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Class Actions - What's on the radar for consumer class actions?

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Over half of the applications for authorization to institute class actions filed in Québec since the beginning of 2017 are based on consumer law. There is no doubt that consumer class actions will continue to fuel discussions within the business and legal communities. We will continue to monitor the situation closely.

Two current issues have been identified:

Does a consumer claiming moral damages in a class action have to prove injury and a causal connection between such injury and the merchant's alleged breach?

At present, two trends appear to be developing.

Vidéotron c. *Union des consommateurs*[1] appeared to have provided the answer. In that class action, the Court of Appeal of Québec affirmed that in order to be entitled to damages under general law, a consumer must establish injury and the causal connection between that prejudice and the merchant's contravention of the Consumer Protection Act.

Recently, however, the Superior Court of Québec in *Option consommateurs* c. *Meubles Léon*[2] held that the quantum of damages could be left to the court's discretion. The Superior Court thereby departed from the Court of Appeal's decision in *Vidéotron* , believing that it was instead bound by the teachings of the Supreme Court of Canada in *Richard* v. *Time,*[3] a decision that was not rendered during a class action. Relying on the Supreme Court's ruling in *Time*, the Superior Court reiterated that the consumer benefits from an absolute presumption of prejudice once it is established that a prohibited practice occurred. Adopting a pragmatic approach, the Superior Court inferred that where there was a prejudice to some group members, that same prejudice was suffered by the group as a whole. The Court, therefore, awarded each group member $100 for moral damages after hearing certain group members testify that they were angry and frustrated about the false or misleading advertising by Leon's Furniture.

In light of this decision, the courts could systematically award moral damages to every member where some consumers testify that they were frustrated by a merchant's prohibited practice. Such an approach would certainly simplify the requirements on the burden of presenting evidence to establish such an injury. Note, however, that Leon's Furniture is appealing the Superior Court decision notably on the ground that the Court erred in awarding $100 for moral damages to the group members. The Court of Appeal will therefore have the opportunity to clarify its rulings.

Should the group representative be examined under article 574 C.C.P. in order to determine the representative's capacity to properly represent the group?

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Since the Court of Appeal of Québec decisions in *Sibiga*[4] and *Boiron,*[5] it seems clear that at the authorization stage, the courts will take a flexible, broad approach to the criteria in article 575 C.C.P. with respect to the representative's ability to properly represent the group members. Indeed, the court should find that the minimum requirements have been satisfied where the representative understands i) the allegations in the application for authorization and ii) that other consumers may also have suffered similar prejudice.

However, while the facts alleged by the plaintiff must be assumed to be true at the authorization stage, the Superior Court recently provided some guidance as to the circumstances that would justify introducing evidence and examining the proposed representative in order to determine his ability to properly represent the group members[6].

In *Mahmoud*, the Superior Court allowed the defendant to examine the plaintiff on the steps undertaken to ascertain the composition of the group members aside from consulting his lawyers and what he had done to verify the extent and size of the proposed group. The Court noted the absence of any allegations on these subjects and held that the questions were relevant to determining whether to apply the rules for mandates to take part in judicial proceedings on behalf of others or for consolidation of proceedings under article 575(3) C.C.P. The Court added that these questions were also relevant to determining whether the plaintiff was in a position to properly represent the interests of group members.

Several months earlier, the Superior Court arrived at the same conclusion on examining the representative under article 574 C.C.P.[7]. The Court held that allegations akin to legal conclusions concerning the representative's ability cannot satisfy the requirements of article 575(4) C.C.P. As a result, the Court found that the examination of the representative would be an efficient means of verifying the criteria of article 575 C.C.P. in a useful and judicious manner to shed light on some of the allegations of the motion for authorization that may be incorrect or incomplete.

Consumer law and class actions are two areas of law that have been rapidly developing in recent years, which is why the courts are faced with issues which cannot be definitively answered by the Superior Courts. During the coming months, it will be interesting to see which approach the courts adopt on awarding damages and where applicable, moral damages. It will also be necessary to see whether the Superior Court will re-examine the criterion on adequate representation by allowing defendants to examine and verify the suitability of representatives.

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1. 2017 QCCA 738.
2. 2017 QCCS 3526.
3. 2012 CSC 8.
4. *Sibiga* c. *Fido Solutions*, 2016 QCCA 1299.
5. *Charles* c. *Boiron*, 2016 QCCA 1716.
6. *Mahmoud* c. *Société des casinos du Québec inc.*, 2017 QCCS 1691.
7. *Michaud* c. *Sanofi-Aventis Canada inc.*, 2016 QCCS 3977.

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