Roaming fees: a long and winding road

September 15, 2016

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On August 10, 2016, the Québec Court of Appeal authorized a class action pertaining to international roaming fees, thus reiterating, with renewed respect for the opposing view, that meeting the authorization threshold and the criteria respecting the representative's interest is fairly easy under Quebec law.[1]

The proposed class action

After having incurred "disagreeably surprising"[2] roaming fees during a trip to the US, Inga Sibiga, a Quebec consumer who has a wireless telephone contract with Fido (a subsidiary of Rogers), seeks the authorization to institute a class action against Bell, Fido, Rogers and Telus, the four major wireless service providers in Canada. In essence, she claims that the international roaming fees charged by those companies to Quebec consumers are abusive, lesionary and so disproportionately high as to amount to exploitation, contrary to section 8 of the *Consumer Protection Act*[3] and article 1437 of the *Civil Code of Québec*. Ms Sibiga asks for the reduction of the obligation of subscribers and punitive damages.

International data roaming allows a consumer to use a mobile phone out of the area served by his or her provider, the latter resorting to another provider's network, at a set tariff. Since all defendants offer national coverage, roaming charges only become an issue in respect of data transmission abroad.

The decision under appeal

On July 2, 2014, the honourable Michel Yergeau of the Superior Court of Québec dismisses the motion for authorization with costs. The Superior Court essentially finds that Ms Sibiga does not appear to have satisfied the requirement of the then-applicable article 1003(b) CCP as the facts alleged in her motion are not sufficient to justify the conclusions sought. Justice Yergeau notes that the motion contains no allegation or document establishing the framework of the contractual

obligations assumed by the petitioner and by her service provider.[4] Specifically, he scolds the petitioner for having failed to produce a copy of her contract with Fido, a contract which he characterizes as an “essential tangible fact”.[5]In view of this rather poor evidence, it appears to the Court that the allegations as to the exploitative nature of the roaming fees are mere speculations and not facts sufficient to justify authorizing a class action. Expressing an oft-heard concern, the Superior Court insists that it is not its role “to embark on the equivalent of a public inquiry” as called for by the motion.[6]As liberal as *Infineon* suggests the screening mechanism at the authorization stage should be,[7]“[o]ne does not launch court proceedings as expensive for the judicial system as a class action on such a tenuous base.”[8]

Adding to this decided conclusion, the Superior Court further expresses the view that Ms Sibiga is not in a position to adequately represent the members of the class, as required by article 1003(d) CCP. This is in part because she does not have the required standing within the meaning of article 55 CCP, at least against Telus and Bell since she is bound by contract only with Fido (and thus Rogers). This is also because, having only a minimal understanding of the class action process and no control whatsoever over the proceedings, she appears to be no more than a pawn of her attorneys.[9] Without blaming Ms Sibiga or her lawyers, the Superior Court insists on the independence of the “representative” in a class action.

Ms Sibiga’s appeal would be allowed, the honourable Nicholas Kasirer writing for the Court of Appeal. The “social dimension” of class actions, emphasized by the most recent Supreme Court decisions, is the rock against which the Superior Court’s decision is quashed.[10]

Appeal

Although concurring with the concerns expressed by the Superior Court that “a lax approach to the standard can result in authorization of class actions that do not deserve to go to trial”,[11]the Court of Appeal is of the view that it erred: “while a judge can refuse a motion for authorization that relies on an overly liberal interpretation of the *Infineon* standard, it is a mistake in law to refuse authorization by treating that standard as overly liberal in itself.”[12]

In the Court of Appeal’s opinion, “by denying authorization […] based on what he described as an imprecise and speculative claim, the motion judge neglected to apply the prima facie case standard relevant to this consumer class action”[13] and thus failed to see the threshold for authorization was met.

