Québec's distinctive class action regime

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I. Introduction

In 1978, Québec was the first province to adopt an opt-out class action regime. The procedural rules introduced were inspired from Rule 23 of the *Federal Rules of Civil Procedure* in the United States. Quebec's class actions rules are codified in the *Code of Civil Procedure, Chapter C-25.01* ("**CCP**"). In our jurisdiction, class actions proceed in three stages: 1) the authorization (certification) of the class action, 2) if authorization is granted, the trial on the merits and 3) the recovery.

This article will focus on the procedural rules at the authorization stage and outline the impact of the recent reform of the CCP on this particular procedural vehicle.

II. Class action procedure in Québec

The conduct of Canadian class proceedings is largely dictated by Canada's unique constitutional arrangement. As a result, provincial courts have jurisdiction to hear class proceedings concerning most civil actions and provincial governments have authority to legislate with regard to the conduct of class proceedings that concern property and civil law.

These constitutional structures have resulted in Canada's current class proceedings being a patchwork of provincial class action statutes that are largely uniform but differ somewhat as to procedural rules.

The Canadian Federal Government and its courts have no authority to coordinate provincial actions with the result that there is no supervisory court or multi-district litigation panel in Canada to streamline putative class proceedings into the most appropriate form as in the United States.

The test for certification of a class action in Canada is less rigorous compared with that in the United States. There is no requirement in Canada that the representative plaintiff meet the prerequisites of numerosity and predominance. Furthermore, defendants are not exposed to excessive awards in punitive damages and to jury trials as in the United States. In Canada, a class action is a form of collective remedy that provides access to justice, judicial economy and the deterrence of anti-social behaviour [*Western Canadian Shopping Centers v. Dutton [2001] SCC 46]*.

Among all Canadian jurisdictions, Québec's procedure is clearly unique in that it is plaintiff-oriented. It is considered more than just a set of procedural rules but a true measure of access to justice. As we will see, the bar for authorization is lower than in the Common Law jurisdictions. Each case is subject to mandatory case management by a designated Superior court judge whose primary task is to ensure that the matter will proceed to authorization promptly.

If Québec is distinct in the Canadian Common Law legal landscape, it is mostly because of its unique bilingual and bijuridical legal system forming the basis of the administration of justice under which civil matters are regulated by French-heritage civil law.

III. The Authorization stage

i. Authorization Criteria

In order for a class action to be authorized, the plaintiff must demonstrate that the prerequisites of Article 575 CCP are met:

> **575.** The court authorizes the class action and appoints the class member it designates as representative plaintiff if it is of the opinion that
>
> (1) the claims of the members of the class raise identical, similar or related issues of law or fact;
>
> (2) the facts alleged appear to justify the conclusions sought;
>
> (3) the composition of the class makes it difficult or impracticable to apply the rules for mandates to take part in judicial proceedings on behalf of others or for consolidation of proceedings; and
>
> (4) the class member appointed as representative plaintiff is in a position to properly represent the class members.

Over the years, our courts have adopted a very flexible approach in the analysis of these four authorization criteria, as illustrated by a series of decisions of the Supreme Court of Canada which have confirmed the relatively low authorization threshold as compared to the other Canadian jurisdictions [*Infineon Technologies AG v. Option consommateurs* [2013] 3 SCR 600; *Vivendi Canada Inc* v. *Dell'Anniello* [2014] 1 SCR 3; *Bank of Montreal* v. *Marcotte* [2014] 2 SCR 725].

There is no restriction on the nature of a class action that can be initiated. Typically, they are commenced more frequently in such areas as consumer-related matters, mass torts, securities, product liability, anti-trust and insurance cases. Public funding is available through the *Fonds d'aide aux actions collectives* (FAAC), which provides financial assistance to the representative plaintiff to cover such expenses as attorneys' fees, disbursements and expert fees.

It is important to note that at the authorization stage, the representative plaintiff's burden is one of demonstration, not of proof, as he or she is only required to make out a defendable case in a context where the allegations of the motion are taken as

true *prima facie*. The authorization stage is considered a filter mechanism whose primary objective is to eliminate frivolous class actions. The representative plaintiff must also show that the resolution of the questions raised by the class action is to the benefit of the putative class on a class wide basis, keeping in mind that a single common question - not the answers - is sufficient to justify a class action provided there exists no conflict within the proposed class. Our courts are quite flexible in determining that a class action is preferable to obtaining individual mandates or a consolidation of actions as well as the ability of the representative plaintiff to properly represent the class members..

As for legal interest, our courts have considered this substantive law requirement in a somewhat liberal manner. This has in fact generated quite a number of class actions filed by individuals and consumer groups against multiple defendants, or even an entire industry, such as banks or car manufacturers, alleging the same behavior. As long as a legal interest against only one of the defendants exists, an actual cause of action against each of them is not required [*Bank of Montreal* v. *Marcotte* [2014] 2 SCR 725].

Provided these four requirements are met, the court has no discretion and must authorize the proposed class action provided that the rule of proportionality [Article 18 CCP] is observed. This rule stipulates that the parties must ensure that the proceedings they choose are proportionate in terms of the costs and time required, to the nature and ultimate purpose of the action or application and complexity of the dispute. However, this does not constitute a stand-alone requirement but rather a principle that must be considered in the assessment of each of the four criteria of article 575 CCP [*Vivendi Canada Inc* v. *Dell'Anniello* [2014]

ii. <u>Defending a class action motion</u>

Contrary to the procedural rules in force in the Common Law provinces, Defendants do not have the possibility of filing a written contestation (statement of defense) to the motion for authorization. The motion can only be contested orally but the judge may allow relevant evidence to be submitted. Hence, the authorization is analyzed on the basis of the allegations of the motion as the procedural process does not allow the defendant opposing the authorization to file affidavits, documentary evidence or expert reports unless leave is granted by the court. Furthermore, the representative plaintiff cannot be examined unless permission is granted by the court. To obtain such leave, the defendant must specify the content and objective of any evidence it seeks to file to oppose the authorization. The judge will grant permission only if he or she determines that the evidence is pertinent for the analysis of the authorization criteria.

