Class actions to watch in 2024

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Quebec is a fertile ground for class actions, with over 550 active cases and between 50 to 100 applications for authorization filed each year. While 2023 marked the fifth anniversary of the "new" class action division: what is there to watch in 2024? Read on to find out.

Opioids and the State: *Sanis Health v. British Columbia*

Can a state be a plaintiff to a class action? Can it be the plaintiff to a class action in another state? Can it be a class member in another state?

In 2018, British Columbia adopted the *Opioid Damages and Health Care Costs Recovery Act*[1] [**ORA**] allowing the government to institute class action proceedings regarding "opioid-related wrongs." This was modelled after an earlier legislation targeting "tobacco-related wrongs,"[2] the constitutionality of which had been upheld by the Supreme Court.[3] The ORA, however, allowed not only British Columbia to institute such proceedings, but also, provided it had commenced such an action, to bring it forward "on behalf of a class consisting of one or more of the governments of Canada and the provinces or territories of Canada."[4] The constitutionality of this provision was challenged, without success in the first instance[5] and on appeal.[6] Though the Court of Appeal upheld the validity of the provision, it did characterize it as "a bold step, if not an experiment, in bringing government-led class litigation as close as possible to truly "national" proceedings in Canada's federal structure."[7] This boldness snowballed: Similar laws have been adopted throughout Canada.[8] Unsurprisingly, the Supreme Court of Canada has granted leave.[9] A hearing should be scheduled in 2024.

Relatedly, in Quebec, the parties are awaiting judgment on an application for authorization to institute a class action against several pharmaceutical companies[10] relating to the manufacturing, marketing, distribution and sale of opioids. In this case, the plaintiff is seeking to represent all persons in Quebec who suffer, or has suffered, from opioid use disorder following the use of

prescription opioids since 1996.

It is now settled law that one person may sue several defendants in a single action regarding an allegedly common practice even if that person does not have a direct cause of action against each defendant, provided that the proposed representative is otherwise able to adequately represent the members who do.[11] It remains to be seen whether the representative plaintiff put forward in this case will be able to fulfill his role against approximately 20 companies having marketed more than 150 different products over more than 25 years.

Jurisdiction over foreign defendants

Are allegations sufficient to establish the jurisdiction of Quebec authorities over foreign defendants that are distinct from their Quebec subsidiaries?[12] And if so, how should the geographical limits of the putative class members be defined?

In the *Bourgeois* case, the proposed representative, a Quebec resident, is seeking authorization to institute a class action against several companies that develop and market video games with a "loot box" mechanism, which he claims constitutes a form of illegal gaming. Putative class members are not limited to Quebec residents such as himself. Moreover, many of the respondents are foreign companies, and some have no establishment in Quebec. Some of these foreign entities filed a declinatory exception, which the court dismissed. An appeal was filed, which includes arguments that the dismissal of the declinatory exception unduly broadened the definition of "establishment" within the meaning of article 3148 C.C.Q. Will the Court of Appeal give guidelines for determining whether such an issue should be addressed at the authorization stage? We should know soon as the Court of Appeal is expected to render judgment on this matter within the coming months. The appeal was heard on February 2, 2024.

In 2023, the Quebec Court of Appeal had closed the door on the use of the guiding principles of procedure to broaden the scope of its jurisdiction.[13] Earlier in the year, the British Columbia Court of Appeal had ruled that it had no jurisdiction over a class action relating to misrepresentations made outside its territory for lack of a "real and substantial connection",[14] and the Ontario Superior Court had followed suit.[15] Clearly, class action law and private international law continue to cross paths, if not swords.

More than 10 years later[16]

The majority of class actions are settled before they reach the merits. The same cannot be said for the case involving the Lac-Mégantic tragedy, in which the Court of Appeal is slated to hear the case on liability of certain defendant this year.

