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A Gentle Reminder that Traditional Class Action Principles are not Passé?

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INTRODUCTION

The Supreme Court of Canada's decision in *Bisaillon v. Concordia University* will certainly spark a plethora of commentary from labour law specialists. In a narrow decision (four to three, Justices McLachlin, Bastarache and Binnie dissenting), the Supreme Court held that disputes arising over funding of the University's pension plan were subject to the exclusive jurisdiction of a labour arbitrator and could not be resolved by way of a class action proceeding before the Quebec Superior Court. It is significant that there was no disagreement among the justices as to the principles that govern class action proceedings, collective agreements and the jurisdiction of arbitrators under those agreements. The justices were divided only with respect to the application of those principles to the specific facts of the case.

We will leave it to others specializing in labour law to opine on whether the application of those principles to the facts at issue in the case will stand the test of time. Instead, this paper will focus on some of the principles applicable to class actions that were clearly enunciated and over which there was no disagreement. The reason is two-fold. First, these principles transcend the arena of labour law and have far-reaching implications for class actions generally. Second, their enunciation is all the more important given the paucity of judgments from the Supreme Court in Quebec class action proceedings. This paucity is due largely to the fact that judgments authorizing class actions may not be appealed in Quebec and many defendants prefer to settle when a class action is certified[1] rather than risk an adverse judgment on the merits.

The guidance that can be gleaned from this judgment is all the more important given the recent and consistent judgments from the Quebec Court of Appeal signaling the Court's desire to see a very broad and liberal interpretation of our class action legislation that favours certification even where individual issues predominate. This has given rise to a number of difficult issues with which our Superior Court and the plaintiffs' bar are only now beginning to wrestle. In particular, questions arise as to how to treat inherently individual issues in a collective process without penalizing the defendant. This results notably from the insistence of the Quebec Court of Appeal that only those motions that are manifestly frivolous should not be certified because it is not the role of the judge hearing the certification motion to decide the merits of the case.

[1] The correct terminology for certification in Quebec is "authorization". The term certification will nonetheless be used here given that it is the term most readily understood outside Quebec.

In this regard, the judgment of the Supreme Court of Canada is a welcome reaffirmation of two principles. The first is that the procedural remedy has not changed the substantive law. Thus, if no individual action lies, no collective action lies either. The second principle is that the class representative must have a sufficient personal interest to sustain an action. This paper will examine each of these principles in light of examples drawn from Quebec case law.

The Procedural Vehicle has not changed the Substantive Law

As mentioned above, Quebec courts have begun to certify actions that raise inherently individual issues. One recent illustration is the judgment on the merits in *Malhab v. Diffusion Métromédia CMR inc*.[2] To appreciate how far the case law has gone in certifying individual issues, a summary of the findings in the *Malhab* case, both in first instance and the Court of Appeal, is useful. Madam Justice Marcelin had initially refused to certify the class action proposed on behalf of all Haïtian and Arab taxi cab drivers who were defamed during a Montreal radio talk show hosted by André Arthur who accused the drivers of being dirty, incompetent and corrupt.[3] In refusing to certify the class action, Madam Justice Marcelin noted that defamation proceedings are inherently individual. Because defamatory remarks aimed at a group do not affect any individual in particular, it is difficult to conceive that an individual forming part of the targeted group could be affected to the point of personally suffering damage. The case law and doctrine have therefore been slow to admit that individuals forming part of a defamed group can suffer damage as a result of defamatory remarks, barring exceptional circumstances.

The Quebec Court of Appeal overturned Madam Justice Marcelin's judgment and certified the action. In doing so, it reiterated the principles applicable in matters of defamation as enunciated by the Supreme Court of Canada in *Prud'homme v. Prud'homme*. In that case, the Supreme Court noted that the civil law contains no special tort of defamation. Rather any action for defamatory remarks follows the simple rules of causation applicable to any tort (delict). Consequently, a fault, prejudice, and a causal link between them must be proved and the prejudice in all cases must be personal. General prejudice affecting a large group of individuals is not sufficient to confer upon an individual plaintiff the necessary interest to sustain an action.[4] Only in exceptional circumstances would defamatory remarks against a group lose their general character and result in personal prejudice, for example remarks against all black persons in a village where there was only one black family.[5]

Notwithstanding these principles, the Court of Appeal argued that the individual class representative had serious grounds for maintaining that there had been an "individualization" of the prejudice by reason of the fact that *all* Haïtian or Arab cab drivers were accused of being

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[2] Inscription in appeal : 500-09-016705-063.

