BCF Class Action NetLetter

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Monthly issues are published on the first day of each month.

HIGHLIGHTS

* In the October 2021 issue of the BCF Class Action NetLetter, you will find the following two articles.
* The first contains submissions that have been made to the Québec Minister of Justice by André Ryan and Shaun E. Finn of BCF LLP as part of a public consultation on proposed class action reforms in Québec. Among other things, these submissions address a report written by Professor Catherine Piché of the Université de Montréal in September 2019 on the same subject.
* The second article discusses punitive damages in the context of class actions in Ontario. It suggests that, even though there is no specific need to depart from the general rule that punitive damages should rarely be granted, they have as important a role to play in class actions as they do in civil proceedings in the ordinary course.
* Please note that the views expressed in the BCF Class Action NetLetter are those of the authors only and do not constitute advice of any kind.
* If you have any comments, wish to advise us of a recent class action case or issue, or would like to submit an article for publication, please feel free to contact the BCF Class Action NetLetter at one of the e-mail addresses below.
* Wishing you and yours safety, good health, and happy reading., Shaun E. Finn, Co-Leader, of the Class Action Defence Group, Partner, BCF, Business, Law shaun.finn@bcf.ca, Carle Jane, Evans, Lawyer, BCF, Business Law, carlejane.evans@bcf.ca, Audrée Anne Barry, Lawyer, BCF, Business Law, audreeanne.barry@bcf.ca

COMMENTARY

Submissions to the Québec Minister of Justice on Proposed Class Action Reforms, by André Ryan and Shaun E. Finn, BCF, Business Law[1]

It is with great interest that we write in response to the public consultation process announced by the Ministry of Justice on possible reforms to the class action regime. This public consultationwhich arises out of a research mandate given to the Class Actions Lab of the Université de Montréal and Professor Catherine Piché's report of September 2019 (the "Report")[2] - is both timely and welcome.

The class action has evolved considerably since it came into force in 1979. From a novel procedure, it has become an integral part Québec's legal framework and has played a meaningful role in advancing judicial

economy, access to justice, and behaviour modification.[3] The increasing number and size of class actions mean that the legislature, the judiciary, the legal profession, and all of society have a vested interest in ensuring that it be as effective and resilient as possible. It is also important that the Québec class action be fully consistent with the culture shift that is embodied by the current *Code of Civil Procedure* ("*Code*" or "C.C.P.")[4] and advocated by the Supreme Court of Canada.[5]

While we commend the Report for its depth and creativity, we do not agree with all its observations and proposed reforms. As will be explained in greater detail below, it is our respectful submission that:

- Doing away with the authorization process as it currently exists and replacing it with a hybrid procedural mechanism at the merits stage (i.e. a truncated authorization test coupled with an elective application to dismiss) would not simplify or accelerate the litigation of class actions.
- The problem of redundancy is largely illusory as very few authorized class actions in Québec are subsequently targeted by an application to dismiss on the merits. Rather than create a hybrid procedural mechanism of the kind proposed in the Report, it would in our view be more efficient to explicitly allow defendants to bring applications to stay or dismiss as quickly as possible following the filing of an application for authorization of a class action ("application for authorization") on the basis of lack of jurisdiction, *lis pendens*, *res judicata*, incapacity, absence of interest, and/or abuse of process.
- As the "arguable case" criterion of article 575(2) C.C.P. has generated some notable disagreement, one measured way of ensuring greater rigour and objectivity would be to replace it with the more robust criteria contained in article 225.4 (par. 3) of the *Securities Act*.[6]
- The hybrid procedural mechanism proposed by the Report would reverse the onus of demonstration that has existed since 1979 by placing it primarily on the *defendant* rather than the *plaintiff*, contrary to what is done in all other North American jurisdictions.
- This disharmony with the other provinces will make it much harder for plaintiffs and defendants to co-operate across jurisdictions, even though many Québec class actions have a multijurisdictional dimension.
- The adoption of the hybrid procedural mechanism would have the effect of setting aside 42 years of case law and require the courts to rebegin from scratch at great institutional cost.
- Most of the statistics cited in the Report were collected *before* the creation of the Class Actions Chamber in the Judicial District of Montreal (by far Québec's most active class action district), a body of specialist judges whose express purpose is to provide enhanced efficiency and consistency.
- While we make no specific submissions about class counsel fees, we note that, although the approach of Québec courts to fee awards is substantially similar to that of the other provinces, Québec class counsel do not face the prospect of obtaining a significant adverse costs award and do not have to contend with carriage disputes. This means that they generally assume less risk, a key factor courts consider when awarding class counsel fees.
- It would be opportune to replace the "first-to-file rule" with a preliminary screening of competing applications for authorization by the case management judge in order to promote quality instead of simplistic celerity.

