Class Actions to Watch this Year

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Author

Laurence Bich-Carrière

Partner, Lawyer

Year in and year out, the Superior Court of Quebec releases around 175 judgments in class actions matters, and 2017 was no exception. With two years having passed since the reform of civil procedure, the courts have had an opportunity to clarify the effect of a number of new provisions: the low threshold for authorization,[1] the limited nature of a defendant's right of appeal a decision authorizing a class action,[2] confirmation that certain interlocutory judgments at the authorization stage can only be appealed with leave,[3] and the obligation of diligence of the first-to-file applicant[4] – to name just a few. Decisions on the merits have also raised questions as to the application of the absolute presumption of prejudice in consumer protection law.[5] We have also seen developments in decisions relating to the enforcement of transactions, particularly in relation to the rights of the Class Action Assistance Fund to the remaining balance.[6]

What, then, will 2018 hold? The following is an overview of decisions to watch for this year.

1. Securities: Class Actions and Prior Disclosure

On January 10, 2017, in an application under section 225.4 of the *Securities Act,* CQLR c. V-1.1, the Superior Court ordered defendant Amaya to disclose certain information to petitioner Derome further to an application under article 574 CCP. While the third paragraph of that article provides that the judge may allow “relevant evidence to be presented”, its first paragraph states that the application for authorization must be contested orally; accordingly, it was generally believed that a request to present relevant evidence could be made only by the defence; this was buttressed by the fact that the truth of the allegations in the application for authorization are to be assumed at that stage.[7]

These arguments failed to persuade the Superior Court, which gave preference to considerations relating to the general exploratory purpose of pre-trial examinations and the obligation of cooperation that is one of the guiding principles of the new Code of Civil Procedure.[8] The motion for leave to appeal was referred to the panel of the Court.[9] The hearing was held on August 29, 2017, a decision can be expected in the near future.

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2. Bank Fees: Class Actions and Legal Fees

When may a judge deny an application to approve a transaction that has been negotiated between counsel for the class members and the defendants in a class action? In the opinion of Justice Claudine Roy, then of the Superior Court, a judge must do so when [TRANSLATION] “the result of the transactions is of very little value for the members, [even if] the defendants have succeeded in causing the plaintiff to lose interest.”[10] On January 23, 2017, she refused to homologate three transactions,[11] on the basis that they offered no real advantage to the members, and rather benefited class counsel, certain defendants, and certain not-for-profit organizations. She called on the courts to be vigilant in ensuring that class actions did not become [TRANSLATION] “a source of enrichment for class member counsel and a source of funding for not-for-profit organizations” and suggested that in that case, a discontinuance was more in keeping with the rules of fairness and the objective of class actions.[12] A few days later, her then colleague, Justice Denis Jacques, adopted her comments and also refused to homologate a transaction in a related case.[13]

On March 31, 2017, Justice Marie Saint-Pierre of the Court of Appeal confirmed that the refusal by a judge of the Superior Court to authorize a transaction could be appealed, but only with leave: unlike a judgment homologating a transaction, a judgment refusing to do so does not terminate the proceedings, and, accordingly, following the ordinary rule pertaining to interlocutory judgements, it may be appealed only with leave.[14] Leave was however granted in both cases.

The appeal was heard on September 1, 2017, and decision was taken under advisement. A decision should be released in early 2018 that will provide guidelines for a judge exercising the power to review transactions.