[3] *Bou-Malhab* v. *Métromédia CMR Montréal inc.*, S.C. (Montreal), No 500-06-000095-998, June 22 2001, Marcelin, S.C.J.

[4] Paragraphs 38 and 39 of the Court of Appeal judgment, summarizing the decision of the Supreme Court of Canada in *Prud'homme*.

[5] Paragraphs 40 and 41 of the Court of Appeal judgment citing the author Denis Buron.

dirty, incompetent and corrupt, without exception. Thus, according to André Arthur, the radio talk show host, it sufficed to be either a Haïtian or Arab cab driver in order for the individual to be dirty, incompetent and corrupt[6]. While admitting that the size of the group targeted by the defamatory remarks was particularly problematic in the case at bar, the Court of Appeal relied upon a 1915 judgment where it had held that defamatory remarks targeting Jews in Quebec City gave rise to an individual cause of action by a Jew for defamation and that the question of whether the size of the group targeted was small enough to give rise to personal prejudice was a question of fact within the discretion of the trial judge.[7] In reversing the trial judge on certification, Madam Justice Rayle of the Court of Appeal held:

> The fact that moral damages, on an individual basis, might be difficult to evaluate cannot constitute a preliminary obstacle to a class action. It will be up to the trial judge hearing the action on the merits to measure the individual prejudice suffered and, as the case may be, to determine the appropriate compensation. Given the discriminatory character that appellant ascribes to the words of André Arthur, it is not inconceivable that the judge would order the payment of damages or, as the case may be, the payment of punitive damages, to a charitable organization, a solution often adopted in the case law.[8]

With respect, the questions raised by the use of a collective procedure to sanction the defamatory remarks made in this case go well beyond the difficulty of evaluating damages on an individual basis. They raise substantive issues. Moreover, the solution proposed by the Court of Appeal to overcome those substantive issues, namely to award "collective" damages to a charitable institution, only serves to obfuscate the substantive issues in a desire to sanction what were unquestionably shocking and racially charged remarks.

This point is amply illustrated by the observations of Mr. Justice Guilbault who inherited the case on its merits. Evidence of the offensiveness of the remarks was made through the representative plaintiff and other witnesses who occupied positions of responsibility within various associations of Montreal taxi cab drivers. Neither the representative plaintiff nor most of these other witnesses had heard the defamatory remarks when they aired, but rather had listened to them afterward for purposes of the litigation. Others, maybe a dozen or so, had heard the remarks when they aired. There was no evidence of any generalized knowledge of the remarks throughout the 1200 Haïtian and Arab cab drivers in the Montreal area, nor was there any evidence that in general, the members of this group would have been informed of the defamatory remarks or that they were even aware of Mr. Arthur's comments or the content of his talk show on the date in question.[9] Mr. Justice Guilbault noted that the principles of civil liability remain

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[6] Paragraph 44 of the Court of Appeal judgment.

[7] Paragraphs 47, 48 and 49 of the Court of Appeal judgment, citing *Ortenberg v. Plamondon*, (1915) 24 Q.B. 69. In that case, there were 75 Jewish families in a city with a population of 80,000.

[8] Paragraph 69 of the Court of Appeal judgment, our translation.

[9] Paragraphs 122 to 132 of the judgment of Mr. Justice Guilbault.

intact and that a causal link must be established for all of the class members.[10] He cannot, however, conclude that such a causal link exists for the class as a whole, based on the evidence before him.[11] Nor can these holes in the evidence be remedied by the presentation of individual evidence, at the subsequent stage of individual liquidation of the claims because it is almost impossible to control the declaration of a given cab driver as to whether he heard the remarks or suffered any prejudice thereby.[12]

While Mr. Justice Guilbault stated that he agreed with the judgment of Madam Justice Marcelin who refused to certify the class proceeding, he nonetheless considers himself bound by the Court of Appeal judgment on certification. He therefore considers that he is bound to award some damages. Given the evidence, or lack thereof, Mr. Justice Guilbault was of the opinion that the only way to do so is to award "collective damages" (that is, a lump sum) to a non-profit organization for the benefit of immigrant cab drivers. He arbitrarily fixes this amount at $200 per driver, for a total of $220,000. In so doing, Mr. Justice Guilbault, albeit reluctantly, awarded more damages than were suffered by the members of the class and awards damages where none would have been awarded to many of the members of the class, had they instituted individual actions.