I. HISTORY OF THE QUÉBEC CLASS ACTION

Québec was the first Canadian province to enact the class action, a legal mechanism that is procedural and not substantive in nature, and that has not modified the civil law of Québec.[7] This decision came in the wake of other major reforms, such as the adoption of the *Consumer Protection Act*[8] in 1971 and the *Charter of Human Rights and Freedoms*[9] in 1976, that stem from the wide-ranging social, economic, and legal reforms brought about by the Quiet Revolution. Although modeled on Rule 23 of the United States *Federal Rules of Civil*

Procedure, the Québec class action regime was adapted to address specific concerns. It was also designed to fit into the unique procedural architecture of Québec, which contains civilian and common law elements. This coherence was underlined by the fact that the adoption of the class action was welcomed by all the major political parties of the time.[10] In other words, the authorization process, as it currently exists, was blessed by a unanimous National Assembly. While it is true that the Québec class action has been streamlined since then,[11] its tripartite structure - which consists of the authorization stage, the merits stage, and the claims-recovery stage (collective or individual), as the case may be - and the four authorization criteria[12] remain the same.

Since becoming a part of Québec's procedural framework, the class action has been adopted legislatively or jurisprudentially[13] by the common law provinces and the Federal Court. To this day, Québec has maintained the distinctness of its regime, while its courts have found practical ways of coordinating matters, when necessary, with the courts of other provinces.[14] Québec is also a participant in the Canadian Judicial Protocol for the Management of Multijurisdictional Class Actions, the purpose of which "is to make use of existing class action legislation, the Rules of Court and Rules of Civil Procedure in various provincial jurisdictions to facilitate the management of multijurisdictional class actions".[15]

II. A SHIFT IN LEGAL CULTURE

While it is important to keep this context in mind, it is also necessary to consider the shift in legal culture that has occurred more recently. This shift - which emphasises the need for access to justice, proportionality, and judicial efficiency - is reflected in the new *Code*.[16] Indeed, according to its Preliminary Provision, this *Code* is "designed to ensure the accessibility, quality, and promptness of civil justice, the fair simple, proportionate and economical application of procedural rules, the exercise of the parties' rights in a spirit of co- operation and balance, and respect for those involved in the administration of justice".

This spirit in entirely in keeping with the "culture shift" recently invoked by the Supreme Court of Canada. In *Hryniak v. Mauldin*, an Ontario case, Justice Karakatsanis begins her reasons by acknowledging that, due to cost and delay, "[e]nsuring access to justice is the greatest challenge to the rule of law in Canada today".[17] As a result:

> [2] Increasingly, there is recognition that a culture shift is required in order to create an environment promoting timely and affordable access to the civil justice system. This shift entails simplifying pre-trial procedures and moving the emphasis away from the conventional trial in favour of proportional procedures tailored to the needs of the particular case. The balance between procedure and access struck by our justice system must come to reflect modern reality and recognize that new models of adjudication can be fair and just. (Our underlining)

Among other things this means that when there is "no genuine issue for trial", "[t]he summary judgment motion is an important tool for enhancing access to justice because it can provide a cheaper, faster alternative [...]".[18] In other words, rather than proceeding directly to the merits, cost-efficient procedural options should be considered when circumstances justify their use.

