A Pure Question of Law May be Decided by the Judge at the Authorization Stage

November 25, 2019

The Court of Appeal confirmed that a pure question of law may be decided by the judge at the authorization stage and ruled on the relative effect of a judgment authorizing a class action for settlement purposes covering only some of the defendants.

In a unanimous decision rendered on November 15, 2019, the Court of Appeal of Québec (the "Court of Appeal") dismissed the appeal from the judgment of the Honourable Judge Stéphane Sansfaçon rendered on May 14, 2018, dismissing the application for authorization to bring a class action against the respondents, based on section 230(c) of the *Consumer Protection Act*.

The Court of Appeal, after recalling the limited power of intervention of a court of appeal at the authorization stage, based on the Supreme Court's findings in its recent decision *L'Oratoire St-Joseph du Mont-Royal v. J.J.*, (2019 SCC 35), determined that the trial judge did not commit any error of law and that his judgment did not result from a manifestly ill-founded assessment of the arguable case test provided for in article 575.2º C.p.c.

The class action, for which authorization was sought, covered cases where the respondents, in the telecommunications and social media field, offered consumers a service for which a monthly rate was included in the contract. The contract also provided that during the first few months, this rate would be lower, or even zero, in certain cases.

Thus, the consumer would pay the reduced rate provided for in the contract for a certain period of time and, at the end of the period, would be billed the full rate, also provided for in the contract. The consumer retained the right, at any time and at his/her sole discretion, to terminate the contract concluded with one of these same respondents, without charge.

The Court of Appeal noted that the judge hearing an application for authorization may decide a question of law at this preliminary stage and that the court must necessarily interpret the law to determine whether the class action for which such certification is sought is manifestly unfounded in law.

This excerpt from the judgment speaks volumes about the filtering role at the authorization stage:

> [8] To agree with the appellant's arguments on this issue would ensure that, despite a manifestly unfounded, even irrational, legal argument in support of the application for authorization, the judge would have no choice but to refer the analysis to the trial judge and consider the criterion in paragraph 575.2 C.C.P. met. The flexible and liberal approach advocated by the Supreme Court's jurisprudence on authorization, and reiterated by this Court on several occasions, does not go that far and the authorization judge's screening role makes sense here.

In the present case, the Court of Appeal held that section 230(c) of the *Consumer Protection Act* does not apply to situations where, as in the case under study, the consumer knows and is able to assess the terms of the contract from the outset and also to give informed consent to being charged the regular price at the end of the period provided for in the contractual agreement.

The Court of Appeal also specified that, although in this case the trial judge authorized the class action, for settlement purposes, against certain defendants, this did not mean that he was absolutely required to authorize the class action against the defendants who did not participate in the settlement.

The Court of Appeal pointed out that the analysis of the criteria in article 575 C.C.P. is more flexible when approving a settlement agreement. The judgment authorizing the institution of a class action for the purpose of approving a settlement covering only some of the defendants therefore has no effect on defendants who do not participate in that settlement, which holding was clearly specified in the judgment.

This decision of the Court of Appeal thus confirms important principles and will give judges a solid basis for deciding a question of law at the authorization stage.

By

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