Recent Developments in Québec Class Action Law
by Enrico Forlini*

I. Introduction

If you think you have been noticing that every time you turn on the radio or the TV, or pick up a magazine or newspaper, you learn about another class action lawsuit that has been filed, you are right. Even Hollywood has presented its views on class actions in movies such as *A Civil Action* and *Erin Brokovich*. Indeed, class action litigation is becoming an “important fact of life”1 for businesses: high profile class actions include allegations of defective breast implants, risky weight loss drugs, tainted blood, cracking toilet tanks, credit card and utility company overcharging, excessive noise and pollution from snowmobiles, misleading press releases leading to artificially high share price2 etc… The list seems never-ending.

Québec, the class action pioneer in Canada, adopted its class action regime via amendments to the Code of Civil Procedure (hereinafter “CCP”) in 1978. Inspired from two American sources, namely Rule 23 of the U.S. Federal Rules of Civil Procedure and articles 901 ff of the Rules of Procedure of the State of New York, Québec was the only province in Canada to have such a procedural mechanism for 15 years. Class action law in Québec was considered to be part of a global and international trend towards making rights effective by providing a means for groups to gain access to justice. Described as “the most progressive class action legislation in Canada, if not in the Commonwealth”,3 other provinces followed the Québec example. Thus, guidelines for collective actions in Ontario were implemented in 1992, in British Columbia in 1996, in Newfoundland in 2001, in Saskatchewan also in 2001, and in Alberta in 2004.4

In recent years, class action litigation has experienced a marked growth, with statistics showing 44 class action lawsuits filed in Québec in 2003, double the amount filed in

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1998. Moreover, approximately 75 per cent of class proceedings are certified in the province of Québec, a rate that far surpasses the success rate in other provinces of Canada. It is often said that Québec is the “class action heaven”. In January 2003, a new set of rules governing class actions came into force in the province of Quebec. On April 29, 2005, in a much awaited decision, the Québec Court of Appeal upheld the constitutional validity of the new rules. Many predict that these new rules will make it even easier for a class action to be certified in this province.

II. The Old Regime

a) The Rules

Even before the 2003 amendments to Québec’s class action rules, the province was known to be a forum favourable to class plaintiffs. A class action was certified if, in the court’s discretion, the plaintiff-petitioner was able to fulfill the following criteria:

i) the recourses of the members raise identical, similar or related questions of law or fact;

ii) the facts alleged seem to justify the conclusions sought;

iii) the composition of the group makes it difficult or impracticable for one person to obtain a mandate to represent others or to join multiple suits into one lawsuit;

iv) the member to whom the court intends to ascribe the status of representative is in a position to represent the members adequately.

For a class to be certified, the petitioner under the old rules had to support the allegations formulated in the lawsuit with one or more affidavits, which are statements under oath that declare the alleged facts to be true. The filing of this (these) affidavits entitled any defendant to the motion for certification the right to cross-examine out of court the class representative; that is, the defendant had the opportunity, before the certification hearing, to confront the class representative and question him/her on the veracity of the allegations made in the lawsuit.

Furthermore, any defendant could contest the motion for certification in writing, supported by its own affidavit(s) containing evidence rebutting the allegations made in

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5 Nicolas Van Praet “Companies ‘revolt’ against class-action rules” The Gazette (April 16, 2005) [Van Praet, “Revolt”].
7 In Québec, the term commonly used when a motion to institute a class action is certified is « authorization ». For this paper, we will use the two expressions interchangeably.
8 Art. 1003 CCP.
The defendant could also present expert-evidence in its contestation. Once at the hearing of the motion to certify, the defendant had the right to adduce all relevant evidence to defeat the motion.

The definition of a “member” was limited to natural persons (thus excluding legal persons such as partnerships, associations, corporations).  

Thus, at the certification hearing, the court had the benefit of hearing the two sides of the story. Notwithstanding these procedural safeguards for the defendant, Québec was nevertheless considered a jurisdiction where class actions were relatively easily certified. Indeed, recent decisions rendered under the old regime demonstrate that courts have given a liberal interpretation to the four conditions listed above and have eased the plaintiffs burden of proof.