Although Québec law does not provide for a summary judgment motion, the reasoning of the Supreme Court of Canada in *Brunette v. Legault Joly Thiffault, s.e.n.c.r.l.*,[19] a Québec case, is substantially to the same effect. According to Justice Rowe (writing for a majority of the Court), "a sufficient interest being a condition of admissibility for all claims, it follows that courts must be capable of determining its existence and, where appropriate, dismiss claims where the alleged interest is insufficient".[20] Justice Rowe goes on to state that "[t]his implies that the sufficient interest of the claimant must be capable of determination at the stage of preliminary motions, without the court needing to determine whether the claim is founded in law".[21] In other words, fatally flawed legal proceedings should be dismissed *at as early a procedural stage as possible*.

Put simply, access to justice, proportionality, and judicial economy militate in favour of expedited preliminary determinations.[22]

III. COMMENTS ON CLASS ACTION PROPOSALS AND POSSIBLE REFORMS

A. Authorization Test

(i) There is Little Actual Redundancy

One of the reasons given in support of the hybrid procedural mechanism proposed by the Report seems to be its premise that courts must currently assess the defendable case criterion a first time at authorization (under art. 575(2) C.C.P.) and a second time on the merits (under at. 168 C.C.P.).[23] Yet, as a matter fact, this alleged analytical redundancy is rather infrequent. Authorized class actions are usually not the subject of an application to dismiss on the merits brought pursuant to article 168 C.C.P. or of an application to annul brought pursuant to article 588 C.C.P. Such applications are the exception rather than the rule. Importantly, no statistics are cited in the Report as to the number, frequency, historical evolution, or success of subsequent applications to dismiss or annul. Such statistics should be weighed carefully before implementing major changes of the kind contemplated by the Report. In other words, there is no clear evidence of a problem in need of a solution.

A more measured change to the class action regime would be the addition of a provision that would enable the respondent to bring an application to stay or dismiss a putative class action as soon as possible following the filing of an application for authorization. Although applications to stay or dismiss are currently possible at the pre-authorization stage, it would be helpful for the legislature to specify that they can be founded on different bases, including lack of jurisdiction (art. 167 C.C.P.), *lis pendens*, *res judicata*, incapacity, absence of interest (art. 168), and/or abuse of procedure (art. 51 ff C.C.P.). Such a provision would be in harmony with the objectives of the new *Code*, as well as the culture shift advocated by the Supreme Court of Canada, by eliminating fatally flawed class actions *before* the analysis required by article 575 C.C.P. -and *well before* they are allowed to proceed on the merits, with the onerous formalities, delays, and costs that would necessarily ensue.

(ii) Reasonable Possibility of Success a More Robust and Objective Criterion

The arguable case criterion of article 575(2) C.C.P. has proven somewhat problematic of late. In *L'Oratoire Saint-Joseph du Mont-Royal v. J.J.*[24] and *Desjardins Financial Services Firm Inc. v. Asselin*,[25] the Supreme Court of Canada could not agree on how it should be construed. In both cases, strong dissenting opinions were expressed as to how far courts can go in "reading between the lines" of the application for authorization and drawing inferences based on the allegations and relevant evidence. While we do not recommend any major changes to this criterion for the time being (since the case law may become more uniform, as it has with respect to the application of proportionality in the class action setting),[26] should the legislature be inclined to modify the provision, it is our view that it would be opportune to strengthen article 575(2) C.C.P., an approach that is consistent with comments made by the current Chief Justice of Québec, the Honourable Manon Savard, in *Whirlpool Canada v. Gaudette*.[27] One way of strengthening this criterion and making it more objective would be to replace it with the criteria contained in section 225.4 (par. 3) of the *Securities Act*. According to this provision, "[t]he court grants authorization if it deems that the action is in good faith and there is a reasonable possibility that it will be resolved in favour of the plaintiff".

