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Leave to Appeal by the Defendant at the Authorization Stage of the Class Action: the Québec Court of Appeal Adopts a Restrictive Approach

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On November 22, 2016, the Québec Court of Appeal issued an unprecedented judgment on the application of article 578 of the *New Code of Civil Procedure* ("NCCP") in the following cases: *DuProprio inc.* v. *La Fédération des chambres immobilières du Québec*, *Énergie éolienne Des Moulins S.E.C.* v. *Labranche* and *La Centrale des syndicats du Québec* c. *Allen*.[1]

In a judgment, written by Justice Jacques Chamberland, the Court of Appeal unanimously dismissed the defendants' applications for leave to appeal the judgments rendered in first instance authorizing the institution of the class actions. Given that article 578 is a new provision, the Court of Appeal joined these three cases for the purposes of the hearing and referred the issue to a panel of three judges.

History of the right to appeal

Firstly, Justice Chamberland provided an outline of the legislative history of the right to appeal a judgment authorizing the institution of a class action. Introduced in 1978, the class action provisions at the time permitted both the plaintiff and the defendant to appeal the judgment authorizing the institution of the class action.

In 1982, the legislator instituted an asymmetric right to appeal, doing away with the defendant's right to appeal at the authorization stage while retaining the plaintiff's right to appeal a judgment denying authorization.

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During the recent reform that resulted in the NCCP, which came into effect on January 1, 2016, the legislator enacted section 578 NCCP, which henceforth permits the appeal, by leave, of judgments granting an application for authorization to institute a class action. However, the legislator did not specify the criteria required to grant such leave.

The standard for intervention

The Court states that the standard for intervening on the appeal of a decision granting or dismissing an application to institute a class action is [translation] “stringent”. The Court of Appeal will intervene only if the first instance judge committed an error in law or manifestly erred in his or her assessment of the four criteria governing the authorization of the action.[2]

The applicable test

Relying on the Minister of Justice’s commentary which states that [translation] “the appeal of the authorization should only deal with the conditions for granting it”, Justice Chamberland explained that [translation] “the test should not be so severe that it sterilizes the right to appeal on leave, nor so supple that it places both parties on the same footing with respect to the right to appeal”. In defining the applicable test, the Court considered the fact that the threshold required to obtain authorization to institute a class action is low and that the judge has [translation] “broad discretion” to grant such a motion.

Thus, the Court stated that the test must be “stringent” and appeals must be reserved for [translation] “exceptional cases”:

The judge will grant leave to appeal where the judgment appears to have an overriding error on its very face concerning the interpretation of the conditions for instituting the class action or the assessment of the facts relating to those conditions, or, further, where it is a flagrant case of incompetence of the Superior Court.[3]

According to the Court, this test respects the intention of the legislator particularly as it: i) deals only with the conditions for exercising the class action, ii) excludes appeals that are unnecessary or that only address incidental matters, iii) respects the discretion of the first instance judge, iv) does not increase the burden to be met by the plaintiff for instituting a class action, and v) avoids a long and costly debate on the merits where the class action is ill-founded.

Conclusion

Applying the aforementioned test to the specific facts of each of the cases, the Court of Appeal dismissed all the applications for leave to appeal the judgments authorizing the institution of the class actions, with costs against the appellants.

Comments

This decision once again demonstrates the liberal approach adopted by the courts, which imposes a low threshold for obtaining authorization to institute a class action. The recent obiter of Justice Bich[4] in which she invites the legislator to reconsider the usefulness of the authorization stage in its current form is just a further reflection of this more liberal approach.

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There is reason to question the real benefits of limiting the right to appeal the judgment authorizing the institution of a class action in such a manner. Indeed, a true filtering mechanism with a right to appeal at the authorization stage would allow the plaintiff to get a good feel, at a preliminary stage, of the viability of his claim before devoting time and money to same. He therefore risks being deprived of the Court of Appeal's insights on the pitfalls and obstacles that could compromise the success of the action later on. Furthermore, a judgment of the Court of Appeal confirming the authorization of the class action can serve as a strong argument in favour of negotiating a settlement, thereby avoiding the expenses and waste of judicial resources resulting from a trial on the merits.

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1. The Court file numbers are: DuProprio: (500-09-026070-169); Énergie éolienne Des Moulins: (200-09-009270-163 and 200-09-009273-167); and CSQ: (200-09-009238-160), (200-09-009241-164) and (200-09-009247-161).
2. Art. 575 C.C.P.
3. At para. 59 of the decision.
4. *Charles* v. *Boiron Canada inc.*, 2016 QCCA 1716 (CanLII).

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