle who finance their purchase through one of the respondents' related finance companies.

The petitioner alleges that this omission is contrary to the *Consumer Protection Act* and the *Regulation respecting the application of the Consumer Protection Act* and that, consequently, the members of the group were wronged by the respondents' misrepresentations and/or omissions in their advertising.

The Judgment

The Superior Court authorized the class action and concluded that the petitioner met the four conditions necessary to obtain authorization to institute a class action set out in article 1003 of the *Code of Civil Procedure* ("C.C.P."). This judgment is surprising in several regards, particularly in that the Court allows a recourse against a plurality of defendants with whom the petitioner has no legal relationship, since the petitioner contracted only with Toyota Canada Inc. and Toyota Credit Canada Inc. ("Toyota").

The Absence of a Legal Relationship with each of the Defendant Parties (article 1003 b) C.C.P.)

Pursuant to subsection b) of article 1003 C.C.P., the petitioner must establish that, according to a "serious appearance of right", the facts alleged in the motion for authorization seem to justify the conclusions sought. The issue is to evaluate the legal syllogism with regard to the facts alleged and thus, necessarily, the existence of a legal relationship between the petitioner and each respondent. Mr. Justice Delorme concludes as follows on the issue of the legal relationship:

> "[30] [The] study of the jurisprudence shows that, despite the absence of interest or cause of action of the representative of the group regarding each of the defendants, many class actions have been authorized.[3]
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> […]
>
> [47] Indeed, it must be retained from the jurisprudence that, provided a class action raises an important question or questions common to all the members of the group, it must be authorized despite the absence of a cause of action of the representative against each of the defendants […] who allegedly have acted in the same manner."[4]

[Our translation]

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1. J.E. 2005-413 (S.C.), inscription in appeal on January 10, 2005 (C.A.) [hereinafter *Bouchard*].
2. *Billette v. Toyota Canada Inc.*, J.E. 2005-1734 (S.C.) [hereinafter *Billette*].
3. *Ibid.* at p. 8.
4. *Ibid.* at p. 18.

In the first place, we note that the existence of questions common to all members of the group does not make it possible to exhaust the issue of the legal relationship and sufficient interest. These are two different conditions set out in subsections 1003 a) C.C.P. and 1003 b) C.C.P. respectively, each of which must be fulfilled.

Secondly, it is important to point out that the class action provisions of the *Code of Civil Procedure* are purely procedural and do not create substantive rights. The petitioner always has the burden of establishing the legal relationship that relates him to each of the respondents he is suing, which was not done by Ms. Billette. Indeed, the petitioner articulates no specific fact in support of the actions against the respondents, other than against Toyota with which she contracted. A simple allegation that the respondents share the same business practices as Toyota is insufficient to establish a cause of action against them. Allowing the petitioner to institute a class action against the 17 other respondents is equivalent to annihilating the criterion of sufficient legal interest in their regard, a fundamental requirement of any legal remedy, and thereby the criterion of the appearance of right prescribed in subsection 1003 b) C.C.P.

Comparative Analysis

The conclusion reached by Mr. Justice Delorme seems to reflect a jurisprudential trend in Quebec, whereby the courts authorize class actions against multiple defendants based on similar business practices, even though the petitioner only alleges a legal relationship against one defendant. In so doing, the Court distorts and diverts the objectives and the purpose sought by the legislator through the class action procedure set forth in sections 999 et seq. C.C.P.

We also note that Madam Justice Carole Julien recently rendered a judgment[5] in which she authorizes Option Consommateurs and Philippe Lavergne to institute a class action against 20 insurers claiming compensation for additional living expenses following the ice storm of January 1998. In this matter, the petitioner was authorized by the Superior Court to amend his motion for authorization in order to include the insurance companies that were the object of 19 other motions for authorization in the same number of related cases. In authorizing the action, the Superior Court once again permitted an action against a multiplicity of defendants against whom Philippe Lavergne had no cause of action, except for the insurer with which he had contracted, on the pretext of better administration and management of the cases.

