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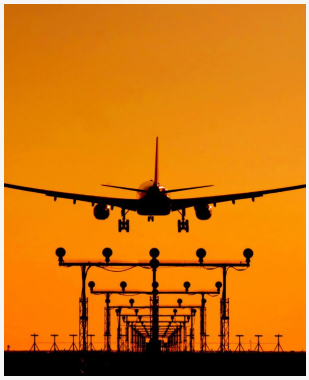
Refund programs as a defence against class action authorizations: an update by the Québec Court of Appeal



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Recent years have seen a rise in refund programs in Québec, which are sometimes used as a strategic defence against class actions. Designed to proactively respond to grievances of the proposed class, these programs have on occasion led to the dismissal of class actions on the merits.

However, the question of whether such programs could prevent class action authorization in the first place remained unclear. Nevertheless, such were the grounds for the Superior Court ruling in *Lachaine v. Air Transat AT inc.* (*Lachaine*), which was recently overturned by the Québec Court of Appeal in a significant development in this area.[1] The appellate decision clarifies the conditions under which a refund program may or may not thwart a class action at the authorization stage.

Background on the *Lachaine* case

The global COVID-19 health crisis led numerous countries to close their borders, including Canada. Air Transat,[2] Air Canada,[3] WestJet[4] and Sunwing[5] had to cancel all domestic and international flights. The airlines offered travel credits to passengers whose contracts did not explicitly provide for refunds. Two passengers filed an application to authorize a class action seeking cash refunds for all cancelled airline tickets and travel packages. They also claimed interest and moral and punitive damages.

Justice Bernard Tremblay of the Superior Court of Québec decided that the two passengers had no arguable case against three of the airlines — namely, Air Canada, Air Transat and WestJet — because they had implemented refund programs for the members of the proposed class action. He also rejected the ancillary claim for interest and moral damages. However, he authorized the class action to proceed against Sunwing, the only defendant that had not implemented a refund program. Several months later, after Sunwing announced a refund program for the class members for airline tickets and travel packages cancelled due to the COVID-19 pandemic, Justice Tremblay granted Sunwing's application to review his initial judgment and set aside the authorization judgment against the airline.[6]

In June 2024, the Québec Court of Appeal overturned these two rulings and authorized the class action against the four air carriers. It found that the Superior Court had erred in law by concluding that the airlines had extinguished all main and ancillary causes of action on the

part of the members of the proposed class action by announcing voluntary refund programs.

Refund programs in a class action context

The main precedents regarding refund programs are *Apple Canada Inc. v. St-Germain* (*Apple*),[7] *Perreault v. McNeil PDI inc.* (*Perreault*)[8] as well as *Paquette v. Samsung Electronics Canada Inc.* (*Paquette*).[9] In *Apple*, Justice Duval Hesler was of the opinion that the implementation of a reimbursement program extinguished the cause of action.[10] The Superior Court came to a similar conclusion in *Paquette*. In *Perreault*, the Court of Appeal of Québec remarked that the plaintiff should have considered accepting the reimbursement offered under a program set up by the respondent before taking legal action to obtain the same remedy.[11]

The Court of Appeal examined these three precedents in the *Lachaine* ruling, finding that in all three, the Courts had decided that allowing the case to proceed would run counter to the objectives of the class action, given that the defendants had diligently fulfilled their responsibilities.[12] In *Apple*, for instance, the company had voluntarily taken steps to reimburse the amounts that would have been claimed by the class action members before the application to authorize a class action was even filed. Similarly, in *Paquette*, consumers had been given the choice of an exchange or refund program before the class action application was filed. The Superior Court also indicated in that case that compensation offered under a refund program did not have to be perfect in the eyes of the Court, but that the Court needed to find that the applicant had been reasonably compensated.[13]

In *Lachaine*, the Québec Court of Appeal distinguished the facts of this case from those on which the first judge based his decision, primarily for two reasons. First, the situation in *Lachaine* differs from preceding cases in that full refunds of the amounts paid by travellers were not made immediately or promptly by the defendant airlines. It took months, and in one case more than a year, to implement the refund programs.