On July 6, 2013, at 1:14 a.m., downtown Lac-Mégantic was set ablaze after a tank car train derailed. Images of the derailment were broadcast around the world. A class action ensued, filed on July 15, 2013. Authorized on June 8, 2015,[17] it was joined with two civil suits, one instituted by the Attorney General of Québec [translation] "for all of the damages suffered by the Quebec State as a result of the tragedy," estimated at over $231,000,000, and the other by a group of insurers.[18] These proceedings were also split in order to first address the liability of the defendants Montreal, Maine & Atlantic [**MMA**] and Canadian Pacific [**CP**].[19]

On December 14, 2022, after a 63-day trial, spanning nine months, the Superior Court did not hold CP liable for the derailment, finding only MMA liable.[20]

Appeals were filed by both sides in January 2023, suspending the continuation of the trial for the remainder of the case.[21] As the appeal materials were filed in the fall of 2023, there should be a

hearing in 2024.

Class counsel or representative's counsel?[22]

Are the lawyers of the representative also those of the class? A trial judgment suggests that they should be considered so if it is in the interest of the class. The Court of Appeal will be ruling on this issue.

The Court of Appeal may be called on to rule on this recurrent point of contention between lawyers who act mainly for the plaintiffs and those who act mainly for the defendants: does class counsel have a direct relationship with the members of the class, or is their legal relationship thereto contingent on the relationship they have with the representative?

Labour law in Canada's major junior hockey leagues gives the case its backdrop. Around 2020, the parties to three certified class actions, one in Alberta, one in Ontario and one in Quebec,[23] agreed to a settlement that included a release. The scope of said release was the stumbling block—the three courts involved refused to approve the transaction and sent the parties back to the drawing board.[24] A new release under the same agreement was drawn up in 2023. It was signed by the two representatives of the Quebec class, Lukas Walter and Thomas Gobeil, on May 9 and June 5, 2023. A date was then set for approval. In a surprising turn of events, on June 14, 2023, Walter and Gobeil informed their lawyers that they no longer agreed to the amended transaction, and notices of revocation of mandate were sent out a few days before the scheduled hearing date. Class counsel, claiming the need to safeguard the interests of the class members, asked the Court to reject the notices of revocation.[25]

The text of article 576 C.C.P. is unequivocal: the court appoints the representative. It is also clear from case law that it is the representative plaintiff who mandates counsel, not the reverse.[26] Because the representative plaintiff is entitled to the counsel of his or her choice, like any other litigant, Walter and Gobeil were in principle entitled to revoke the mandates of their lawyers, even though said lawyers had been involved from the outset of the case. The matter complexifies when one considers the interests of the class members, as the trial judge writes: [translation] "Who will act in the case and whom will they be representing?"[27] Possibly to assuage both sides, she acknowledged the revocation of mandate, but confirmed that the lawyers would continue to represent the class, stating that they [translation] "must uphold their duty to represent the class and present the terms of the settlement agreement as amended for approval."[28] In other words, she considered that class counsel had a direct relationship with the class.

Needless to say, the case was appealed. The hearing on leave to appeal took place on February 29, 2024.

Price higher than advertised: where's the harm?

What burden is imposed on plaintiffs who wish to institute proceedings under section 224(c) of the Consumer Protection Act, *prohibiting the practice of hidden charges or drip pricing? A trial judgment states that the mere finding of a prohibited practice is not sufficient to prove actual harm.*

For the first time in reported case law, the Court of Appeal will consider a judgment on the merits dealing with the application of article 224(c) of the *Consumer Protection Act*.

In this case, Union des consommateurs claims that Air Canada, during the first stage of an online ticket purchase process, failed to indicate the amount of taxes, fees, charges and surcharges included in the final price charged, thereby violating applicable legislation. Union des consommateurs is seeking a reduction in the price paid by members of the class corresponding to

the sum of the charges, as well as punitive damages of $10 million.

The Superior Court found that Air Canada had indeed advertised a price lower than that ultimately charged to class members. This finding of fault, however, did not relieve the plaintiff of the burden of proving actual harm. Because Air Canada demonstrated that there were clearly visible warnings that the advertised prices did not include all of the fees charged, the Court concluded that the prohibited practice was not likely to influence the formation of the contract.[29]

Since no harm has been demonstrated, no compensatory damages were awarded. As for punitive damages, the evidence did not show that Air Canada had engaged in "conduct […] which display[ed] ignorance, carelessness or serious negligence". Moreover, Air Canada had ceased engaging in the contentious practice before the class action was authorized.

The appeal was lodged on December 28, 2022, and should be heard this year. The upcoming decision will have a significant impact on a number of ongoing class actions under section 224(c) CPA. The decision will certainly shed some interesting light on the required proof of actual harm and the impact of the prohibited practice on consumers' purchasing decisions.

