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Class action dismissed against the REM: Limits on obligations owed to public transit users

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Recently, in the case of *Barré v. CDPQ Infra Inc.*, the Quebec Superior Court dismissed an application for authorization to institute a class action relating to the inconveniences caused by the construction of the *Réseau électrique métropolitain* (the REM), ruling that the criteria set out in subsections 575 (2°) and 575 (4°) of the *Code of Civil Procedure* (CCP) were not met. Notably, the Court underlined the importance and relevance of its filtering role at the authorization stage of a class action. In this case, the Court concluded that the defendants were not at fault with respect to the mitigation measures proposed during the construction work. It also concluded that there was no relief permissible based on neighbourhood disturbances. Moreover, since the applicant had no personal cause of action to assert against any of the defendants, she was not in a position to ensure adequate representation of the members of the class. Finally, the Court noted that there was a serious deficiency in the description of the proposed class, describing it as circular, and therefore unacceptable.

Background

To briefly summarize the context, the applicant sought authorization to institute a class action against five defendants, namely CDPQ Infra Inc., the Projet REM SEC, the Réseau de transport métropolitain doing business under the corporate name "exo," the Autorité régionale de transport métropolitain, as well as the Attorney General of Quebec, specifically in relation to the Minister of Transport and the Government of Quebec (the Defendants).

This request for authorization was aimed more specifically at the REM construction project, which is expected to result in the partial interruption of commuter train service on the Deux-Montagnes line and the Mascouche line, in particular due to a temporary but prolonged closure of the tunnel under the Mount Royal.

In order to compensate for the inconveniences caused by the eventual closure of this tunnel, the Defendants announced accommodation measures. These were considered by the applicant to be markedly insufficient, as she feared that her daily travel time, and that of the members of the proposed class, would be doubled. Thus, the accommodation measures announced would, in her view, result in undeniable future inconvenience and prejudice.

Essentially, the conclusions sought on the merits were that the Defendants should be found liable *in solidum* both with regard to fault and no-fault liability. However, the Court denied the request for authorization against all of the Defendants.

Grounds and conclusion

From the outset, in the context of the analysis of the second criterion of article 575 CC. (i.e., appearance of right), the Court criticized the applicant for having added an argument in her plan of arguments based on section 16 of the *Consumer Protection Act*, which was not supported by any facts in her request for authorization. The request cannot be modified by roundabout means at the time of communicating the plan of arguments. According to the Court, nothing in the request for authorization or in the proposed syllogism would make it possible to establish the liability of either of the defendants on a contractual basis.

Still in the context of its analysis of the second criterion, the Superior Court analyzed the issue of liability for extracontractual fault provided for in article 1457 of the *Civil Code of Québec* (CCQ) in light of the allegations made in the request for authorization. The applicant argued essentially that the project involved serious inconveniences that were not adequately mitigated by the Defendants. However, the Court concluded that the latter did not demonstrate, even summarily, the alleged fault. Indeed, the Defendants' development and co-ordination of mitigation measures could not be wrong in and of itself. A civil fault cannot be demonstrated by reproaching public authorities for not doing enough. Thus, there was no basis to conclude that the Defendants, by act or omission, would behave in a manner to harm commuter train service users.

The request for authorization also invoked the Defendants' no-fault liability for the neighbourhood disturbances they would cause to the applicant and to the other members of the proposed class, pursuant to article 976 CCQ. In this regard, the Court noted that the applicant did not even reside in the vicinity of the Deux-Montagnes train line. The issues raised by the applicant were therefore not sufficiently closely related to her place of residence. The Court could not therefore authorize a class action on that basis.

With respect to the fourth criterion of article 575 CCP (relating to the adequacy of the proposed representative), the Court concluded on the basis of the foregoing analysis that the applicant had no personal cause of action to assert against any of the Defendants, in addition to the fact that she could not be considered a "neighbour" as she had suggested in her request for authorization.

The request for authorization of the class action was therefore rejected, as two of the criteria of article 575 CCP were not met. Moreover, the Court made sure to add that there was a fatal flaw in the description of the proposed class. In fact, it did not describe the members in a clear and objective manner because of its circular nature, with the result that one could not easily understand whether he or she was part of the class. Thus, it did not respect the right of exclusion, which is a fundamental principle in class actions.

Comment

We welcome this decision, which sets limits on the obligations that public authorities may have with respect to the provision of public transportation services, despite the essential nature of these services. The Court observed that the REM is in all likelihood the largest infrastructure project currently underway in Québec, and that it necessarily entails its share of inconveniences and uncertainties for users and citizens. The Court was also careful to distinguish between the inconveniences which may be caused by interruptions of regular public transport services, linked for example to problems with equipment, which may give rise to liability on the part of the parties concerned.[1] The authorization of the class action in *Barré* could indeed have had significant negative repercussions on the liability of public authorities in connection with maintenance or construction work on infrastructure, in

particular road infrastructure.

This decision thus strikes a balance between the public interest in realizing the construction and maintenance of infrastructure that can benefit a large number of users, and the unfortunate but necessary inconveniences that can be caused by such major works. It also reminds us that, despite a class action authorization process in Québec that is described as flexible, with a simple burden of demonstration and logic that can be fairly easily met, this process must still make it possible to dismiss applications that are manifestly ill-founded in fact or in law, as was the case here. It should also be noted that in recent months, several judges (including those of the Court of Appeal) have not hesitated to dismiss class action applications deemed to be ill-founded.

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[1] In this regard, the Court distinguishes with the authorization of the Class Action granted in *Konstas v. Réseau de transport métropolitain (Exo)*, 2020 QCCS 1099.