Using language reminiscent of *Hryniak* and *Brunette*, the Supreme Court of Canada states in *Theratechnologies Inc. v. 121851 Canada Inc*. that, when construing section 225.4, "the courts must undertake

a reasoned consideration of the evidence to ensure that the action has some merit. In other words, to promote the legislative objective of a robust deterrent screening mechanism so that cases without merit are prevented from proceeding, the threshold requires that there be a reasonable or realistic chance that the action will succeed".[28] The Court further states that "[a] case with a reasonable possibility of success requires the claimant to offer both a plausible analysis of the applicable legislative provisions, and some credible evidence in support of the claim".[29] These criteria would impose a heavier evidentiary burden on the applicant but, significantly, are not as demanding as those contained in the securities statutes of the common law provinces.[30] Amending article 575 C.C.P. in this manner would send a strong signal to class counsel that the proceedings they file must be serious, substantiated, and consistent with the principle of proportionality.[31] Given that approximately 30% of class actions are dismissed at the authorization stage,[32] the practical effect of a more muscular criterion would be to ensure that only worthy prospective class actions may tax the limited time and resources of Québec's court system.[33]

(iii) A Reversal of the Onus would be Inappropriate

Under Québec's current class action regime, it is the applicant who bears the burden of demonstrating that the four cumulative criteria for authorization are met. Under the hybrid procedural mechanism proposed by the Report, however, the defendant would now be the one required to show that the class action should be dismissed if the court determines that the other authorization criteria have been satisfied. This reversal of the onus, however, is problematic. Unlike with a personal recourse, it is reasonable to expect a party seeking justice on behalf of a class to demonstrate the seriousness of his or her proceeding (even if only on a *prima facie* basis), especially when that party asks to represent thousands, if not millions, of absent class members. Given the possibly far- reaching consequences of a class action, the person who seeks to undertake such an action should, at a minimum, be called upon to satisfy the court that the facts and evidence alleged substantiate a viable legal syllogism. Moreover, the burden imposed by article 168 C.C.P. is more onerous than that of article 575(2) C.C.P.

(iv) Co-operation Between Courts and Counsel Would be Undermined

One important reality of class action practice in Québec is that many class actions are modeled on class actions instituted elsewhere, describe a multijurisdictional class, or are substantially similar to class actions pending before other Canadian courts. This reality is reflected in article 577 C.C.P. which stipulates, among other things, that "[t]he court cannot refuse to authorize a class action on the sole grounds that the class members are part of a multi-jurisdictional class action under way outside Québec". It follows that class counsel and defence counsel must often actively co-operate across jurisdictions in order to stay, discontinue, settle, or litigate class actions in a proportionate and cost-effective manner. If adopted, the hybrid procedural mechanism proposed by the Report would have the effect of making Québec's now 42-year-old class action regime suddenly and significantly different from that of any other province, territory, or state in North America. Not only would Québec plaintiff and defence counsel find it more difficult to coordinate with their colleagues from the common law provinces, but the superior court judges of these provinces would also be at pains to collaborate, schedule joint hearings, and implement the Canadian Judicial Protocol for the Management of Multijurisdictional Class Actions.

We are of the view that collaboration between class counsel from multiple Canadian jurisdictions facilitates the institution of class action proceedings on an national basis, inclusive of Québec, as it allows for the formation of larger classes, creates economies of scale, and enables more streamlined procedural administration, something encouraged by the Supreme Court of Canada in certain instances.[34] It should further be noted that once instituted, multijurisdictional proceedings are administered provincially pursuant to applicable law. Harmonizing procedural rules nationally does not in any way, shape, or form affect or detract from the substantive law of Québec. It is also our view that adopting the reforms proposed by the Report would invite the

kind of forum shopping that the *Code* and the new legal culture seek to discourage. Rather than simplifying class action practice, the proposed reforms would, in our view, complicate them significantly for all interested parties and participants.