Devaluation of taxi licenses

Will the Superior Court find that by adopting the* Act respecting remunerated passenger transportation by automobile,[30] *the Quebec government expropriated taxi owners without paying fair and reasonable compensation?

From April 1 to 24, 2024, the Superior Court will hear a class action on the revenue decline in the taxi industry attributed to the arrival of Uber, an online transportation platform having transformed the urban travel landscape by connecting users with independent drivers via a mobile app. The class action was authorized in 2018.[31]

The representative, who holds a taxi license, represents a group of taxi drivers and owners. He alleges that his loss of income and the depreciation in the value of his permits were caused by the legislator's authorization of Uber's business activities. He argues that the exemption provided to Uber by the law relative to taxi permit fees and the non-regulation of fares for its drivers have enabled Uber to charge far lower fares than those that regulated taxi operators charge.

In this case, it will be interesting to see whether the Superior Court will apply the foundations of expropriation law to the class, which establish that no expropriation can take place without compensation for property rights.

Member participation and class counsel's fee to impose conditions relating to class counsel's fees

Can the Court make the full payment of the plaintiff's lawyer fees contingent on achieving a certain level of participation of members of the class, even though it has already held that the fees agreed to in the settlement agreement were reasonable?

Following the authorization of a class action on the false or misleading use of the word "champagne" by an airline that rather served a sparkling wine,[32] the parties agreed to a settlement awarding the class members a 7% discount on their next purchase to be made within the next three years, without any restrictions.

The settlement also provided for the payment of $1,500,000 to the class counsel, the reimbursement of expert fees and an envelope of up to $20,000 to maximize the settlement's visibility on social media, without affecting the 7% compensation offered to members.

The judgment approving the settlement authorizes the immediate payment of $751,450 to class counsel but makes payment of the balance conditional on achieving a participation rate of 50% of members, or 469,398 claims.[33] The plaintiff applied for and obtained leave to appeal the decision.[34]

He also applied for the revocation, rectification and clarification of the judgment, in particular on the grounds that, under article 593 C.C.P., final payment of professional fees cannot be made conditional on achieving a recovery rate, and that the 50% rate is excessive. Only the second ground of the application was allowed, and the 50% participation rate was reduced to 10%, or 93,880 claims.[35] The plaintiff has appealed this second decision. The judgment granting him leave to do so has been joined to the two appeals,[36] and the factums are slated to be submitted in 2024.

A number of decisions have already suggested that there needs to be a correlation between the professional fees of class counsel and participation of members in the benefits negotiated for them.[37] The Court of Appeal's upcoming ruling is certain to have significant implications on future settlements, and it will provide an interesting perspective on the discretionary power of trial judges to impose conditions relating to plaintiffs' lawyers' fees.

Greenwashing: can a class action help the environment?

Will the Superior Court authorize a class action on a misrepresentation that certain bags are recyclable?[38] Does consumer law provide an entry for asking the courts to address environmental concerns?

In recent years, many businesses have adopted environmental, social and governance practices (better known by the acronym ESG), often specifically performance criteria in these areas. However, some observers question the sincerity of these actions and sometimes consider them to be public relations schemes rather than genuine efforts on the part of businesses to reduce their environmental footprint or improve their social impact.

This context will make it interesting to follow the progress of a class action on misleading representations concerning bags, which a number of superstores present as "recyclable," when in fact they are only reusable as they are discarded by recycling plants in Quebec.

If this class action is authorized, it could pave the way for further similar actions. Businesses that have adopted ESG practices and have made their commitment public should pay attention to the outcome of this case.

