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Court Requirements Regarding the Sufficiency of Class Action Allegations:

Is a New Trend Emerging?

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Following the reform of procedural rules governing class actions in Quebec, and more particularly the elimination by the legislator of the requirement that an affidavit be filed in support of a motion for authorization to bring a class action, respondents are often faced with very vague actions, which are often broadly framed against a multitude of defendants in the same proceeding. In addition, there is no right to cross-examine the plaintiff on his or her affidavit filed in support of authorization. However, recent decisions in Quebec indicate that there may be a new judicial trend emerging with respect to a tightening of requirements of proof.

Actions targeting an entire industry (banking, pharmaceutical, etc.) have multiplied even though the class plaintiff often has no connection with most of the respondents and alleges few facts against them. Often, the legal obligations that have allegedly been breached are barely referenced and, even in the case of an action for liability under a contract, the contracts in question are not filed. In many cases, the plaintiff merely claims that the respondents have all committed the same faults or engaged in the same prohibited practice, without further details, or at times by filing general reports prepared by public interest organizations or even newspaper articles. Respondents therefore have difficulty determining what exactly they are being accused of and find themselves faced with an evidentiary fishing expedition.

The requirement that the plaintiff allege with sufficient detail the facts justifying the conclusions sought is certainly not new. Courts have often reminded litigants that the absence of specific and circumscribed allegations of fact fundamentally affects an application for authorization and that such an absence alone may justify the dismissal of the application. However, recent decisions have strictly applied this rule and required that there be sufficient legal interest against each respondent.

For instance, the Honorable Claudine Roy, J. of the Superior Court of Quebec in the *Novopharm* case on January 17, 2006, dismissed a motion for authorization to bring a class action involving several respondents on the grounds that the facts alleged did not appear to justify the conclusions sought, adding that the court must be able to appreciate the seriousness of the application and that the existence of a newspaper article is not sufficient to convince the court of the existence of a serious color of right. This judgment has been appealed.

More recently, the Honorable Jasmin, J., also of the Superior Court of Quebec, reached a similar result in another highly publicized matter, the *Norbourg* case. It was alleged that between January 1998 and August 2005, Vincent Lacroix directly or indirectly controlled Norbourg Asset Management, Norbourg Financial Group, Ascencia Capital and Norbourg Investments. From 2001 to August 25, 2005, Lacroix, assisted by a few coconspirators, misappropriated up to $130 million belonging to more than 9,000 investors. The petitioner, Wilhem B. Pellemans, wished to represent these investors in a class action instituted not only against Lacroix, his accomplices and the companies in the Norbourg group, but also against other respondents who had not participated in the fraud at all, but who were allegedly extracontractually liable.

The Honorable Jasmin, J. dismissed the motion for authorization against certain respondents in the second group—Boisvenue, KPMG, Concentra and PricewaterhouseCoopers—on the basis of lack of evidence.

Boisvenue

Respondent Boisvenue was only involved in the Evolution Portfolio Funds, namely four funds out of the 29 in dispute, as securities adviser and portfolio manager. The court held that there was no allegation of fraud against this respondent and that the facts alleged respecting the duty of care toward investors were vague and insufficient. As the court noted, although in principle whether there was gross fault is an issue which must be decided on the merits, the petitioner must

nonetheless first allege in his motion sufficiently precise facts which, once proven, could constitute the legal foundation for it. In other cases, judges hearing the motion for authorization had developed the practice of referring such matters to the judge who will hear the case on the merits.

KPMG

The petitioner alleged that KPMG did not comply with the procedures and standards required as outside auditor of mutual funds. The court held that the facts alleged were sufficiently precise and could justify the conclusions sought. The condition under paragraph 1003(b) of the *Code of Civil Procedure* (hereinafter "CCP") was therefore complied with. However, the court approached that provision from a relatively unique perspective. Article 1003(a) CCP provides:

> The court authorizes the bringing of the class action and ascribes the status of representative to the member it designates if of opinion that: (a) the recourses of the members raise identical, similar or related questions of law or fact.

