The Court of Appeal upholds the dismissal of an environmental class action at the authorization stage

February 10, 2023

Introduction

In Pollués de Montréal-Trudeau c. Aéroports de Montréal (2022 QCCA 1646), the Court of Appeal dismissed the Pollués de Montréal-Trudeau (PDMT)'s appeal from a Superior Court judgment rendered by the Honourable Gary D. D. Morrison, j.s.c. denying leave to institute a class action against the Attorney General of Canada, NAV Canada and Aéroports de Montréal (collectively, the Respondents).

The PDMT sought leave to institute a class action against the Respondents due to alleged exposure to nanoparticle air pollution which, according to the applicants, was generated by Aéroport international Montréal-Trudeau (the Airport) operations.

The PDMT claimed compensatory damages under the Respondents' extracontractual liability (art. 1457 CCQ) and the liability regime for neighbourhood annoyances (art. 976 CCQ). The PDMT also claimed punitive damages, arguing that the alleged pollution constitutes an unlawful and intentional interference with their right to a healthful environment enshrined in article 46.1 of the *Charter of human rights and freedoms*.

Analysis

The Court of Appeal began its analysis by reminding that it has a limited power of review with respect to a judgment on an application for leave to institute a class action and that deference is owed in such matters. The Court of Appeal can only intervene in such appeals if it finds an error of law or a manifestly ill-founded interpretation of the authorization criteria in art. 575 CCP.

The Court of Appeal also noted the authorizing judge's screening role with respect to frivolous class actions that have no chance of success or are manifestly without merit. It concluded that the trial judge had correctly stated and applied the principles governing class action authorization and had rightly found that the appellants had failed to meet the burden of proof required to have their application authorized.

The Court upheld the trial judge's conclusion that the PDMT had been unable to identify any breached standard or explain how the Respondents could be responsible for the nanoparticle pollution or what they should have done to limit it, thereby failing to allege any fault by the Respondents. The Court also upheld the authorizing judge's conclusion that the PDMT had failed to allege any harm or abnormal annoyance beyond the limit of tolerance and thus had no foundation for their claims under art. 1457 CCQ and art. 976 CCQ.

Regarding the punitive damages sought, the Court of Appeal confirmed that failing any allegations that the Respondents had acted intentionally, malevolently or vexatiously, such a claim was untenable and the proposed class action had to be dismissed.

Commentary

Art. 976 CCQ provides that "neighbours shall suffer the normal neighbourhood annoyances that are not beyond the limit of tolerance they owe each other, according to the nature or location of their land or local usage." Under this fault-free liability regime, civil liability arises not from the perpetrator's behaviour, but rather from the excessive and abnormal nature of the annoyances suffered.

This means that sufficient allegations apparently proving the existence of excessive or abnormal annoyances must be put forward at the authorization stage. The applicants had to identify a legal obligation and allege that it had not been met, but they did not do so here.

This Court of Appeal decision serves as a reminder that a court cannot authorize a class action based on mere possibility of harm, and that *prima facie* evidence of a likelihood of harm that can be extrapolated to all class members is required. General and imprecise allegations about the possibility or risk of potential or hypothetical harm are an insufficient basis for a claim both under civil liability (art. 1457 CCQ) and neighbourhood annoyances (art. 976 CCQ).

Finally, the Court of Appeal noted that the precautionary principle, which has been recognized in Canadian administrative law since the Supreme Court's decision in Spraytech, cannot be used to justify a class action for compensatory damages where there is no alleged fault or actual harm. Not only is it insufficient to allege that a public authority ought to have done more, but the Court of Appeal also noted that compensatory damages serve a remedial rather than a preventive function. In the case at bar, none of the allegations support the cause of action put forward by the PDMT.

In this case, the respondent Aéroports de Montréal was represented by BLG's class action lawyers.

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