The unbearable lightness of the authorization filter

“The action should be allowed to proceed if the applicant has an arguable case,”[14] “the court’s role is merely to filter out frivolous motions”[15]: article 1003 CCP sets a low threshold, despite proposals for a more interrogative approach. Indeed, a scintilla of credibility suffices at this stage: it is at the trial on the merits that allegations should be substantiated, supported by the evidence. The motion judge, says the Court of Appeal, should not have asked for more. In other respects, perhaps paradoxically, the Court of Appeal finds that it was “imprudent and indeed mistaken”[16] for the Superior Court to engage with the motion and its supporting evidence on the merits, as the authorization calls for a consideration of the surface of the evidence.[17]

What is more, the Court of Appeal is less convinced than the Superior Court that it is necessary that Ms Sibiga’s contract be filed in the court record. Since the existence of a contractual relation is not

disputed, the Court of Appeal considers that, at the authorization stage, the filing of the monthly statements from the service provider and some publicly available information documents should be considered sufficient.[18]

The representative is neither a puppet nor a spearhead

As to the petitioner's representative capacity, in line with the *Marcotte*[19] decision of the Supreme Court (which was unavailable to the Superior Court for it was under advisement the time), the Court of Appeal concludes that the absence of a direct cause of action (here, in contract) with two of the proposed defendants should not constitute an insurmountable obstacle to a class action.[20] The issue of the role and capacity of the petitioner to work with –rather than for– her attorneys proves a more delicate one: although excesses have been known to occur, entrepreneurial lawyering is not itself a bar to finding that the designated representative has the requisite interest in the suit.[21] The genuineness of a motion is not wholly discredited merely because the proceedings bear the lawyer's scent.[22] Here too, the Court of Appeal finds that the Superior Court failed to apply the liberal standard warranted by the Supreme Court.

The class description: the burden of proof belongs to the brave

Building on a comment of the Superior Court to the effect that, absent any detail concerning many of the countries where roaming costs could allegedly have been incurred or the variety of the mobile plans involved, the proposed class was unduly inclusive, defendants Bell and Telus had asked that, should the appeal be allowed, the class be restricted.[23] The Court of Appeal declines to make such a ruling. As tempting as it might be to bring the proposed class to more common proportions, doing so would amount to prejudging the ability of the applicant to conduct her case.[24] Again, at the authorization stage, it suffices to establish an arguable case, and this burden was met by petitioner.[25] In any event, class definition can be reviewed by the court at the trial on common issues.[26]

Conclusion

The decision of the Québec Court of Appeal falls in line with the most recent decisions of the Supreme Court of Canada relating to class actions. The decision is not one for jurisprudential controversy; it rather serves to show how emphatically the highest court in the land has diluted the threshold for authorization in Quebec.[27] Authorization is, of course, not a mere formality, a call for rubber-stamping, but it is not fatal for the evidence presented at this preliminary stage to be incomplete or imprecise. The criteria for authorization have been substantively untouched by Québec's civil procedure reform, there is every reason to believe that there is a bright future for this liberal approach.

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1. *Sibiga c. Fido Solutions inc.*, 2016 QCCA 1299 [CA], inf. *Sibiga c. Fido Solutions inc.*, 2014 QCCS 3235 [SC].
2. CA, at para. 18.
3. *Consumer Protection Act*, CQLR c P-40.1.
4. SC, at para. 113.
5. SC, at para. 109 [our translation].
6. CA, at para. 131; SC, at para. 121.
7. SC, at para. 147, reference made to *Infineon Technologies AG v. Option consommateurs*, [2013] 3 SCR 600, 2013 SCC 59.

8. SC, 98 [our translation].
9. SC, at paras. 148-155.
10. CA, at para. 51, reference made to *Bisaillon v. Concordia University*, [2006] 1 SCR 666, 2006 SCC 19, at para. 19.
11. CA, at para. 14.
12. CA, at para. 15.
13. CA, at para. 15.
14. *Infineon Technologies AG v. Option consommateurs*, [2013] 3 SCR 600, 2013 SCC 59, at para. 65.
15. *Ibid.*, at para. 61.
16. CA, at para. 96.
17. CA, at paras. 69-96.
18. CA, at paras. 56-68.
19. *Bank of Montreal v. Marcotte*, [2014] 2 SCR 725, 2014 SCC 55.
20. CA, at paras. 39, 98, 115.
21. CA, at paras. 102-103.
22. CA, at para. 104.
23. CS, at para. 122.
24. CA, at paras. 140-141.
25. CA, at paras. 137-138.
26. CA, at para. 150.
27. See e.g., *Infineon Technologies AG v. Option consommateurs*, [2013] 3 SCR 600, 2013 SCC 59; *Vivendi Canada Inc. v. Dell'Aniello*, [2014] 1 SCR 3, 2014 SCC 1; *Bank of Montreal v. Marcotte*, [2014] 2 SCR 725, 2014 SCC 55; *Theratechnologies Inc. v. 121851 Canada Inc.*, [2015] 2 SCR 106, 2015 SCC 18.