It is in this context that the remarks of the Supreme Court of Canada in the *Bisaillon* matter are particularly instructive: "The class action is nevertheless a procedural vehicle whose use neither modifies nor creates substantive rights…*It cannot serve as a basis for legal proceedings if the various claims it covers, taken individually, would not do so".*[13] Yet arguably, this is precisely what happened in the *Malhab* case. A monetary award was made, based on the number of the class members, when in fact there was no evidence upon which the court could conclude that the elements of civil liability - namely, fault, prejudice and causal link - existed for all the members of the group. On the contrary, it was clear that many of the various claims, taken individually, could not serve as a basis for legal proceedings.

It is the very application of this general principle that leads Mr. Justice LeBel to conclude that however much class actions should be favoured, courts cannot create substantive rights where none would otherwise exist: "In short, the class action procedure cannot have the effect of conferring jurisdiction on the Superior Court over a group of cases that would otherwise fall within the subject-matter jurisdiction of another court or tribunal. Except as provided for by law, this procedure does not alter the jurisdiction of courts and tribunals. *Nor does it create new substantive rights".*

It is not because the procedural vehicle chosen is a class proceeding that the result must be an order for collective recovery of damages, where a number of members of the class have no valid

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[10] Paragraph 143 of the judgment of Mr. Justice Guilbault.

[11] Paragraph 146 of the judgment.

[12] Paragraphs 133 and 134 of the judgment of Mr. Justice Guilbault.

[13] Ironically, one of the authorities cited in support of this affirmation is the judgment of the Quebec Court of Appeal in *Bou-Malhab v. Métromédia CMR Montréal inc.*

individual cause of action. Yet that is precisely what some argue should be the case. Members of the plaintiffs' bar contend that a fault, be it a misrepresentation, a failure to warn or some other breach of duty, can in and of itself give rise to a damage award by way of class action, without evidence of a causal link between the defendant's fault and prejudice suffered by each of the members of the class, particularly where exemplary or punitive damages are claimed. Under this approach, once evidence of a fault has been made, the court would simply tally up the number of persons in the class and award an arbitrary amount based on the number of persons in the class.

Arguably the principles of the *Bisaillon* case would preclude an award of damages simply because a fault was committed where no prejudice is demonstrated or where no causal link between that fault and the prejudice is demonstrated, with respect to all members of the class.

The role of the Class Representative

Both the dissenting and majority judgments of the Supreme Court confirm the important role the class representative's cause of action plays at the hearing on the merits. The importance of the role of the class representative in Quebec has been significantly diminished over the years by the case law – to the point that some judgments now hold that the class representative, or the 'designated member' where the representative is a consumer group, need not have a personal cause of action. This is the case for example of the judgment certifying the class action in *Option Consommateurs v. Service aux marchands détalliants ltée (Household Finance)*[14]. In that case, Mr. Justice Fraiberg held as follows:

> HFC argues that if the individual recourse a prospective representative intends to exercise in the name of the group is unfounded because prescribed on the face of the record, the recourses of the other members of the group fail with it, even if not likewise prescribed. (p. 4)
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> If, however, as HFC would have the Court conclude, Ms. Gagné's recourses are in fact entirely prescribed under both the *Consumer Protection Act* and the *Civil Code*, there are two reason this would not mean that the recourses of the others in the group are similarly barred….
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> …
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> since many others in the group must inevitably have the same rights as the prospective representative that are not prescribed, the Court should not bar the class action, even in part, until, as required by Art. 1012 C.C.P., it can ascertain from the proof whether it is common to a substantial part of the members. Such proof cannot be led until after authorization. (p. 6) [15]

Mr. Justice Fraiberg goes even further, opining that: "The second reason the class action need not be barred, even if Ms. Gagné's recourses were entirely prescribed, is that she herself is not

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[14] *Option Consommateurs v. Service aux marchands détaillants ltée (Household Finance)*, J.E. 2001-1018 (S.C.).