One example is *Riendeau v. The Hudson’s Bay Company*\(^9\) in which the Court of Appeal authorized the institution of a class proceeding against The Hudson’s Bay Company on behalf of every person having held a The Bay credit card which bears an annual interest of 28.8% on unpaid balances. The plaintiff alleged that this rate was not consistent with lower commercial lending rates. In its decision to grant certification, Québec’s highest court concluded that the prerequisite that “facts alleged seem to justify the conclusions sought” should be read to mean that the court must examine the motion assuming that all the facts alleged in it are true, regardless of the possibility for the defendant to answer these facts by way of contestation supported by an affidavit.

This liberal approach towards the application of class action law in the province is further illustrated by the fact that Québec law provides that only judgments dismissing motions for authorization can be appealed. \(^11\) In other words, only the plaintiff gets two ‘kicks at the can’.

**b) Tobacco Class Actions Certified in Québec**

Recent cases involving class actions against tobacco companies illustrate the plaintiff-friendly approach in the application of the class action rules in force prior to the 2003 amendments. In February 2005, the Québec Superior Court certified two class action lawsuits seeking billions of dollars against three tobacco companies operating in Québec. \(^12\)

The defendants are JTI-Macdonald Corp., Imperial Tobacco Canada Ltée and Rothmans, Benson & Hedges Inc. The plaintiffs allege damages on the part of millions of Québécois as a result of addiction to tobacco products and smoking-related illnesses. The

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\(^9\) Articles 999, 1002 old CCP.  
\(^10\) *The Hudson’s Bay Company*, supra note 2.  
\(^11\) Art. 1010 CCP.  
\(^12\) *Conseil québécois sur le tabac et la santé et J.Y. Blais v. JTI-MacDonald Corp.et al* (February 21, 2005), Montreal 500-06-000076-980 [Blais] and *Létourneau v JTI-MacDonald Corp. et al* 500-06-000070-983 [Létourneau].
suits seek damages on the part of each class member. In the Létourneau suit, the class representative is seeking $5,000 for each of the estimated two million Québécois addicted to smoking. In the Blais suit, filed by a smoker who lost a lung to cancer, plaintiff is asking up to $100,000 for each Québécois who suffered emphysema or cancer of the lungs, larynx or throat between 1995 and 1998.  

To counter these allegations, the defendants argued notably, that in order to ascertain liability, the suits would inevitably require inquiry into the specific circumstances of each of the millions of individuals likely to be part of the class, which is an impossible task within the confines of a class action. Moreover, the defendants argued that the relevant issues for establishing liability were not identical, similar or related, and therefore a class proceeding would be contrary to the efficient administration of justice.

The Superior Court dismissed the tobacco companies’ arguments. Justice Jasmin reiterated that the class action is not a discretionary recourse; the Court must authorize a class action if it is of the opinion that the criteria of art.1003 CCP, which are to be interpreted liberally, are satisfied. It exercises discretion only in the evaluation of these criteria. Furthermore, he stated that at the certification stage, the standard of proof is not as high as the standard in an ordinary claim. All that is needed is sufficient proof that the proceeding is not futile, unfounded or irreparably destined to fail. Finally, the court reiterated that the rules governing the certification of a class action must be interpreted liberally; in case of doubt, the class action must be certified.

The Court’s authorization of these two class actions is yet another example of Québec’s favourable attitude towards class proceedings, and illustrates the philosophical and legislative differences between Québec and other North American jurisdictions. Indeed, a similar class action had previously been brought in Ontario, which did not receive the success of its Québec counterpart.

In Caputo v. Imperial Tobacco Ltd., the plaintiffs brought a motion to certify a class action in respect of an action for damages against tobacco manufacturers for injuries caused by the use of cigarettes. The class was composed of all residents of Ontario, living or deceased, who had smoked cigarettes manufactured by the defendants and all persons having derivative claims. The number of individuals was estimated at between 2.4 and 15 million, and the claims arose from a multitude of situations spanning at least 50 years. The defendants, Imperial Tobacco Ltd., Rothmans, Benson & Hedges and RJR-Macdonald, argued that the proposed class proceeding lacked the core element of commonality as required by the Class Proceedings Act, 1992 (the “CPA”).

