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This article discusses what is commonly referred to by defense counsel as the "friendly" class action landscape in Quebec. We first expose the criteria necessary for certification, as well as the generous "Plaintiff friendly" interpretation of same established by the Quebec courts, including most recently by the Supreme Court of Canada. To further illustrate the "Plaintiff friendly" legislative landscape, the authors discuss consumer class actions, the statutory regime recently adopted to facilitate class actions for false and misleading disclosure on the secondary stock market, as well as the recent landmark tobacco class action judgment, in which the tobacco companies inherited historical compensatory and punitive awards.

The Friendly Quebec Class Action Landscape

ABOUT THE AUTHORS

Éric Azran has been a member of the civil and commercial litigation group in the Montréal office of Stikeman Elliott since November 1999. He was named a partner of the firm in November 2008. His practice extends to all aspects of civil and commercial litigation, ranging from providing clients with legal opinions and strategic advice to representing clients in Quebec courts of first instance and appeal as well as administrative tribunals. He can be reached at eazran@stikeman.com.

Patrick Desalliers is an associate and member of the Knowledge Management Committee at the Montréal office of Stikeman Elliott where he practices within the Litigation Group. His practice includes providing advice, drafting proceedings and representing clients before the courts. His practice focuses mainly on litigation in the corporate field, including directors and officers liability, shareholder conflicts, securities litigation as well as class actions. He can be reached at pdesalliers@stikeman.com.

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Martin J. Healy
Vice Chair of Publications
Sedgwick LLP
martin.healy@sedgwicklaw.com

Overview of the Quebec Class Action Landscape

In Canada, as a result of the federal-provincial division of powers in the constitution, each province may adopt its own class action legislation.

In Quebec, a plaintiff may not institute class proceedings without the prior authorization of the court. The motion for authorization must state the facts giving rise to the claim, identify the principal questions to be dealt with collectively, the related conclusions sought and describe the group on behalf of which the representative member intends to act.

In essence, the motion for authorization constitutes a filter mechanism, the purpose of which is to enable the Court to verify whether each of the criteria set forth at Article 1003 of the Quebec *Code of Civil Procedure* ("**CCP**") is met, namely:

- The recourses of the members raise identical, similar or related questions of law or fact;

- The facts alleged (which are assumed to be true at the authorization stage) seem to justify the conclusions sought, i.e. does the applicant have an "*arguable case*" in light of the facts and the applicable law[1];

- The composition of the group makes the application of alternate procedures for joining multiple plaintiffs difficult or impracticable. This condition is generally met where it is impossible for the applicant to identify the individual class members; and

- The member to whom the court intends to ascribe the status of representative is in a position to adequately represent the members of the class.

The Supreme Court of Canada has recently adopted a generous, broad and liberal interpretation of the above criteria[2]. As a result, there is a low threshold in Quebec with respect to certification of class actions.

From a procedural standpoint, it is worth noting that before 2002, the applicant was required to file affidavit evidence in support of the motion for authorization, thus exposing the applicant to discovery before the authorization hearing. However, this requirement was removed in 2002, further evidencing the legislature's intent to facilitate class actions.

Furthermore, (i) the defendant must obtain leave from the Court to file rebuttal evidence at the authorization hearing; and (ii) the

[1] *Infineon Technologies AG* v. *Option consommateurs*, [2013] 3 SCR 600, at para. 65.
[2] *Vivendi Canada Inc.* v. *Dell'Aniello*, 2014 SCC 1 (CanLII), at para. 58; *Infineon Technologies AG* v. *Option consommateurs*, [2013] 3 SCR 600, at paras. 59-61; *Marcotte* v. *Longueuil (City)*, [2009] 3 S.C.R. 65, at para. 22;

judgment authorizing the bringing of class proceedings cannot be appealed.

As a result of the above, Quebec is the most "class friendly"/permissive jurisdiction *vis-à-vis* certification of class proceedings in Canada.

To be noted that the test for certification in Quebec is less onerous than that provided at Rule 23 of the American Federal Rules of Civil Procedure. Among other differences, the test for certification in Quebec does not require that the questions of law or fact which are common to the class members predominate over questions affecting only individual members. Indeed, in Quebec, one single common issue to all members could be deemed sufficient, unless the issue in question plays an insignificant role in the outcome of the class action[3].

As noted recently by the Supreme Court of Canada in the *Vivendi* case:

[57] Thus, the Quebec approach to authorization is more flexible than the one taken in the common law provinces, although the latter provinces do generally subscribe to an interpretation that is favourable to the class action. The Quebec approach is also more flexible than the current approach in the United States: […]. As Professor Lafond says, [translation] "Quebec procedure surpasses in this regard the procedure of the other Canadian provinces, and of England and the United States, which struggle with the rigid concepts of 'same interest' or 'common interest', and of 'predominance of the common issues'"[…] (citations omitted)[4]

Consumer Class Actions

A key weapon used by merchants to tackle consumer class actions is the inclusion of arbitration clauses in their contracts, thus preventing consumers from bringing class actions[5]. For example, in the *Dell Computer* case, the Supreme Court of Canada gave effect to such a clause, which was accessible *via* a hyperlink, and dismissed the motion for authorization to institute a class action[6].