However, these two recent judgments contrast with the decision rendered by Mr. Justice J. Viens in the aforementioned *Bouchard* case. In this case, Mr. Justice Viens mentions:

"[95] The first question is whether the petitioner André Bouchard himself has an individual claim against the dairy plants he is suing. He acknowledged in various out-of-court examinations that were conducted that he does not buy milk from all the dairy plants he is suing. It follows that he has no individual claim against each and every one of the respondent parties. More specifically, if he does not buy milk processed by the respondent Agropur Coopérative or Parmalat or another respondent, does he have a sufficient interest to sue a respondent from which he does not buy milk (article 55 C.C.P.)?

[…]

[99] […] In our opinion, the respondents rightly submit that the fact that the petitioner wishes to institute a "class action" does not confer any additional substantive right upon him. He does not acquire the rights of the other members of the proposed group. Thus, the question is posed of the serious appearance of right which the petitioner infers in his action against the milk processors from which he did not buy products."

[Our translation]

These judgments also contrast with those in Ontario, which require that the representative of the group prove that he has a legal relationship and thus a personal claim against each of the defendants he intends to sue in class action.

[5] *Option Consommateurs et Lavergne v. Union Canadienne et al* (17 November 2005), Longueuil 505-06-000006-002 (S.C.).

For example, in the case of *Ragoonanan Estate* v. *Imperial Tobacco Canada Ltd.*[6], the class action that the representative of the group intended to institute against three cigarette manufacturers was dismissed against two of them, on the grounds that the representative had only purchased cigarettes manufactured by one of them.

Also, the Ontario Court of Appeal[7] upheld the trial judgment, which had refused to authorize a class action against companies with which the representative of the group had no legal relationship.

In that case, Hughes had purchased a smoke detector manufactured by First Alert Inc., which he alleged was defective. He also wanted to include as defendants three other companies which manufactured smoke detectors that incorporated the same technology. This was refused because he had not purchased the products of these other three manufacturers. The Ontario Court of Appeal summarized its decision as follows:

> "[18] In Ontario a statement of claim must disclose a cause of action against each defendant. Thus in a proposed class action, there must be a representative plaintiff with a claim against each defendant. Hughes, therefore, may not maintain his action against Sunbeam, BRK Brands and Pittway."

However, the British Columbia Court of Appeal took a diametrically different position[8] and ruled that under that province's class action legislation, there is no requirement that the representative prove a legal relationship with each of the defendants he intends to sue by class action, provided that there are sufficient questions to be decided collectively to render the class action effective.

Comments

The *Bouchard* case is under appeal and will be heard at the end of January 2006, and quite probably the Court of Appeal will rule on the legality of including in a class action multiple defendants with whom the representative of the group has no legal relationship. It will then be interesting to see whether the Quebec Court of Appeal will follow the Ontario example or whether, on the contrary, it will prefer the British Columbia approach.

The issue is important because several companies, as in the *Billette* case, are involved in class actions as group defendants because of the industry in which they operate or because of products, services or practices which are similar to those of the entity with which the representative of the group has contracted.

Quebec already differs significantly from the legislation of other provinces, which have purely procedural class action legislation, with the result that class actions are more easily authorized in Quebec than in the other provinces. This exposes companies doing business in Quebec to more litigation and puts them at a disadvantage, if only due to the costs they must incur to defend themselves or to settle the class action, often for considerations unrelated to the validity of the recourse. If, in addition, they may be defendants in class actions simply because they are part of an industry, they will be at an even greater disadvantage.

This is an issue to follow.

6. (2000), 51 O.R. (3d) 603 (S.C.J. Ont.) Also see *Boulanger v. Johnson & Johnson*, [2002] O.J. No. 1075 (S.C.J. Ont.); *Lupsor Estate v. Middlesex Mutual Insurance Co.*, [2003] O.J. No. 1038 (S.C.J. Ont).
7. *Hugues v. Sunbeam Corporation (Canada) Limited* (2002), 61 O.R. (3d) 433 (C.A. Ont).
8. *Campbell v. Flexwatt Corp.*, [1998] 6 W.W.R. 275 (B.C.C.A.); *Harrington v. Dow Corning Corp.*, [2000] 11 W.W.R. 201 (B.C.C.A.); *Furlan v. Shell Oil* (2000), 77 B.C.L.R. (3d) 35 (B.C.C.A.).

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