The judgment authorizing the class action does not dispose of the merits of the dispute as the defendant will be able to defend the case at the trial on the merits. Québec is by far the Canadian province that has authorized the most class actions that have proceeded on the merits. One of them is the tobacco litigation in which

$15.5 billion in damages were awarded against the tobacco companies [*Létourneau c. JTI-MacDonald Corp., 2015 QCCS 2382 - under appeal*]. Another case is the Lac Mégantic rail disaster of 2014 that generated both class action and insolvency proceedings that were recently settled, certainly one of the largest mass tort cases in Canadian history [*Montréal, Maine & Atlantique Canada Cie (Arrangement relatif à), 2015 QCCS 2706; Montreal, Maine & Atlantic City Canada Co./(Montreal, Maine & Atlantique Canada Cie) (Arrangement relatif à),* 2015 QCCS 3235*; Montréal, Maine & Atlantique Canada Cie (Arrangement relatif à),* 2015 QCCS 3236].

IV. The new Code of Civil Procedure

On January 1, 2016, the new Code of Civil Procedure came into force and brought significant changes to the rules governing class actions in Québec.

i. Asymmetrical right of appeal

The former rule preventing an appeal by the defendant of a judgment authorizing a class action but granting an appeal *de plano* to the plaintiff of a judgment disallowing the authorization [former Article 1010 CCP] was considered among the defense bar as a major irritant, if not an infringement of the principles of procedural fairness.

This has been revised with the new CCP, with the result that defendants will now have the right to seek leave to appeal a judgment granting the authorization [Article 578 CCP].

So far, leave to appeal under this new rule has been sought in three matters currently before the Court of Appeal [*Duproprio inc.* c. *Fédération des chambres immobilières du Québec (FCIQ)* 2016 QCCA 930; *Énergie éolienne des Moulins, s.e.c.* c. *Labranche* 2016 QCCA 857; *Centrale des syndicats du Québec* c. *Allen*, 2016 QCCA 621 (CanLII)]. Counsel in each of these cases have been invited to submit a brief before a special panel of three judges as to the criteria that should guide the Court of Appeal in allowing leave. It will be quite interesting to read the first decisions of the Court of Appeal to be issued as to whether it will adopt a restrictive approach by limiting the right of appeal of the defendant only in cases where the judgment of the Superior court would cause serious injustice if it is not appealed, as the plaintiff Bar is likely to argue.

ii. Standing to institute a class action

The new CCP has modified the rule governing standing to file a class action or be part of a class which, for corporations, was limited to companies having less than 50 employees [Article 571 CCP.].

There was no longer any justification for this rule which had been introduced in 1978, in a context where class actions were considered to be a procedural tool

designed for the sole benefit of individuals and consumers. This amendment, in addition to broadening access to justice and promoting the principle of judicial economy, harmonizes the rules with that of the other Canadian jurisdictions. It also avoids situations where companies which did not qualify under the former rule will no longer have to exercise their rights and ask to be included in class actions of the same nature pending in other Canadian jurisdictions as they can now have standing to initiate a class action and be member of a class.

iii. Multijurisdictional class actions

The filing of multiple class actions in various jurisdictions raises issues of *lis pendens* and recognition of judgments from other Canadian jurisdictions.

In Canada, the filing of multijurisdictional class actions is frequent. They will be difficult to manage if the law and particular issues vary from one jurisdiction to another. Although a protocol was put in place to streamline such proceedings, Canada does not have the equivalent of a MDL like in the US.

The new provision [Article 577 CCP] reinforces the principle that Québec courts are the custodians of the interests of class members and must consider the best interest of Québec residents before granting the discontinuance of a motion for authorization to allow a class action introduced in another Canadian jurisdiction which includes Québec residents to proceed or allowing the Québec class action to be stayed.

The Québec court will also make sure that the *Civil Code of Québec* and the rules of the CCP will be complied with should the court in another Canadian jurisdiction be asked to make a determination as to the rights of the Québec residents included in a national class [Article 594 CCP]. This may apply with respect to public policy legislation such as the *Consumer Protection Act* (CPA), labour laws and insurance law.

This new provision codifies the existing case law on the issue of multijurisdictional class actions. It is not unique to Québec as other provinces, namely Alberta and Saskatchewan [*Class Proceedings Act, SA 2003*, c C-16.5; *The Class Actions Act, SS 2001*, c C-12.01] have adopted similar rules.

V. Conclusion

Class proceedings in Québec introduced by the legislator in 1978 are clearly plaintiff friendly and designed to provide access to justice primarily to individuals and consumer groups soliciting collective redress and behaviour modification.

The coming into force of the new CCP only enhances a regime that has worked well over the years and is considered to be efficient in the administration of justice.. The new provisions will also ensure some uniformity with the procedural rules applied in the common law jurisdictions and will make Québec a more

attractive jurisdiction in the context of multijurisdictional and cross-border class actions.

There is no doubt that class action activity will not only be maintained but will significantly increase in the years ahead, bringing about quite interesting challenges for the defence Bar in opposing class actions in Québec.