However, since December 2006, these clauses were prohibited in Quebec as a result of Section 11.1 of the *Consumer Protection Act*[7] :

11.1 Any stipulation that obliges the consumer to refer a dispute to arbitration, that restricts the consumer's right to go before a court, in particular by prohibiting the consumer from bringing a class action, or that deprives the consumer of the right to be a member of a group bringing a class action is prohibited."

[3] *Vivendi Canada Inc.* v. *Dell'Aniello*, 2014 SCC 1 (CanLII), at para. 58; *Union des consommateurs* c. *Air Canada*, 2014 QCCA 523 (CanLII), paras. 76-77.
[4] *Vivendi Canada Inc.* v. *Dell'Aniello*, 2014 SCC 1 (CanLII), at para. 57.
[5] See Shelley McGILL, *Pre-dispute mandatory arbitration clauses – The not-so-secret weapon of "class" destruction,* The Canadian Class Action Review, Irwin Law, January 2015, Volume 10, Issue 1, p. 119.
[6] *Dell Computer Corp*. v. *Union des consommateurs*, [2007] 2 SCR 801.
[7] *Consumer Protection Act*, CQLR c P-40.1.

The Landmark Tobacco Class Action Case

On June 8, 2015, Justice Brian Riordan of the Superior Court of Quebec, after a hearing which lasted 251 days, released a historic ruling ending a 17 year legal battle between consumers of tobacco products (the "**Plaintiffs**") and the three big tobacco companies, namely JTI-Macdonald Corp, Imperial Tobacco Canada Limited and Rothmans, Benson & Hedges (collectively, the "**Companies**")[8]. The Plaintiffs sought compensatory and punitive (exemplary) damages.

The Court awarded to the Plaintiffs an amount of approximately CAD $15,5 billion, making this the highest amount of damages ever awarded in the context of class proceedings in Quebec.

Plaintiffs also sought an award for punitive damages from the Companies. Such damages are usually awarded in "exceptional cases for 'malicious, oppressive and high-handed' misconduct that offends the court's sense of decency'"[9], and where the misconduct "represents a marked departure from ordinary standards of decent behavior"[10].

The Court found that the Companies, with a view to maximize profits, knowingly withheld critical information from their customers and lulled them into a sense of non-urgency about the dangers of smoking[11]. The Court awarded the Plaintiffs an aggregate amount of CAD $1,3 billion in punitive damages, once again the highest such award in the context of class proceedings in Quebec.

Finally, Justice Riordan ordered the provisional execution of the judgment notwithstanding appeal for an amount of CAD $1 billion.

The Companies have indicated their desire to appeal this historic judgment.

Securities Class Actions

Investors suffering losses as a result of misrepresentations on the secondary market have traditionally faced a major obstacle to pursue their claim *via* class actions. Indeed, the plaintiff traditionally bears the burden of showing causation, i.e. that the investor in fact relied on the misrepresentation in question to buy its shares.

In the United States, to get around this hurdle in the context of class proceedings, the U.S. Supreme Court has adopted, in the *Basic Inc.* v. *Levinson* case, the *Fraud on the Market Theory*[12]. This theory is based on the fact that the price of a security traded on an efficient market will reflect all publicly available information about a corporation. It allows the court to presume that purchasers of securities

[8] *Létourneau* v. *JTI-MacDonald Corp.*, 2015 QCCS 2382.
[9] *Id.*, par. 1018, p. 202, quoting *Hill* v. *Church of Scientology of Toronto,* [1995] 2 S.C.R. 1130, par. 196.
[10] *Létourneau* v. *JTI-Macdonald Corp.*, 2015 QCCS 2382, par. 1018, p. 202, quoting *Whiten* v. *Pilot Insurance Co.*, [2002] S.C.R. 595, par. 36.
[11] *Létourneau* v. *JTI-Macdonald Corp.*, 2015 QCCS 2382, par. 485
[12] *Basic Inc. v. Levinson*, 485 U.S. 224 (1988).

traded on an efficient market were injured by misrepresentations or omissions of the issuing corporation which in turn artificially inflated the share price. Given the burden of proving that an entire class of investors has relied upon an alleged misrepresentation or omission, the *Fraud on the Market Theory* has become a particularly valuable tool for those wishing to institute class actions against security issuers. The theory was reaffirmed in 2014 by the U.S. Supreme Court in *Halliburton Co.* v. *Erica P. John Fund, Inc.*[13]

In Canada, several courts have explicitly rejected the incorporation of the *Fraud on the Market Theory* into Canadian law.[14] There is, however, some conflicting case law suggesting that the doctrine of *inferred reliance*, a variation of the *Fraud on the Market Theory*, could be used to get around this hurdle[15]. Subject to further developments in Canada on this issue, it remains difficult to certify common law class proceedings of this nature, as the Court has no choice but to proceed with a "case by case analysis" of the specific situation of each retail investor. Did each retail investor benefit from identical representations? Were these representations determinative of his/her decision to invest? Typically, these questions can only be determined on a case by case basis and that is why such claims do not usually lend themselves to class proceedings.