[15] See also *Union des consommateurs and Billette c. Hyundai Motor America* 500-06-000184-024 REJB 2003-43925 for similar comments.

now nor will she ever be the representative. That role would be ascribed to Petitioner [a consumer group], a legal person that, *ipso facto*, cannot in its own right possess any rights or recourses susceptible of being exercised in a class action." Thus, in the opinion of Mr. Justice Fraiberg, the mere fact that a consumer group is party to the action is sufficient to obviate all enquiry as to whether the designated class member has a legal interest in the suit. Since consumer groups rarely have a legal interest to sue on their own behalf, this interpretation would mean that a class action could proceed, as it did in *Household Finance*, without a representative who has a cause of action. The lack of a cause of action against one or more of a group of proposed defendants has been held on more than one occasion not to be a bar to certification: "However, a study of the case law reveals that despite the representative's lack of interest or cause of action with respect to all defendants, many class actions have been authorized."[16]

Again, the judgment of the Supreme Court of Canada in *Bisaillon* is instructive. Mr. Justice Bastarache, writing for the minority, begins by affirming the principles stated in the majority opinion with which he agrees: "I have had the opportunity to read the reasons of my colleague Justice LeBel, and I agree with many of the arguments raised in his analysis. Thus we agree that, although the respondent Bisaillon started this case as a class action, this cannot affect the substantive rights of those implicated therein." He disagrees with Mr. Justice LeBel on the characterization of the rights under Concordia's pension plan which, in his opinion, cannot be traced back to the collective agreement that binds Bisaillon to the University. Because of this latter conclusion, he finds that the Superior Court's jurisdiction over the questions in issue is not ousted by the collective agreement and therefore the Court retains jurisdiction to hear the dispute by way of class action.

Having concluded that the Superior Court retains jurisdiction over the dispute, Mr. Justice Bastarache cautions that "[i]n reaching this conclusion, I do not comment on whether the respondent's proposed class action should be certified as such. That is a matter for the Quebec Superior Court to decide." He then states:

> I also do not purport to decide whether the respondent has a "sufficient interest" to proceed with this claim independently of his union: see art. 55 of the *Code of Civil Procedure*, R.S.Q., c.C-25. This Court has only been asked to determine whether the Quebec Superior Court has jurisdiction. Now that this has been established [in the opinion of the minority], though, that court may still refuse to render judgment if it is not convinced of the sufficiency of the respondent's interest in the claim: see art. 462 of the Code of Civil Procedure.

Clearly, in the opinion of the minority, the class representative must have a personal cause of action. The same may be gleaned from the majority opinion when Mr. Justice LeBel writes:

> The Court of Appeal should not have focused on determining whether the grievance arbitrator under one agreement had jurisdiction over every potential member of the group covered by the class action. *Instead, it should have begun by determining whether a grievance arbitrator had*

[16] *Lucie Billette v. Toyota Canada Inc. et al* 500-06-000184-024, Delorme, J. (S.C.), at paragraph 30.

> *jurisdiction to rule on the individual proceeding between Mr. Bisaillon and Concordia.* It should then have enquired into the nature of the individual claims of the majority of the other members of the group and into the *in personam* jurisdiction of the arbitrator with regard to those claims. Absent such an analysis, the Court of Appeal's position removed individual proceedings, over which the arbitrator had jurisdiction, from the grievance arbitration process and assigned them to the Superior Court – which otherwise had no jurisdiction over the parties or the subject matter – *simply because a motion for authorization to institute a class action had been filed. This position disregards both the principles applicable to class actions and the nature of this procedure*. [emphasis added]

This interpretation accords with that postulated when Quebec's class action legislation was put before the National Assembly. The report to Cabinet by Mtre Denis Ferland provided quite clearly that the class representative or the designated member must have a personal cause of action.[17]

CONCLUSION

Simply put, the *Bisaillon* case can be interpreted to mean that not every wrong can or should remedied by way of class action and that the procedural remedy, coupled with collective recovery, should not be used to circumvent the fact that many members of the class on whose behalf rights are asserted have no valid cause of action. To do so would often result in an injustice to the defendant who then becomes saddled with a condemnation based upon an amount that no longer bears a reasonable relationship with the number of persons actually having a cause of action. It is to be hoped that Quebec courts will begin to apply the principles laid down in the *Bisaillon* case in a manner consistent with the traditional principles of civil law liability that require the existence of a fault, prejudice and causal link.

[17] *Dossier relatif au recours collectif*, Conseil des ministres, M. Pierre Marois, ministre, Québec, le 19 avril 1997, pp. 8-9.