3. Motor Vehicles: Class Actions and Interpretation of a Settlement

The automotive world was astounded on September 18, 2015, when it was revealed that Volkswagen had installed surreptitious software in some of its diesel-powered vehicles to falsify the results of environmental compliance tests done by government agencies. Numerous class actions were instituted, including, in Canada, one in Quebec and another in Ontario. After lengthy talks, the parties reached a comprehensive agreement regarding certain categories of vehicle, which agreement was endorsed by the Superior Courts of Quebec[15] and Ontario.[16] The agreement included a provision that some owners would be eligible for a refund in the event that certain “fixes” were not available by June 15, 2017. On June 15, 2017, the fixes had received all of the necessary regulatory approvals, but had not yet been put on the market, and a dispute ensued as to whether the refund was available. Motions for interpretation of the settlement were filed in both jurisdictions. In Quebec, the Court concluded that the “availability” contemplated in the settlement agreement had to be understood to mean availability of the fix itself and that approval by the authorities before the deadline was not sufficient to defeat the obligation to refund. The Court noted that a transaction of this scope is necessarily a delicate compromise, the terms and deadlines for which were deliberately chosen over the course of numerous talks,[17] and also pointed out that the opposite interpretation assumed that the agreement did not contain an implementation date and would leave performance to the whim of the defendants,[18] which seemed hardly compatible with the spirit of a settlement.

However, its Ontario counterpart came to precisely the reverse conclusion: the refund is dependent on the availability of the fixes, so that without them, the refund clause cannot apply. This said even if the agreement does not mention a specific deadline for performance, defendants are required to

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implement it diligently, having regard to the good faith performance obligation clause.[19]

The Quebec Court of Appeal is to hear the appeal on February 2, 2018,[20] and the Ontario Court of Appeal will do so shortly thereafter.

4. Investments: Class Actions and Plans of Arrangement

On November 30, 2015, the Superior Court authorized a class action instituted against certain entities in the Desjardins Group relating to risky investments, including some in connection with asset-based commercial paper[21] ("**ABCP**"). The ABCPs had already been the subject of a plan of arrangement filed with and approved by the Ontario Superior Court of Justice under the *Companies' Creditors Arrangements Act*, RSC 1985, c. C-36 and an injunction. The defendants therefore applied to the Superior Court to strike out the conclusions in the class action proceedings relating to the ABCPs. The Court ruled that the motion was premature and that further evidence would be required before it could conclude the allegations were aimed at matters fully covered by the plan of arrangement..[22]

Since the matter involved a question of jurisdiction – what is more, a novel one –, the Court of Appeal agreed to consider the matter,[23] and it is to be heard on February 9, 2018.

5. Noise Pollution: Class Actions and Constitutional Law

Factory discharges, highway dust, and noise pollution: the number of class actions based on neighbourhood disturbances continues to rise in the wake of the decision in *St. Lawrence Ciment*.[24] Two such cases should be watched this year, since they involve not only the principle of the free enjoyment of a person's property, guaranteed by the *Civil Code* and the Quebec *Charter*, but also the broad rules governing the division of constitutional powers between the federal and provincial governments. Because aviation falls within the exclusive jurisdiction of Parliament, companies operating in that field are considered to be more or less immune to provincial legislation interfering with the conduct of their business. It remains to be determined whether interjurisdictional immunity, as the doctrine is known, is sufficient to defeat a class action alleging excessive noise pollution.

Interjurisdictional immunities were argued at the November 20-21, 2017 authorization hearing in the action instituted by Les Pollués de Montréal-Trudeau against the operator of the Trudeau airport. Justice Chantal Tremblay may acceded to the submission –and deny the authorization– or refer the issue for determination on the merit, if she is of the view, for instance, that the evidence is currently insufficient for a decision.

However, the argument should find a definitive answer by the end of the year, since a five-week trial is to begin in February in the action instituted by the Coalition contre le bruit against the operators of the airfield at Lac-à-la-Tortue in Mauricie. Lavery was retained in this matter after the judgment granting authorization.[25]

6. Retail Commerce: Class Actions and Consumer Law

Between 2007 and 2011, Leon's Furniture advertised to customers that they could [TRANSLATION] "pay nothing for 15 months". Some of the purchase financing programs, however, involved paying annual administrative fees. On July 31, 2017, the Superior Court found Leon's liable and ordered the company to pay almost two million dollars to consumers,[26] stating in passing that assessing the

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quantum of compensatory damages a discretionary exercise. While the decision relies on the Supreme Court's decision in *Time,* specificallythe passages dealing with the irrebuttable presumption of prejudice resulting from a violation of the *Consumer Protection Act*, CQLR, c. P-40.1 [CPA][27], it seems to run counter to a decision of the Court of Appeal rendered barely two months earlier,[28] which many took to hold that, even in the class action context, it is up to a consumer who wishes to obtain compensatory damages to prove the alleged prejudice and that it was caused by the merchant's violation of the CPA. Although the Superior Court's decision squarely serves the remedial and protective objectives of the CPA, it raises a number of questions regarding the applicability of the general rules of civil law to consumer protection cases, especially as they relate to awards of compensatory damages. We commented on those decisions earlier here. The appeal is expected to be heard at the end of 2018.

