Environmental class action — evidence deemed sufficiently specific to allow collective recovery in the “red dust” case

March 06, 2019

Judgment on the merits in the "red dust" case, *Lalande c. Compagnie d’arrimage de Québec et al.*, 2019 QCCS 306 (CanLII) was rendered on February 5 last.

After carrying out a minute analysis of the evidence, Mr. Justice Pierre Ouellet, J.C.S., subdivided the geographic boundaries of the class action area into separate zones, and then went on to determine whether the plaintiff had succeeded in adducing sufficient proof of a common injury to the class members to justify a collective, as opposed to a purely individual, recovery of the compensation to be awarded.

Summary of the Facts

In October 2012, a reddish dust started appearing in a residential neighbourhood in Québec City’s Lower Town. Some of the residents noticed the dust accumulating on their balconies, vehicles and door and window frames. Following that occurrence, a number of them proceeded to clean up their homes and/or belongings. Some of them then started to worry about the potential effects of the dust on their own health and that of their family members.

The red dust came from the facilities of one of the divisions of the *Compagnie d’arrimage de Québec*/Quebec Stevedoring Co. Ltd., which operates a marine terminal for the transshipment of goods in the vicinity of the residential neighbourhood concerned. It was eventually ascertained that the red dust emanated from the discharging of a vessel containing South African iron ore. Public notices were subsequently issued, confirming that this red dust was in fact ferrous oxide and that it did not pose any toxic health risk.

The class action was filed on January 13, 2013.

Analysis of the Injury and Collective Recovery

The argument on the merits turned essentially on the issue of assessing the harm caused, since the *Compagnie d'arrimage de Québec* had admitted, before the hearing, that the red dust did in fact emanate from its facilities.

In its reasons, the Court opted to subdivide the three areas proposed by the plaintiff into four zones: red, pink, blue and black, depending on the intensity of their respective exposure to the source of the contaminant. The judge then identified the zones or portions of zones for which the plaintiff had been able to establish common injury with sufficient precision.

In analyzing the injury, Mr. Justice Ouellet observed that the disturbance and inconvenience suffered by the residents in connection with this incident were, on the whole, quite minimal. This was an isolated incident that had occurred on just one day. The majority of the affected citizens had done the cleaning in the hours following the occurrence and no harm to public health had been demonstrated.

The judge concluded that a single indemnity should be paid per dwelling, and not per person, contrary to what the plaintiff was claiming. Compensation per dwelling was primarily intended to compensate for the time invested by the residents doing the cleanup. He set that award at $200 per dwelling for the red zone and $100 per dwelling for the pink and blue zones. He awarded no compensation for the black zone, since the plaintiff had conceded at the hearing that no evidence of any common injury could be adduced for that zone.

The judge then embarked upon an analysis of the proper method of recovery. The parties took opposite positions on the issue, the plaintiff pleading for collective recovery and the defence favouring an individual mode of recovery. In particular, the defence contended that in Québec class actions involving the right to environmental protection, unlike class actions in consumer law cases, the courts have generally opted for individual recovery, except in the case of *Robitaille*c*. Désourdy,* AZ-50404022 (C.S.) de 1991.

After reviewing the law applying to collective recovery, Justice Ouellet held that that mode of compensation must be applied where the Court has before it sufficient evidence of common injury for each of the affected zones, which required proof supporting the conclusion that all individuals living in those same zones had sustained some personal injury. In the judge's opinion, the indemnification awarded was just and reasonable and ensured that all citizens who would not otherwise have instituted any legal proceedings considering the insignificant amount of the indemnity, would be compensated.

Commentary

In its judgment, the Court dismissed the argument that collective recovery is unsuitable in environmental, as opposed to consumer law, cases. The Court recalled that in *Ciment du Saint-Laurent inc.*c*. Barrette* (2008 SCC 64) and *Coalition pour la protection de l'environnement du parc linéaire « Petit Train du Nord »* c*. Laurentides (Municipalité régionale de Comté des),* 2004 CanLII 45407 (QC CS), it was lack of evidence that precluded the Court from determining with sufficient precision the total quantum of the claims being asserted, so as to permit opting for a mode of collective recovery.

In the red dust case, the plaintiff submitted a report from an architect and an urban planner supporting the collective recovery claim, and that report served, in particular, to establish the number of dwellings and their characteristics in the neighbourhood described in the authorizing judgment. No counter expert report was filed by the defendant.

According to the Court, the main issue which it had to resolve in deciding whether or not to order collective recovery was whether the evidence adduced, even if incomplete or imperfect, enabled it to ascertain the total quantum of the claims, with sufficient accuracy.

The Court found that the expert report filed by the plaintiff, although imperfect, was adequate to allow it to make that determination. It required, however, that the report be improved and updated, and so it summoned the parties to appear at a later date to address specifically all the issues relating to the collective recovery.

In short, in environmental class actions, where the harm caused is often difficult to quantify objectively, and where assessing the total claim is complicated, the Court may adopt a flexible approach, even allowing plaintiffs to complete or specify their evidence in that regard, in order to favour a mode of collective recovery. Such was the solution adopted by Mr. Justice Ouellet, stating his opinion that the legislator, in enacting Articles 595 *et seq.*of the *Code of Civil Procedure*, intended to favour the collective, rather than an individual, mode of recovery, which, in this case, would have obliged every class member to make proof of their personal damages.

By

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