Section 5 of the CPA provides that:

13 “Québec court certifies class action suits against 3 tobacco companies” CBC Business News (February 21, 2005), online: CBC <http://www.cbc.ca/story/business/national/2005/02/21/tobacco-050221.html>.

14 Conseil québécois sur le tabac, supra note 17 at para. 39-45.

15 Caputo v. Imperial Tobacco Ltd., 236 D.L.R. (4th) 348 (Ont. Sup Ct.) [Caputo].

5(1) The court shall certify a class proceeding on a motion under section 2, 3 or 4 if,

(a) the pleadings or notice of application discloses a cause of action;
(b) there is an identifiable class of two or more persons that would be represented by the representative plaintiff or defendant;
(c) the claims of the class members raise common issues;
(d) a class proceeding would be the preferable procedure for the resolution of the common issues; and
(e) there is a representative plaintiff or defendant who,
   (i) would fairly and adequately represent the interests of the class,
   (ii) has produced a plan for the proceeding that sets out a workable method of advancing the proceeding on behalf of the class and of notifying class members of the proceeding, and
   (iii) does not have, on the common issues for the class, an interest in conflict with the interests of other class members.

The Ontario Superior Court of Justice found that the pleadings disclosed a cause of action. However, it was of the opinion that the plaintiffs failed to disclose an identifiable class, and therefore failed to establish the commonality criterion. In fact, the action was an amalgamation of potential class proceedings that made it impossible to describe a definite single class sharing substantial common issues. Relying on the SCC’s judgment in Hollick, the Court recalled that common issues must be such that their resolution will significantly advance the action. Moreover, the Court put much emphasis on the requirement that the class action must meet the “preferable procedure”17 criterion of the test for certification, taking into account the “fairness, efficiency and manageability”18 of the proceeding as a whole, including any individual issue that might exist. In fact, the Court underlined that individual issues could not be ignored, as their presence and importance cannot be diminished by a creative, albeit flawed, strategy that obvious individual issues can be dealt with as though they were common to the class as a whole. The presence of the multiplicity of individual issues and the corresponding lack of commonality led the Court to conclude that the class proceeding is not the preferable procedure. The plaintiff failed to satisfy the onus of proving that a class action would be fair, efficient and manageable.

Whereas the Ontario court emphasized the workability of such a case as well as the efficiency and manageability of the proceeding, taking into account the important presence of individual issues, the Québec court found a way to overcome these concerns by giving a generous interpretation to Québec class action law. In Québec, concerns that stand in the way of certification in other provinces are overshadowed by the emphasis on improving access to justice which is notably accomplished by fostering and facilitating access to class actions.

17 Caputo, supra note 20 at para. 61.
18 Ibid. at para. 67.
III. Class Action Law Reform in Québec

a) The New Rules

In January 2003, new rules governing class actions came into effect in the province of Québec. The changes are significant and as a result of them, a jurisdiction that was already favourable to plaintiffs will become even more plaintiff-friendly. The major changes of interest are:

- defendants lose the right to examine petitioners;

- defendants lose the right to file a written contestation to the motion to certify;

- defendants lose the right to adduce evidence at the certification hearing; and

- the definition of class member is expanded.

Under the old rules, a plaintiff asking that a class action be certified had to sign an affidavit stating that the facts alleged in the motion to certify the class were true. This obligation for plaintiffs to sign sworn statements has been eliminated. As a consequence of the elimination, all defendants lose their right to cross-examine petitioners. Thus, the veracity of allegations made by petitioners in their motion can no longer be “tested” through the process of out of court cross-examinations.

