IN FACT AND IN LAW

Class Actions

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The Court of Appeal Warns Petitioners in Motions for Authorization Against Group Descriptions that are too Broad and Disproportionate

by Catherine Lamarre-Dumas

On September 26, 2007, the Court of Appeal dismissed the appeal of appellant Citizens for a Quality of Life [1] *("CQL") and upheld the judgment of the Superior Court* [2] *dated December 14, 2004, which had refused to grant its motion for authorization to institute a class action against Aéroports de Montréal ("ADM") on the basis of the lack of similar or related questions raised by the recourses of the class members.*

The Facts

CQL sought to represent a class of approximately 100,000 persons residing or having resided since April 1, 2000 in a territory extending from Villeray, St-Michel and Parc Extension in the east up to Senneville in the west and from Ile-Bizard in the north up to the western part of Montreal in the south, the acoustic environment of which is exposed to the noise produced by planes that take off or land at the Montreal-Trudeau Airport between 11 p.m. and 7 a.m., and more particularly those which take off between 6 a.m. and 7 a.m.

CQL argued that ADM: (i) contravened the regulations governing the control and minimization of noise, (ii) failed to comply with the provisions of the *Environment Quality Act* as well as with the civil and fundamental rights guaranteed under the Charter and (iii) did not comply with the obligations of reasonable conduct and good neighbourliness prescribed in the *Civil Code of Quebec*.

CQL accordingly required that the class members be compensated for the trouble and inconvenience which they allegedly suffered as a result of the "night" flights as well as a permanent injunction ordering ADM not to authorize them.

The Superior Court

The Superior Court dismissed the motion for lack of identical, similar or related questions of law or fact, a condition set out in Article 1003 a) of the *Code of Civil Procedure* ("C.C.P.").

The Superior Court judge emphasized that CQL sought to represent a class scattered across a territory of 32.5 km in the north-east/south-west axis and 17 km in the east-west axis. According to the Court, the territory proposed by CQL was so large that it amounted to having no geographical reference resulting in a disproportion of the common issues in comparison with the individual ones.

> **[Our translation] "The least that can be said is that the large geographical territory used by CQL to define the class increases significantly the possibility of highly diversified individual claims which runs against the fundamental objective sought by a class action."**

[1] *Citoyens pour une qualité de vie/Citizens for a Quality of Life* v. *Aéroports de Montréal*, 2007 QCCA 1274.

[2] *Citoyens pour une qualité de vie/Citizens for a Quality of Life* v. *Aéroports de Montréal*, J.E. 2005-414 (S.C.).

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The Court added that the description of the group submitted by CQL required that it determine whether any given member lived in an environment exposed to noise. Such determination cannot be made without referring to the evidence on the merits of the case since the class trial judge has to decide in each case whether the environment of the concerned members is truly exposed to noise and, in the affirmative, to what degree. The judge also examined the possibility of reformulating the description of the class but decided against it for lack of evidence. Accordingly, he declared that the condition set out in Article 1003 a) C.C.P. was not met and dismissed the motion for authorization to institute the class action.

The Court of Appeal

(a) On appeal, the Superior Court judgment may be challenged in its entirety

The Superior Court judge concluded that CQL had met three (3) of the four (4) conditions necessary for instituting a class action. CQL was arguing that ADM was precluded from challenging the trial judge's decision on those issues.

The Court of Appeal confirmed that ADM was entitled to challenge all unfavourable aspects of the Superior Court judgment in response to a duly brought principal appeal, thus putting an end to the uncertainty that existed since the judgment of the Court of Appeal in *Paquin* v. *Compagnie de chemins de fer Canadien Pacifique* [3].

Therefore, ADM was allowed to plead that the Superior Court judge erred in concluding that CQL had adduced *prima facie* evidence of a serious case to set forth. On that issue, and with certain reservations expressed by the majority judges, the Court of Appeal concluded that the Superior Court judge did not commit a palpable error in declaring itself generally satisfied as to the existence of an appearance of right which could have led to the conclusions sought.

(b) The description of the class is inappropriate

The other issue in dispute before the Court of Appeal was whether the trial judge had properly exercised his discretionary power not to remedy the deficiencies of the description of the class proposed by CQL, particularly with respect to the fact that the geographical territory significantly increased the possibility of highly diversified individual claims.

CQL argued that the judge seized with a motion for authorization has the obligation to describe the class, and as if he concludes that the description is so vast that it may result in a disproportion between the individual claims and the common issues, he must redefine the class in order to allow the class action to proceed.