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The Honorable Jasmin, J. held firstly that it was the intention of the legislator that [*translation*] "the members all be united by questions of law or fact with the same legal nature and not complementary or subsidiary points of law." He also noted that in this case the only questions common to all the members were fraud, negligence or carelessness of the auditors of the companies controlled by Vincent Lacroix, negligence or gross fault alleged against the AMF and the alleged negligence against Northern Trust, which was the custodian of all the Norbourg and Evolution funds. Each member prima facie had an individual right of action against each of these respondents. The situation was different against the other respondents, who were accused of different faults.

Recalling the importance of the description of the group at the authorization stage, the Honorable Jasmin, J. stated that [*translation*] "it must appear from the very description of the group that there is a collective aspect to the determination of the liability of each of the respondents" and that "according to established case law, the proposed group must be homogeneous and support its claims based on the same source of liability." According to the court, there was no common cause of action of the members of the proposed group with respect to KPMG, and, furthermore, many members of the group, namely all those who had invested in funds other than the Evolution funds, had no legal relationship with this respondent. The court therefore came to the conclusion that the motion against KPMG should be dismissed because the criteria of paragraph 1003(a) CCP were not met in that the action of the members did not raise common or similar questions of law or fact.

Although the argument of the absence of a legal relationship was generally discussed as part of the analysis of paragraph 1003(b) CCP, it appears that, in addition to basing itself on the absence of a legal relationship to dismiss the motion against KPMG, the court added an element—the requirement under paragraph 1003(a) CCP that all the members be in a position to participate in the common questions against all the respondents. Does this mean that any action attempting to bring together respondents who did not commit the same fault would not meet the conditions of paragraph 1003(a)? Although it is too early to answer this question, this is what the Honorable Jasmin, J. appears to suggest.

Concentra

The petitioner claimed that Concentra had the obligation to set up a control procedure with Northem Trust, which had custody of the securities. The court dismissed the motion on the grounds that, firstly, the petitioner did not have the necessary interest to institute an action against Concentra, as he had only invested in a fund that was not managed by it. The court recalled that the class action is a procedural means that does not create any substantial right. The petitioner therefore had to [*translation*] "show that, individually, he benefited from the same right of action as through a class action." Finally, the Honorable Jasmin, J. also reiterated the argument discussed above with respect to the lack of commonality, which again seemed to be a separate issue from the absence of a legal relationship and a supplemental condition.

The court added that the application should also be refused as the allegations against this respondent were too vague and insufficient. In particular, this passage from the decision of Jasmin, J. should raise the bar with respect to the burden of the petitioner: [*translation*] "[H]e does not state at all whether it is a contractual or legal obligation. If it is a contractual obligation, he should at least file the relevant contract. If it is a legal obligation, he should describe the relevant legal principles." It therefore seems to be established that, even without filing an affidavit and being examined, the petitioner must allege all the elements on which his action is based and, where applicable, file the supporting documents.

PricewaterhouseCoopers

The court also dismissed the action against this respondent on the grounds that the allegations of the petitioner do not allow a causal link to be established between the damages

claimed and the alleged fault by PricewaterhouseCoopers. The reasons relied on to dismiss the KPMG and Concentra actions were also invoked here. Once again, we see that the court is requiring that the sources of the legal obligation that were allegedly breached by the respondent be clearly stated.

It is too early to know whether this decision will be appealed. At least it illustrates the court's desire to ensure that the motion for authorization remain a procedure for serious filtering, notwithstanding the absence of an affidavit or rights of examination. These recent decisions disallow the creation of procedural "monsters," actions against a multitude of respondents against whom the petitioner has in fact no legal interest and is unable to allege facts in support of the conclusions he is seeking. Although the Court of Appeal in *Bouchard* has since then determined that the petitioner must establish a legal relationship against each of the defendants whom he wishes to sue by way of class action, we believe that the rule of the sufficiency of the allegations will at least be strengthened and will avoid the authorization of actions which, once authorized, become fishing expeditions. ■

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