A second aspect of the reform is the abolition of the defendant’s right to contest in writing the motion to certify. Under the old rules, defendants routinely sought permission from a judge of the Superior court to contest in writing the motion to certify. These permissions were regularly granted. These written contestations gave the defendant the opportunity to respond to the allegations made in the motion to certify and to present facts in support of its arguments. All factual allegations made by defendants in their written contestations were supported by one or more affidavits. The petitioner was obviously entitled to examine out of court whomever signed the affidavit(s) for the defendant.

Since January 1, 2003, defendants can no longer contest in writing. They may only contest the motions orally, that is, at the hearing, in person.

Thirdly, respondents now have a limited right to adduce evidence at the hearing to certify a class action. In fact, the rule states that the judge “may allow evidence to be submitted”. That is, the defendants’ right to adduce evidence will be decided according to what the Court deems relevant in the circumstances. This means that a defendant may show up at a hearing with five witnesses without knowing whether or not they will be heard. Similarly, the defendant may have spent significant sums of money on preparing an expert’s report to rebut the plaintiff’s allegations, but will not know until the day of the hearing whether this report will be admissible into evidence. The regime under which

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19 Art. 1002 CCP.
defendants were entitled to avail themselves of all available and relevant evidence has disappeared – defendants are now at the mercy of the Tribunal’s discretion.

In summary, at the hearing of a motion, Petitioners/Plaintiffs do not testify and cannot be examined. The facts they allege are assumed to be true. However, as regards defendants’ witnesses that the Court has allowed to testify on their behalf, they can be cross-examined by the plaintiffs. It appears that the amendments brought by the legislator in January 2003 are an attempt to make life even easier for those who file a motion for certification of a class action by diminishing or abolishing the defendants’ procedural rights.

This reform of class action law in Québec considerably skews the balance of rights in favour of plaintiffs. Plaintiffs, it should be noted were already favoured by the old rules. Indeed, article 1010 of C.C.P. already provides that a judgment dismissing a motion for authorization to institute a class action is subject to appeal as of right. Such an appeal is then heard and decided by preference. A judgment certifying such a motion, however, is without appeal. This rule has not been modified by the 2003 amendments.

It is thus no surprise that defendants immediately contested the constitutional validity of the legislative amendments.

b) Section 23 of the Québec Charter of Human Rights and Freedoms

An important issue with respect to these new changes is whether they are consistent with section 23 of the Québec Charter of Human Rights and Freedoms (hereinafter “Charter”). Section 23 ensures one’s right to a full and equal, public and fair hearing by an independent and impartial tribunal. Since the Charter has constitutional status, all Québec laws must comply with its general principles. The purpose of section 23 is to provide equal protection to parties to legal proceedings in such a way that it is conducted fairly and impartially. Indeed, everyone is equal in the eyes of the law.

When the new rules governing class actions were adopted in 2003, many argued that they blatantly overlooked this protected right. By severely curtailing every defendant’s ability to contest the certification motion, in effect denying the defendant the opportunity to confront its accuser, many protested that the new regime violated the rights conferred by section 23 of the Charter. Surely, a proceeding in which the defendant cannot cross-examine petitioners, nor make written contestations, does not respect the right to a fair hearing. In addition, the principle of audi alteram partem (i.e., the right to be heard) may well be violated. The defendants’ rights are significantly affected, and yet they have no opportunity to make “full answer and defence”.

21 André Durocher & Peter Kirby, “Is the Class Action Law Reform in Québec Compatible with Section 23 of the Charter of Human Rights and Freedoms and with Chapter 11 of NAFTA?”, Fasken Martineau DuMoulin, at p.17 [Durocher & Kirby, “Class Action Law Reform”].
These arguments as well as the constitutionality of art.1002 CCP were considered by the Québec Court of Appeal in the very recent *Piro*\(^{22}\) case. In *Piro*, Québec’s highest court affirmed the constitutionality of the new regime. As of the date of the writing of this text, defendants have indicated that they will be seeking leave to appeal this decision to the Supreme Court of Canada. If the Supreme Court grants leave, and until the Court of Appeal’s judgement is overruled, if it ever is, *Piro* remains the law in the province of Québec.