Speaking on behalf of the majority, Mr. Justice Pelletier confirmed that the description of the class needed to be included in the authorization judgment since this requirement is linked to the notice that must be published. However, he added that this did not mean that the judge was in any way responsible of defining the class. This responsibility belongs to the person who seeks to represent the class. That person must describe a class that reflects the reality and the scope of the problem from which the dispute originates. The judge has the authority to redefine the class only in certain circumstances:

> **[Our translation] "[109] Of course, I recognize that the Courts must not be unduly severe with the petitioners in motions for authorization, particularly when the proposed recourse deals with an environmental matter. But there is a margin between severity and giving away a licence. The fact that we are dealing with an environmental issue does not relieve the petitioner from his burden to such an extent that he may suggest a class definition that is disproportionate in many respects and then let the judge separate the wheat from the chaff."** [4]

In the case at bar, the Court of Appeal was of the opinion that the trial judge properly exercised his discretionary power when he chose not to intervene to remedy the deficiencies of the definition of the class proposed by the appellant. Firstly, the description was circular and inconsistent with the teachings of the Supreme Court of Canada in *Western Canadian Shopping Centres* v. *Dutton* [5], according to which it is

[3] [2005] R.J.Q. 2840 (C.A.). See also *Del Guidice* v. *Honda Canada inc.*, [2007] R.J.Q. 1496 (C.A.).

[4] *Supra* note 1.

[5] [2001] 2 S.C.R. 534.

necessary that "*any particular person's claim to membership in the class be determinable by stated, objective criteria*". Mr. Justice Pelletier added that this circularity implied that sectors not affected by the noise were to be found in the relevant territory which, in the absence of details, further complicated the task of the judge that would undertake rewrite the definition.

In support of its decision, the Court of Appeal quoted the following excerpts from two of its own recent judgments dismissing motions to institute class action:

> **[Our translation] "[18] Case law has for a long time insisted on the power of the authorizing judge to modify the composition of the class proposed by the petitioner in a motion for authorization. Without minimizing the importance of this power, I note that this insistence may have had the perverse effect of encouraging certain petitioners to propose very wide definitions. Relying on this power of the judge to redefine the class into logical and reasonable proportions, these petitioners underestimate the risk they incur to see their motion dismissed for failing to comply with Article 1003 (a) C.C.P. One must keep in mind that the person who is in the best position to adequately define the class remains he or she who carried out the investigation prior to introducing the motion for authorization, namely, the person who seeks the status of representative. Without a doubt, the judge may, after a hearing, intervene to polish certain aspects of the definition but he is not the one who primarily bears the responsibility of creating it."** [6]
> **(emphasis added)**

In the same manner, in *Bouchard* v. *Agropur coopérative* [7], the Court of Appeal stated the following:

> **[Our translation] "[21] When he notes that the proposed class is not sufficiently homogeneous, causing the use of the procedural vehicle of class action to become inappropriate by reason of the importance of individual issues, the judge may elect to dismiss the motion or to attempt to redefine the class. He is under no strict obligation to choose the latter, particularly when he feels that he does not hold the elements that would allow him to impose on the petitioner a definition that the latter did not first deem appropriate to retain or if he estimates that, all in all, the remodelled definition is not going to ensure the conduct of a trial reconciling efficiency and fairness, to paraphrase the terms used by Chief Justice McLachlin in *Canadian Shopping Centres*."**
> **(emphasis added).**

Conclusion

We understand from the case *Citoyens pour une qualité de vie/Citizens for a Quality of Life* v. *Aéroports de Montréal* [8] and the other judgments referred to by the Court of Appeal that the petitioner is primarily responsible for describing the class he seeks to represent and that he must do so in logical and reasonable proportions. Under Article 1005 C.C.P., and in the presence of appropriate evidence, the judge seized with a motion for authorization has the authority to intervene to remodel the class but not to the extent of creating from scratch a description of the class which the petitioner is responsible for. Not only is this task not incumbent on the judge but a description that is too broad may very well lead to the absence of common issues and a preponderance of individual issues. In such a case, the petitioner will see his application for authorization dismissed for failing to comply with Article 1003 (a) C.C.P.

Mtres Guy Lemay and Jean Saint-Onge of Lavery, de Billy represented ADM in this matter.

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6 *Lallier* v. *Volkswagen Canada inc.*, J.E. 2007-1346 (C.A.). See also *Del Guidice* v. *Honda Canada inc.*, J.E. 2005-1302 (C.S.), confirmed by [2007] R.J.Q. 1496 (C.A.), *supra* note 3.

7 J.E. 2006-2095 (C.A.).

8 *Supra* note 1.

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