Second, the first judge in *Lachaine* had no details about the refund programs proposed by the airlines. No written refund policy was filed in evidence. The Court of Appeal found that this gap in the evidence prevented the judge from identifying the contours of an enforceable, concrete contractual framework and from determining with certainty that all members would in fact be adequately reimbursed.[14] The Court of Appeal distinguishes this situation from the *Apple*, *Perreault* and *Paquette* precedents by pointing out that in those cases, the Court seemed to have had the opportunity to examine the refund programs proposed by the defendants when evaluating the class action so as to ensure that class members' claims had been covered.[15]

Impact of *Lachaine*

After the *Lachaine* decision, is it still possible to prevent class action authorization by means of a refund program? In theory, the answer is yes. Despite its decision to authorize the class action in *Lachaine*, the Court expressly stated that implementation of a refund program could, in certain circumstances, extinguish the cause of action, thus preventing the class action at the authorization stage.

However, the Court noted that the answer to this question lies in the examination of the terms of the refund program. Companies targeted by class actions in the years ahead will therefore need to pay particularly close attention to these terms and conditions when developing refund programs as a defence against class action authorization. Based on this decision, such programs must meet the following three criteria:

a. be implemented promptly

b. compensate for all losses incurred by the members of the proposed class action

c. be submitted as detailed evidence to assist the tribunal in its concrete assessment at the authorization stage

A. A promptly implemented program

The first lesson we can draw from both the *Lachaine* decision and the previous trend in case law with respect to refund programs is that courts will generally favour a quickly implemented program. If the program is not implemented prior to the class action filing, it should at least enable the defendant company to refund the amounts claimed by the members of the proposed class action promptly, if not immediately. The court will have to be convinced that the defendant has acted diligently in fulfilling its obligations.

In this regard, there is a certain tension between the defendant's right to challenge the class action authorization and the requirement to implement a refund program promptly. *Lachaine* illustrates this contradiction. In its ruling, the Court of Appeal recognized the right of the airlines to challenge the merits of the plaintiffs' claim and, consequently, the class action authorization. At the same time, the Court criticized them for not having developed a refund program earlier. The decision to adopt one strategy over the other will therefore be a matter of assessing their respective risks and benefits on a case-by-case basis.

B. A program that compensates for all losses

In addition to demonstrating the defendant's good faith, a rapidly executed refund program will minimize the scope of the ancillary claims it must cover. The longer it takes to implement a refund program after the alleged fault occurs, the more the program will need to account for interest (due from the time of default) and moral damages, if applicable. In the case of *Paquette*, it is also worth noting that the refund program not only compensated for the entire main claim, but also made allowances for additional compensation. This was despite the fact that the program was implemented before the class action authorization filing.

The second lesson we can draw from the *Lachaine* ruling and the previous trend in case law is that defending parties considering the development of a refund program to prevent a class action from proceeding should consider the possibility of compensating not only the main claims, but also ancillary claims.

As the Québec Court of Appeal pointed out, even if the main cause of action is extinguished, a class action can still be authorized to proceed on the basis of interest and damages alone, despite that such claims may appear minimal compared to the main claim. It is important to note that under Article 1617 of the *Civil Code of Québec*, interest constitutes an independent claim. Consequently, extinguishment of the main cause of action does not result in extinguishment of the ancillary causes.

C. A detailed program, filed in writing as evidence

Finally, it seems essential that the court hearing an application to authorize a class action have an opportunity to review the details of the refund program proposed by the defendant. Simply indicating that a program will be implemented is not sufficient grounds to oppose an application for authorization.[16] The judge ruling on the application must also be able to assess the implications and details of the proposal made by the defendant to the members of the proposed class action.