IV. Application of the New Rules

Two recent cases illustrate the application of the new rules.

a) **Marcotte**

*Marcotte v. Bank of Montreal*\(^{23}\) dealt with a class action against all major banks and credit card companies operating in Québec, claiming that the credit card foreign exchange charges violate Québec’s *Consumer Protection Act*. In *Marcotte*, the defendant banks petitioned the Court requesting the permission to examine on discovery the petitioners’ representative, file a written contestation, and obtain the right to file documentary evidence and affidavit evidence in support of their contestation. Justice Tessier denied the Defendants’ first two requests. As for the third request, he referred it to the judge who would hear the hearing on the certification of the motion.

b) **Piro: The Québec Court of Appeal confirms the constitutional validity of the 2003 Amendments**

The most recent affirmation of the liberal and generous application of Québec’s class action regime is illustrated by the Québec Court of Appeal’s decision in the *Piro* case, in which the court upheld the constitutionality of the 2003 amendments.

The case was triggered by a newspaper article published on February 27, 2003 in the French daily *La Presse*, which denounced the policies of various manufacturers of generic drugs. The writer claimed that the drug manufacturers gave pharmacists premiums, discounts, rebates and other illegal benefits. Believing that such practices increased the price of drugs sold to the Régie de l’assurance-maladie, and thus increased the publics’ mandatory financial contributions to Québec’s drug insurance scheme, Option Consommateurs and Giuseppina Piro brought a motion to institute a class proceeding against the drug manufacturers. The plaintiffs claimed, on behalf of all purchasers of products from the pharmaceutical companies since January 1995, the value of the premium reductions, deductibles and co-insurance which they would have been entitled had the price of the drugs excluded the allegedly unlawful benefits.

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\(^{22}\) *Pharmascience Inc. c. Option Consommaterus* (April 29, 2005), Montreal 500-09-014659-049; 500-06-000192-035 [*Piro*].

From the outset, the pharmaceutical companies opposed the motion by arguing that art. 1002 CCP was unconstitutional. The defendants contended that the recent amendments denied them the right to full answer and defence at the authorization stage of the proceeding. Defendants also requested the right to submit additional evidence. At a preliminary hearing, the lower court judge refused to decide on the constitutionality issue. Dissatisfied with the result, the defendants appealed.

With respect to the constitutional question, the Court of Appeal rejected the defendants’ argument that s. 23 of the Charter requires a plaintiff to prove the facts supporting his/her claim, and conversely entitles the defendant to require such proof before its submission of a defence. Justice Gendreau, writing for the Court, based his decision on the grounds that the motion for authorization to institute a class action is a “filtering and verification mechanism” and that the judicial decision granting the authorization is a judgment of “verification and control” which will lead to the formation and the institution of the class action. Before the authorization judgment, the collective recourse does not exist. Justice Gendreau also cite with approval the comments of the Comité de revision de la procedure civile to the effect that the pre-2003 practice had transformed the authorization procedure into a full-fledged debate on the merits of the class action, similar to that prevailing in other Canadian provinces with class action legislation. The Comité had argued that his lead to ever increasing delays and costs (par. 27) and was contrary to the spirit behind class action legislation. Justice Gendreau agreed with the Comité’s views and added that the existing regime had gone astray.

Justice Gendreau furthermore noted that the removal of the obligation to submit affidavits and the limitation of examinations would accelerate the procedure without fundamentally modifying the class action regime. He further stated that the purpose of the authorization judgment is not to determine the defendants’ rights and obligations, as the action is yet to be formed. Rather, its purpose is to authorize a person to represent a group and verifying the application of the law to a series of facts alleged in the motion. Thus, the motion for authorization to institute a class action is only a preliminary step towards the formulation of the class action.

Judge Gendreau therefore concluded that the 2003 amendments do not violate s.23 of the Québec Charter.

The pharmaceutical companies’ unsuccessful attempt to contest the amendments is further evidence of Québec’s pro-plaintiff attitude towards class proceedings. As a matter of fact, Judge Gendreau reiterated that the class action is a social measure that favours access to justice by permitting a comparable and just redress for all the members, without their being multiple similar actions and within a context that insures a balance of power between the parties.

