The SCC Reaffirms the Court's Screening Role at the Authorization Stage for Class Actions

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The Supreme Court of Canada recently upheld the Court of Appeal's decision for the authorization of a class action on sexual assault in *L'Oratoire Saint-Joseph du Mont-Royal v. J.J.*, 2019 SCC 35.

Context

The representative plaintiff filed an application for authorization to institute a class action against the Oratoire Saint-Joseph du Mont-Royal (the Oratory) and the Province canadienne de la Congrégation de Sainte-Croix (the Congregation) on behalf of all victims of sexual assault allegedly committed by members of the Congregation. The Oratory was also designated as a defendant due to its connection with the Congregation and the claim; members of the Congregation act as directors of the Oratory and manage its affairs. The Oratory was also the location of the plaintiff's alleged sexual assault and that of four other members of the class action.

Previously, the Superior Court of Québec has denied the institution of the class action, stating that the applicant did not meet any of the four conditions in article 575 of the *Code of Civil Procedure* (*C.C.P.*). The decision was reversed by the Court of Appeal, which found numerous errors, both of fact and of law, and found that all conditions of art. 575 were met. The Supreme Court upheld the decision and furthered the analysis of article 2926.1 of the *Civil Code of Québec* (*C.C.Q*).

The Supreme Court's Decision

In its decision, the Supreme Court affirmed *Vivendi Canada Inc. v. Dell'Aniello*, [2014] 1 S.C.R. 3 and *Infineon Technologies AG v. Option consommateurs*, [2013] 3 S.C.R. 600 and emphasized on the court's role at the authorization stage. Pursuant to art. 571, the court plays a screening role and must only view the application as a procedural means.

In assessing the condition of commonality of issues, the Court reaffirmed the application of art. 575(1) in *Vivendi*. The emphasis is not on the differences between the class members, but on the "identical, similar or related issues of law or fact". The judge must simply assess whether there is at least one common question stemming from the fact of

all class members. If the fact is significant enough to advance the resolution of every class member's claim, the condition is met. The Court remains flexible in its interpretation of the common interest to this regard.

In this case, the Court also maintained the class action against the Oratory on the basis that any finding of direct liability of the Oratory will advance the action of each member of the class. The aspect of commonality as defined by *Vivendi* is present if every class member's claim can be advanced due to the connection between the defendants.

To meet the condition of art. 575(2), the facts alleged in the application must "appear to justify" the conclusions being sought. The judge must refrain from assessing the sufficiency of the alleged facts on its merits. To establish an arguable case, the applicant only needs to demonstrate a tenable legal syllogism and meet an evidentiary threshold that falls below the standard of proof on a balance of probabilities. A sufficient basis in fact is not required for the claim to meet the condition of art. 575(2).

At the authorization stage, if the alleged facts are sufficiently precise, they are assumed to be true. If they are vague, general or imprecise, evidence must be presented to form an arguable case. The allegations are to be considered in light of all the evidences presented in support of the case. In case of doubt, for either evidentiary or legal threshold requirements, the applicant is given the benefit of the doubt.

Brown J., writing for the majority, also affirmed the analysis of article 2926.1 *C.C.Q.* in Gascon J.'s dissenting judgment. The three-year prescription for actions in which the author or the victim passed away does not create a term of forfeiture. It remains a prescriptive period, similar to that of the first paragraph, and begins to run when the victim is aware of the connection between the assault and the injury. It was also noted that the starting point of the period is declaratory, thus retrospective.

Commentary

The Supreme Court's ruling on this case reaffirms the past decisions on article 575 *C.C.P.* and clarifies the evidentiary and legal threshold requirements with regards to its conditions. It must also be noted that all three Québec judges have dissented in this case.

In the judgment, Brown J., writing for the majority, commented that it is not advisable to revisit the Court's decision in *Vivendi* and *Infineon.* With the new *Code of Civil Procedure* in force since 2016, these decisions and their stand on the authorization process have been endorsed by the Québec legislature. Concurring with Côté J. (dissenting), Brown J. also states that this does not reduce the process to a mere formality. The applicant still has the burden to establish an "arguable case, although not a heavy one."

By

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