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1. SBC 2018, c 35.
2. *Tobacco Damages and Health Care Costs Recovery Act*, SBC 2000, c. 30.
3. *British Columbia v. Imperial Tobacco Ltd*, 2005 SCC 49.
4. *Sandoz Canada Inc. v. British Columbia*, 2023 BCCA 306, para. 2.
5. *British Columbia v. Apotex Inc.*, 2022 BCSC 2147.
6. *Sandoz Canada Inc. v. British Columbia*, 2023 BCCA 306.
7. *Sandoz Canada Inc. v. British Columbia*, 2023 BCCA 306, para. 3.
8. Québec being the last one with the *Opioid-related Damages and Health Care Costs Recovery Act*, SQ 2023, c 25, having been assented to and having come into force on November 2, 2023.
9. *Sanis Health Inc. v. British Columbia*, SCC 40864 (November 9, 2023).
10. Of the initial thirty-four defendants, a certain number agreed to settle out of court. Lavery, de Billy represents one of these defendants.
11. *Bank of Montreal v. Marcotte*, 2014 SCC 55, para. 43.
12. *Bourgeois c. Electronics Arts Inc.*, 2023 QCCS 1011, leave to appeal granted: *Electronics Arts Inc. c. Bourgeois*, 2023 QCCA 826, only judge.
13. *Otsuka Pharmaceutical Company Limited c. Pohoresky*, 2022 QCCA 1230, leave to appeal denied: SCC 40452 (May 25, 2023).
14. *Hershey Company v. Leaf*, 2023 BCCA 264.
15. *Gebien v. Apotex Inc.*, 2023 ONSC 6792.
16. Lavery, de Billy represented one of the defendants between 2013 and 2016.

17. *Ouellet c. Rail World inc.*, 2015 QCCS 2002, amended by *Ouellet c. Canadian Pacific Railway Company*, 2016 QCCS 5087.
18. *Ouellet c. Compagnie de chemin de fer Canadien Pacifique*, 2017 QCCS 5674. Two other civil cases were suspended in the wake of these three cases, one by the same judgment, the other by *9020-1468 Québec inc. c. Canadian Pacific Railway Company*, 2019 QCCS 366.
19. *Ouellet c. Compagnie de chemin de fer Canadien Pacifique*, 2017 QCCS 5674.
20. *Ouellet c. Compagnie de chemin de fer Canadien Pacifique*, 2022 QCCS 4643.
21. Since June 30, 2023 article 211 C.C.P. prohibits the immediate appeal of a judgment rendered in a split proceeding that does not terminate the proceeding; there was therefore no reason to consider the consequences of possible asymmetry in res judicata in the case of a judgment that only partially puts an end to such a proceeding.
22. *Walter c. Quebec Major Junior Hockey League Inc.*, 2023 QCCS 3655.
23. *Walter v. Western Hockey league*, 2017 ABQB 382; *Berg v. Canadian Hockey League*, 2017 ONSC 2608 and *Walter c. Quebec Major Junior Hockey League Inc.*, 2019 QCCS 2334.
24. *Walter c. Western Hockey League*, 2020 ABQB 631; *Berg v. Canadian Hockey League*, 2020 ONSC 6389 and *Walter c. Ligue de hockey junior majeur du Québec Inc.* 2020 QCCS 3724.
25. *Walter c. Quebec Major Junior Hockey League Inc.*, 2023 QCCS 3655, para. 13.
26. *Deraspe c. Zinc électrolytique du Canada ltée*, 2018 QCCA 256, paras. 38 *et s.*
27. *Walter c. Quebec Major Junior Hockey League Inc.*, 2023 QCCS 3655, para. 23.
28. *Walter c. Quebec Major Junior Hockey League Inc.*, 2023 QCCS 3655, para. 24.
29. *Union des consommateurs c. Air Canada*, 2022 QCCS 4254, para. 113, quoting to *Richard v. Time Inc*., 2012 SCC 8, para. 125.
30. *Act respecting remunerated passenger transportation by automobile*, CQLR c. T-11.2.
31. *Metellus c. Procureure générale du Québec*, 2018 QCCS 4626.
32. *Macduff c. Vacances Sunwing inc.*, 2018 QCCS 1510.
33. *MacDuff c. Vacances Sunwing inc.*, 2023 QCCS 343.
34. *MacDuff c. Vacances Sunwing inc.*,2023 QCCA 476, only judge.
35. *MacDuff c. Vacances Sunwing inc.*, 2023 QCCS 4125.
36. *MacDuff c. Vacances Sunwing inc.*, 2024 QCCA 61, only judge.
37. E.g., *Daunais c. Honda Canada inc.*, 2022 QCCS 2485, paras. 132–133.
38. *Cohen c. Dollarama et al.*, SC 500-06-001200-225.