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24 Piro, supra note 29 at para. 24.
25 Ibid. at para. 30.
26 Ibid. at para. 20.
The pharmaceutical companies argued, rightly in our view, that the granting of authorization by a Court to institute a class action is a critical event, with potentially significant adverse effects. Therefore, the defendants procedural rights must be protected even at the authorization – certification stage. While the Court of Appeal noted that “admittedly, to be summoned before the judicial system, especially when the claim is substantial, may well represent an economic burden, as the appellant argued, … however, this is irrelevant in Québec law. The legislator has set the criteria to be considered for the purpose of preventing frivolous actions, not to adjudicate on the appropriateness of the proceedings.” (translation)(at par. 31).

c) *Implications of the Piro Decision*

Under the new regime validated by the Québec Court of Appeal, the certification of a class action in the province of Québec will become much simpler than before. Many fear, rightfully so, that class actions with almost routinely be authorized. As opposed to Ontario and other common law jurisdictions where the certification process allows for substantial discovery and adjudication of issues, defendants before the Québec courts are now deprived of fundamental procedural safeguards. As some practitioners have noted, the notion that a judgment granting a motion for authorization to institute a class action is merely a filtering mechanism disentitling the defence of the full panoply of procedural rights comes somewhat as a shock. A Superior Court judgment is still a judgment, regardless of whether it grants a motion for authorization to institute a class action or allows an action on the merits. Patently, granting authorization to institute proceedings will significantly affect the rights of the party being sued and it is entitled to present a defence. Allowing the party being sued to contest the motion for authorization but withholding the effective means for doing so is tantamount to denying its right to full answer and defense.

Once a class proceeding is authorized, it can and usually does become a powerful negotiating tool for petitioners, forcing defendants to find a compromise and to seek out-of-court settlements. And who is to say that the cases certified are not based on frivolous claims? There is a risk that, by easily granting authorizations, plaintiffs might be encouraged to pursue their claims, even if the latter are in fact frivolous and without any legal basis. Abuses are bound to occur. Access to justice is important, but perhaps not at the expense of negatively affecting the justice system’s reputation, portraying it as an institution that permits plaintiffs to sue at their whimsical pleasure. Such a system would surely lose society’s respect and confidence.

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27 See Caputo, supra note 20.
28 André Durocher & Claude Marseille, “The Court of Appeal Renders Judgement in the Piro Case: Québec Continues to be Canada’s Class Action Heaven”, Fasken Martineau DuMoulin [Durocher & Marseille, “Piro”].
29 André Durocher & Claude Marseille, “The Court of Appeal Renders Judgement in the Piro Case: Québec Continues to be Canada’s Class Action Heaven”, Fasken Martineau DuMoulin [Durocher & Marseille, “Piro”].
V. How do Defendants protect themselves?

Faced with the risk of being targeted by a class action, which is ever-increasing in Québec, are there ways to manage this risk?

a) Arbitration Clauses

One method that may be effective in managing this risk is to include mandatory arbitration clauses in contracts. An arbitration clause excludes the courts’ jurisdiction (power) to deal with a claim that might arise. In case of a dispute, the case must be referred to arbitration, where the issues will be decided by arbitrators, who may be named by the parties, and who may proceed according to their own procedural rules. The arbitration clause may even require claims to be dealt with individually, rather than on a collective basis. The decision of the arbitrators is binding on the parties, but not on third parties.

The validity of arbitration clauses in Québec was confirmed by the Supreme Court of Canada in Desputeaux v. Éditions Chouette.\(^{30}\) According to the Supreme Court of Canada, arbitration clauses should not be overlooked, as they are an important alternative means of dispute resolution. Moreover, the Court noted that arbitration enjoys autonomy vis-à-vis the judicial courts, and that arbitration clauses must be interpreted broadly and liberally.