In Quebec, since 2007, the legislator has provided investors with a statutory mechanism to get around these difficulties. Under section 225.12 of the *Quebec Securities*

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[13] *Halliburton Co.* v. *Erica P. John Fund, Inc.*, 134 S. Ct. 2398, 189 L. Ed. 2d 339 (2014).

[14] *Kripps* v. *Touche Ross & Co*, [1990] B.C.J. 2787, p. 9-12 (BCSC); *Carom* v. *Bre-X Minerals Ltd.*, [1998] O.J. 4496, p. 7-14 (Ont. Gen. Div.), confirmed at [1999] O.J. 5144 (Ont. Div. C.); *First Choice Capital Fund Ltd.* v. *First Canadian Capital Corp.*, [1999] S.J. 163, par. 28 (SCQB); *Collette v. Great Pacific Management Co.*, [2001] B.C.J. 253, par 50 (BCSC); *Mondor v. Fisherman*, [2001] O.J. 4620, par 57-71 (Sup. C.J.); *Boulanger* v. *Johnson & Johnson Corp*.,[2002] O.J. 1075, at paras 11-13 (Sup. C.J.) confirmed at [2003] O.J. 2218, par. 11 (OCA); *Menegon* v. *Philip Services Corp*., [2003] O.J. 8, par. 14 (OCA); *Green* v. *Canadian Imperial Bank of Commerce*, 2014 ONCA 90 (CanLII), at paras. 97-103. But see *Silver* v. *IMAX*, 2013 ONSC 1667 (CanLII), at paras, 145 to 147 (leave to appeal to the Div. Ct. refused 2013 ONSC 6751 (CanLII)).

[15] The concept of inferred reliance was introduced in *Mondor v. Fisherman*, [2001] O.J. 4620 (Sup. C.J.): "*Given that the case law recognizes that a person's reliance upon a representation may be inferred from all the circumstances, in my view it would be premature to foreclose the consideration of this issue in the case at hand beyond the pleading stage*." Although the Ontario Superior Court rejected the concept of inferred reliance in two 2012 cases: see *Millwright Regional Council of Ontario Pension Trust Fund (Trustees of) v. Celestica Inc.*, 2012 O.J. No. 5083 at paras 167-172 and *Green v. Canadian Imperial Bank of Commerce*, 2012 O.J. No. 3072 at paras 595, 597 & 600, it remains a live and controversial issue as is reflected in the recent decision *Dugal v. Manulife Financial,* 2013 ONSC 4083, at para. 93 and footnote 48 (leave to appeal dismissed at 2014 ONSC 1347), where the Ontario Superior Court ignored its *Millwright* and *Green* cases and certified as a common issue the question whether *"each Class Member's reliance" can be inferred from the fact that each Class Member acquired the MFC securities in an efficient market".*
In Quebec, see the surprising *Nguyen c. CP Ship*, 2008 QCCS 3817, at paras. 32 to 39, where the Superior Court is recognizing under pure civil law something akin to the *Fraud on the Market Theory* or the inferred reliance doctrine.

Act ("**QSA**")[16], investors are not required to establish that they relied upon the misrepresentation when they acquired or disposed of their shares. The presumption of reliance established by the *Fraud on the Market Theory* is incorporated by statute. The burden of proof is therefore shifted to the defendants, i.e. it is up to them to establish that the losses were caused by other intervening events (s. 225.30 QSA).

Conclusion

Despite the class friendly nature of Quebec class action legislation, there are a number of advantages to proceeding in the province of Quebec, many of which reduce defendants' exposure to large damage awards.

Firstly, no party may opt for a jury trial in civil matters. This minimizes the risk of high damage awards by typically pro-consumer juries.

A number of other factors also contribute to lowering the quantum of damages awarded by courts in Quebec and across Canada. For instance and setting aside the tobacco case mentioned above which is unique and exceptional, punitive or exemplary damages are awarded in limited circumstances, for limited amounts.

As a final note, it is worth mentioning that the nuisance effect and potential cost of proceeding with a class action in Quebec is reduced in light of the less extensive scope of discovery. The discovery process is generally more limited in scope and, as noted above, is conducted only later in the process. There is no mandatory disclosure requirement - documents must be specifically requested from the other party. "Fishing expeditions" are not tolerated. Thus, discovery in Quebec is generally less intrusive and time-consuming.

[16] *Securities Act*, CQLR c V-1.1. For example, see *Theratechnologies inc.* c. *121851 Canada inc.,* 2015 CSC 18.

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