To do so, in keeping with the teachings of *Lachaine*, the judge will need access to details about the proposed program, as well as its terms and conditions of application. This is because the court must be in a position to ensure that class members will be fully reimbursed and no longer have an interest in the proposed action. To meet this requirement, a defendant wishing to invoke a refund program to oppose a class action authorization will need to obtain authorization from the Court to file relevant evidence at the authorization stage and adduce detailed evidence on the program.[17] The onus is on the defendant to prove that its refund program is suitable, rather than on the plaintiff to demonstrate that it is inappropriate. Needless to say, this requirement implies that the proposed program is no longer in its infancy but has been fully developed so as to be enforceable. However, if a defendant needs more time to fully develop a refund program and adduce evidence on same prior to the authorization hearing, it could consider asking the Court to delay or stay the authorization process for a short period of time.

Conclusion

Lachaine is in line with previous case law to a certain extent in that it reflects the principles set out therein. But it differs in that it establishes clear conditions that must generally be met in order to prevent a class action from proceeding. The voluntary refund program should be implemented promptly, should compensate for all (or most) losses incurred and should be detailed in court, preferably by filing a written program as evidence.

Although one might agree with the requirement for sufficient proof regarding the details of the program established by the defendant, there is certainly room to question the appropriateness and severity of the conditions related to the timeframe and the absolute comprehensiveness of the compensation. In our view, these conditions, especially if applied rigidly, do not seem particularly conducive to fulfilling the purpose of a class action — i.e., to ensure or facilitate access to justice — particularly at a time when judicial resources are in short supply. This can be seen as an indication of a gap between Québec's highest court, which is responsible for establishing the principles in this area, and the Superior Court, which is responsible for implementing them, and especially for managing cases that are increasingly numerous and complex.

In light of the above, we can conclude that implementation of a refund program can, in principle, prevent the authorization of a class action. However, there is often a gap between theory and practice. Depending on the case, defendants may find it difficult to reconcile their right to challenge a class action on its merits with the need to act promptly to implement a comprehensive, immediately executable refund program. Although such programs don't have to be perfect, the scope of the refund to be awarded to group members must be rapidly and carefully estimated so that a complete proposal can be submitted to the court.

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[1] 2024 QCCA 726. For the trial court decision, see *Lachaine v. Air Transat AT Inc.*, 2021 QCCS 2305.

[2] Air Transat A.T. Inc. and Transat Tours Canada Inc. (Air Transat).

[3] Air Canada and Air Canada Vacations (Air Canada).

[4] WestJet Airlines LTD and WestJet Vacations Inc. (WestJet).

[5] Sunwing Airlines Inc. and Sunwing Vacations Inc. (Sunwing).

[6] *Bonnier v. Air Transat AT Inc.*, 2021 QCCS 5898.

[7] 2010 QCCA 1376.

[8] 2012 QCCA 713 (application for leave to appeal to the Supreme Court dismissed, *Perreault v. McNeil PDI inc. et al.*, 2012 CanLII 64751).

[9] 2020 QCCS 1160.

[10] Justice Duval Hesler's opinion is a concurring opinion. For their part, the majority justices were of the opinion that the trial judge should have refused authorization to institute the class action, since the conditions for instituting an action for undue payment under Articles 1491 and 1492 of the *Civil Code of Québec* had not been met. Thus, irrespective of the issue of the reimbursement program, the members' claims had no legal basis.

[11] *Perreault*, para. 42.

[12] *Lachaine*, para. 35.

[13] *Paquette*, para. 74.

[14] *Lachaine*, para. 30.

[15] *Ibid.*

[16] See, notably, *Bitton v. Amazon.com.ca inc.*, 2023 QCCS 3058.

[17] Pursuant to section 574 al. 3 of the *Code of Civil Procedure*, RLRQ c. C-25.01, an application for authorization may only be contested orally, but the court may allow relevant evidence to be submitted.