The use of arbitration clauses in contracts to circumvent the possibility of a class action was considered in Union des Consommateurs v. Dell Computer Corporation.\(^{31}\) In that case, the plaintiff, a consumer advocacy group, brought a class action against Dell for misleading advertisement on the company’s website. Dell sells computers via the Internet, and purchasers must agree to the terms and conditions of the sale contract in order to complete the transaction. The sale contract contained an arbitration clause, according to which the dispute with regard to the purchase of computers must be settled exclusively by arbitration. Based on this clause, Dell asked the court to refer the matter to arbitration. On its face, the arbitration clause indeed prevented any kind of action against the company. However, under art. 3149 of the Civil Code of Québec, consumers residing or domiciled in Québec cannot waive the jurisdiction of the Québec courts when a consumer contract is involved. Since the arbitration authority referred to in the Dell clause was based in the U.S., the Québec Superior Court refused to refer the matter to arbitration. Thus, in the context of a class action brought by consumers, it would be prudent to draft the clause in such a way that the arbitral authority is situated in Québec.

In common law jurisdictions, the arbitration clause has been successfully invoked to curtail the risk of class actions. For example, in Ontario, Rogers Cable Inc. was able to


enforce its arbitration clause. The Ontario court rejected arguments pursuant to which the clause was unconscionable and that it contravened public policy, or that nobody would pursue a claim before an arbitrator given the disproportion between the value of the claim and the costs of arbitration. In the U.S., the courts note that the objective of the Federal Arbitration Act is to remove all hostility that courts may have towards arbitration clauses, and that the class action is a procedural device that should not be given preferential treatment over the right to have a matter resolved by arbitration. As such, in the U.S., a properly drafted arbitration clause would defeat the possibility of a class proceeding.

Although the issue of the ability to invoke arbitration clauses to avoid the risk of class actions is not fully settled in Québec, given the common law experience, this potential defence has significant merit. By inserting a well-drafted clause in a contract, courts should have no other alternative but to refer the matter to arbitration and abandon their jurisdiction over class actions. Furthermore, the arbitration clause can even call for individual, rather than group, claims. Thus, companies operating in Québec should consider the inclusion of arbitration clauses in their contracts in order to manage the risk of class actions.

b) Chapter 11 of NAFTA

Another possible avenue for multinational companies to mitigate their exposure to class actions in Québec is found in Chapter 11 of the North American Free Trade Agreement (hereinafter “NAFTA”). Indeed, this treaty provides protection to investors (and their investments) who are parties to NAFTA, by establishing rules governing their treatment by the host government. For instance, the host government cannot discriminate against investments of non-nationals.

Of particular interest is art.1105 of the agreement, which provides that “Each Party shall accord to investments of investors of another Party treatment in accordance with international law, including fair and equitable treatment and full protection and security”. Thus, both Québec’s legislation on class actions and the manner in which that legislation is applied in specific cases would be subject to scrutiny under article 1105 of NAFTA. Mexican and U.S. investors who find themselves defendants to a Québec class action could argue that article 1105 of NAFTA guarantees them a “minimum standard of treatment in accordance with international law” which minimum standards include “fare and equitable treatment” and “full protection and security”.

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33 See Marseille & Durocher, “Arbitration Clauses”, supra note 6 at p.3.
VI. Conclusion

Québec is rightfully recognized as a plaintiff-friendly jurisdiction because of the ease with which consumers can obtain the court’s approval to proceed with class actions. With the advent of the new rules which came into force on January 1, 2003, Québec has perhaps rightly earned the label “class action paradise”. Indeed, the amendments have abolished the obligation to submit affidavits, thus eliminating the defendants’ right to cross-examine petitioners. Furthermore, defendants may only contest orally the motion and submission of evidence is at the discretion of the court. Such a procedure arguably contravenes the defendants’ right to a full and fair hearing under the Québec Charter. However, the constitutionality of the amendments has been upheld by the Court of Appeal. One can only hope that the Supreme Court of Canada will accept to hear the appeal and correct an inherently unfair situation.

35 Van Praet, “Revolt”, supra note 3.