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1. *Asselin v. Desjardins Cabinet de services financiers inc.*, 2017 QCCA 1673; *Ameublements Tanguay inc. v. Cantin*, 2017 QCCA 1330 (leave to appeal requested); *Pfizer inc. v. Sifneos*, 2017 QCCA 1050.
2. *Groupe Jean Coutu (PJC) inc. v. Sopropharm*, 2017 QCCA 1883; *Trottier v. Canadian Malartic Mine*, 2017 QCCA 119.
3. *Groupe Jean Coutu (PJC) inc. v. Sopropharm*, 2017 QCCA 1883.
4. *Cohen v. Option Consommateurs*, 2017 QCCA 94 and *Badamshin v. Option Consommateurs*, 2017 QCCA 95 (leave to appeal to the Supreme Court denied: SCC No. 37521 (July 16, 2017).
5. *Vidéotron v. Union des consommateurs*, 2017 QCCA 738; *Option Consommateurs v. Meubles Léon ltée*, 2017 QCCS 3526.
6. *Handicap-Vie-Dignité v. Résidence St-Charles-Borromée, CHSLD Centre-ville de Montréal*, 2017 QCCS 935 (costs of publication and remaining balance); *Halfon v. Moose International Inc.*, 2017 QCCS 4300 (right to remaining balance where payment is in nature).
7. *Derome v. Amaya inc.*, 2017 QCCS 44.
8. *Derome v. Amaya inc.*, 2017 QCCS 44, paras. 41-53.
9. *Amaya inc. v. Derome*, 2017 QCCA 335.
10. *Option Consommateurs v. Banque Amex du Canada*, 2017 QCCS 200, para. 65.
11. *Option Consommateurs v. Banque Amex du Canada*, 2017 QCCS 200.
12. *Option Consommateurs v. Banque Amex du Canada*, 2017 QCCS 200, para. 110.
13. *Option Consommateurs v. Banque Canadienne Impériale de Commerce*, 2017 QCCS 275.
14. *Option Consommateurs v. Banque Amex du Canada*, 2017 QCCA 502.
15. *Option Consommateurs v. Volkswagen Group Canada Inc.*, 2017 QCCS 1411.
16. *Quenneville v. Volkswagen*, 2017 ONSC 2448.
17. *Option Consommateurs v. Volkswagen Group Canada Inc.*, 2017 QCCS 2870, par. 22.
18. *Option Consommateurs v. Volkswagen Group Canada Inc.*, 2017 QCCS 2870, par. 39.
19. *Quenneville v. Volkswagen*, 2017 ONSC 4583.
20. Authorization granted: *Volkswagen Group Canada Inc. v. Option Consommateurs*, 2017 QCCA 1361.
21. *Dupuis v. Desjardins Sécurité financière, compagnie d'assurance-vie*, 2015 QCCS 5828.
22. *Dupuis v. Desjardins Sécurité financière, compagnie d'assurance-vie*, 2016 QCCS 6348.
23. *Desjardins Sécurité financière, compagnie d'assurance-vie v. Dupuis*, 2017 QCCA 802.
24. St. Lawrence Cement Inc. v. Barrette, [2008] 3 SCR 392, 2008 SCC 64.
25. Authorization granted: *Coalition contre le bruit v. Shawinigan (Ville de)*, 2012 QCCS 4142.
26. *Option Consommateurs v. Meubles Léon ltée*, 2017 QCCS 3526.
27. *Richard v. Time Inc.*, [2012] 1 RCS 265, 2012 CSC 8, par. 123.
28. *Vidéotron v. Union des consommateurs*, 2017 QCCA 738.

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