Supreme Court of Canada Confirms “Flexible, Liberal and Generous Approach” to Authorization of Class Actions in Québec

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Introduction

On October 30, 2020, the Supreme Court of Canada rendered an important decision with respect to the test for authorization of a class action under Québec’s *Code of Civil Procedure*[1]. In *Desjardins Financial Services Firm Inc. et al.* v. *Asselin*, 2020 SCC 30, the Court confirmed the screening function that the authorization stage performs in class actions and the low threshold that the claimant must meet. In this judgment, the highest court in Canada reiterated the analytical framework it had established in its previous decisions in *Infineon Technologies AG* v. *Option Consommateurs*, 2013 SCC 59, *Vivendi Canada Inc.* v. *Dell’Aniello*, 2014 SCC 1 and *L’Oratoire Saint-Jose ph du Mont-Royal* v. *J.J.*, 2019 SCC 35.

Background

Ronald Asselin (Asselin) alleged that he purchased certain investments (the Investments) designed by Desjardins Global Asset Management Inc. (Management) prior to the economic crisis of 2008. The Investments guaranteed a capital amount at maturity equal to the original amount deposited, plus a potential return. Asselin alleged that he had purchased the Investments on the basis of representations of a financial planner from Desjardins Financial Services Firm Inc. (the Firm), who represented them as safe. Following the financial crisis, Asselin was informed that the Investments would produce no return, although the capital was guaranteed, and that they could not be cashed until maturity. Alleging that he had been induced by the Firm to enter into deposit agreements for investments that failed to comply with the representations made about them, and contending that Management had recklessly mismanaged the Investments, Asselin filed a motion for authorization to institute a class action. He sought to represent all persons who held such Investments during the relevant period or any other partial investments included in those Investments (the Group).

At first instance, Justice Claude Dallaire, S.C.J. refused to authorize the class action, holding that Asselin had not met the conditions of paragraphs 1003 (a) and (b) of the

Code of Civil Procedure, which require the existence of identical, similar or related issues, and that the facts alleged justify the conclusions sought.

The Court of Appeal, for reasons set forth by Justice Marie-France Bich, J.A., reversed the judgment of first instance and authorized the class action[2]. The Supreme Court allowed the appeal in part only, endorsing the essence of the Court of Appeal's conclusions.

Analysis

In the reasons given by Justice Kasirer, writing for the majority[3], the Supreme Court affirmed the flexible, liberal and generous approach adopted by the Court of Appeal with respect to proceedings at the authorization stage[4]. Specifically, Kasirer J. enumerated the following principles:

- ***The court may consider implicit messages****.* The Court must not be overly literal and rigid, although this does not constitute an invitation to search in a vacuum for non-existent allegations.
- ***The threshold of an arguable case is still a low one****.* The arguable case test was met in this case. It was improper for the motion judge to rule on the legal merits of the conclusions in the light of the factual allegations. Only unsustainable or frivolous motions may be dismissed at the authorization stage.
- ***A pure question of law may be decided at the authorization stage if the outcome of the case depends upon doing so****.* Kasirer J. reiterated that courts may decide pure questions of law at the authorization stage if the outcome of the class action depends on such decisions, but that doing so is a matter of judicial discretion. In this case, he held that the applicability of a release was not a pure question of law, but rather required a factual analysis that should be deferred to the trial judge.

  In addition, relating as it did exclusively to the claim for punitive damages, the release, if enforceable, would not be a bar to an award of compensatory damages. Nevertheless, owing to Asselin's admission regarding the applicability of the release, the Supreme Court restricted the common questions and the conclusions relating to the payment of punitive damages to certain claims only.
- ***Distinguishing between the evidence required for a "positive misrepresentation" and an omission.*** The authorization judge must analyze the evidence adduced in order to evaluate whether a sufficient basis exists before dismissing a motion for authorization. There is a distinction between the evidence required to demonstrate the existence of a positive misrepresentation and an omission.
- ***A single common question suffices.*** The existence of a single common question linking the members of the Group is sufficient, provided that it advances the litigation in a significant manner. In this case, the study of the general and systemic failings of the Firm to inform members of the Group sufficed to fulfill that condition.

Côté J., dissenting together with Moldaver and Rowe, JJ., was of the view that the existence of a release defeated Asselin's legal theory[5]. Furthermore, the claims asserted against the Firm would not satisfy the common question criterion. Since the relationship between a client and a financial advisor is highly particularized, an

individual analysis of the Firm's liability would have to be conducted for each Group member. Not finding the systematic character required at the authorization stage in Asselin's allegations, Justice Côté would have dismissed the claim against the Firm.

Commentary

The message from the Supreme Court is crystal-clear. The Court reminded us once again that under Quebec's *Code of Civil Procedure*, only frivolous class actions are to be dismissed at the authorization stage.

While the majority of the Supreme Court affirmed that judges must take into account what is implicit when reading the allegations contained in a motion for authorization, that principle is not new. That being said, it is foreseeable that, in practice, such an openness to reading between the lines could lead to a still wider and more permissive construction of the allegations contained in future authorization applications.

Moreover, and although the Supreme Court's jurisprudence had already clearly established in *Oratoire* that a court may "…of course decide a pure question of law at the authorization stage if the outcome of the proposed class action depends on its doing so", the Court now seems to have added an additional qualification, namely, that the choice of whether or not to decide such a legal issue "… is generally a discretionary one"[6].

To conclude, the Supreme Court has reminded us that the common question criterion for the authorization of class actions in Québec does not require any predominance of common questions, but only the existence of a single common question capable of advancing the litigation. The Court's emphasis on this principle could make it even harder for defendants to resist authorization by arguing that the common legal and factual issues are insignificant in comparison to the multiplicity of questions that will require individual determinations.

[1] CQLR, c. C-25, respectively sec. 575(1) and (2) of the *Code of Civil Procedure*, CQLR, c. C-25.01.

[2] *Asselin* c. *Desjardins Cabinet de services financiers inc.*, 2017 QCCA 1673.

[3] Côté, Moldaver and Rowe, JJ., dissenting in part.

[4] The appeal was allowed in part, for the sole purpose of circumscribing the issues of fact and of law to be addressed collectively, with regard to punitive damages.

[5] Justice Côté, however, would have allowed the action against Management, but only for the claim relating to compensatory damages.

[6] See the decision under analysis, at para. 27.

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