November 23, 2016

Appeal from a Judgment Authorizing a Class Action: The Door Is Unlocked, But Difficult to Open

Author: Jean-Philippe Groleau

On January 1, 2016, the new *Code of Civil Procedure* (New CCP) of Québec came into force. The New CCP contains a number of new provisions governing class actions, which were originally called "recours collectifs" in the French text and are now called "actions collectives."

One of the major changes in the New CCP concerns the right of appeal from judgments on applications for authorization to institute a class action. Under the former CCP, Article 1010 provided that the "judgment granting the motion and authorizing the exercise of the recourse is without appeal." Therefore, defendants had no remedy when faced with a judgment wrongly granting an application for authorization to institute a class action, while applicants enjoyed a right to appeal *pleno jure* from a judgment denying authorization. In light of this asymmetry in the rule that resulted in an imbalance between the parties' rights, the legislature decided to create, in Article 578 of the New CCP, a right of appeal with leave from a judgment authorizing a class action. However, there was still one unknown factor – namely, what test would be applied to the application for leave to appeal from such a judgment.

In a decision on a trilogy rendered on November 22, 2016 (the legionellosis [*Centrale des syndicats du Québec* c. *Allen]*, Du Proprio and Des Moulins wind farm cases), a panel of three judges of the Court of Appeal of Québec determined the test applicable to an application for leave to appeal from a judgment authorizing a class action as follows:

> [Translation]
> [59] The judge will grant leave to appeal if he or she is of the view that, on the very face of it, the judgment appears to contain a fatal error concerning the interpretation of the requirements to institute a class action or the assessment of the facts relating to such requirements, or in a flagrant case of lack of jurisdiction of the Superior Court.[1]

The last part of the test set out by the Court of Appeal must not be misunderstood. "[A] flagrant case of lack of jurisdiction of the Superior Court" is not aimed at cases in which the judge has demonstrated flagrant lack of jurisdiction in the exercise of his or her judicial function, but rather cases in which the lack of *ratione materiae* jurisdiction (subject-matter jurisdiction over the main issues of the case) or *ratione loci* jurisdiction (territorial jurisdiction) is flagrant.

It therefore seems that there are three situations in which leave to appeal from a judgment authorizing a class action will be granted:

- a fatal error, on the very face of the judgment, concerning the application of the criteria provided for in Article 575 of the New CCP – that is, the criteria of commonality, right of claim, composition of the class group and proper representation;

- a fatal error, on the very face of the judgment, concerning the assessment of the facts relating to the same criteria;
- a flagrant case of a lack of subject-matter or territorial jurisdiction of the Superior Court.

The Court of Appeal of Québec has also pointed out that, even though the test to obtain leave to appeal from a judgment authorizing a class action is demanding and is passed only in "[translation] overall exceptional cases,"[2] it "also ensures that a class action will not proceed on a wrong basis, thus preventing the parties from being dragged into long and expensive proceedings."[3] We will follow up on the decisions rendered by the Court of Appeal to determine how the criteria set out above will be applied in practice. However, one question arises – namely, what purpose an appeal on the merits will serve once a judge of the Court of Appeal determines that the trial judgment contains a fatal error on the very face of it or a flagrant error concerning the court's jurisdiction.

[1] *Centrale des syndicats du Québec* c. *Allen*, 2016 QCCA 1878, at par. 59.
[2] *Ibid* at par. 58.
[3] *Ibid* at par. 60.