(v) Québec Courts Would Need to Develop a New Case Law

The hybrid procedural mechanism would also mean that much of the case law that has been developed by Québec courts for the last 42 years (especially with respect to the arguable case) would need to be replaced with a new jurisprudence. The approach to the remaining criteria - once severed from a discarded article 575(2) C.C.P. - would also likely need to be revisited and reconceptualized. This would mean that Québec litigants, practitioners, and courts would be called upon to return to the drawing board at great institutional cost, thereby injecting uncertainty into an area of the law that is already highly complex and specialized. By contrast, adopting criteria like those of section 225.4 (par. 3) of the *Securities Act* would allow our courts to continue to rely on existing case law.

(vi) The Results Obtained by the Class Actions Chamber Merit Further Study

Finally, one of the more significant institutional developments that has taken place in Québec is the creation of the Class Actions Chamber, which came into being on December 31, 2018 pursuant to sections 226 and 227 of the *Directives of the Superior Court for the District of Montreal*. Composed of 10 to 11 judges with specialized knowledge of class actions, the Chamber is designed to case-manage class actions more efficiently - from the filing of the application for authorization to the setting down of the case for proof and hearing (if authorized) - reduce delays, and better harmonize class action case law.[35] Although the Report gives high marks to the Chamber, most of the Report's statistics relate to the period preceding the Chamber's constitution. Once again, before proceeding with a major reform such as the hybrid procedural mechanism proposed by the Report, a more exhaustive study of the Chamber's impact on class actions should be undertaken. It should also be noted that Professor Pierre-Claude Lafond, another eminent doctrinal authority on class actions in Québec, advocates for a change of *culture* rather than significant legislative amendments to the existing regime. The Chamber embodies just such a beneficial cultural change.[36]

B. The Awarding of Class Counsel Fees

In Québec as in Ontario and the other provinces, class counsel fees are granted based on a percentage of the indemnities provided by the class action judgment or settlement. They can also be based on the "loadstar method" according to which the billable time docketed by the plaintiff's lawyer(s) is multiplied by a factor of 1.1 to 4.[37] Among other things, the percentage or multiplier are intended to compensate class counsel for the risk that they assumed in prosecuting the class action.[38] Unlike in Ontario[39] and other common law provinces,[40] however, Québec applicants/plaintiffs are not subject to substantial costs awards if the class action is dismissed. They are also not required to engage in lengthy and costly carriage disputes given the jurisprudential "first-to-file" rule created and later modified[41] by the Court of Appeal.[42] According to this rule, the first party to file an application for authorization will have carriage of the case unless there are strong considerations militating against it, such as class counsel's obvious unwillingness to prosecute the class action. While we do not advocate for a reform of fee approval in Québec, we respectfully submit that these important distinctions between Québec's class action regime and those of the common law provinces should be considered when assessing the reasonableness of the fees sought by class counsel. If the risk is not the same, neither should be the reward.

C. Discarding the First-to-File Rule

One of the causes for delay at the pre-authorization stage is arguably the first-to-file rule. This rule encourages class counsel to file their applications for authorization as quickly as possible, to the detriment of the scope and depth of their preliminary analysis, their discussions with the applicant, and the quality of the application. This means that counsel must attempt to cure incomplete or unsubstantiated allegations after the fact, thereby delaying the authorization hearing. While this problem can be resolved, in part, by way of proactive case-management, another solution would be to allow the court to assess competing applications for authorization and their exhibits preliminarily.[43] If the second application is clearly superior to the first, the applicant who filed it should be granted carriage in order to ensure expediency and a more cogent and serious debate. Such a result would be in the interests of the class members, the respondents, the court, and the administration of justice more broadly.

IV. CONCLUSION

The Report and the consultation process to which it has given rise are very positive developments. The class action is an important procedural mechanism whose principle vocation is to provide access to justice to large numbers of consumers and ordinary citizens. It is therefore entirely appropriate to study the Québec class action more closely and, if necessary, adopt reforms in order to improve it. While some of the more substantial reforms outlined in the Report are certainly innovative, we respectfully submit that the hybrid procedural mechanism it proposes would not facilitate, streamline, or enhance class action practice in Québec. We submit that other, more measured changes are more likely to produce benefits for all stakeholders, most notably the class members themselves.

CAMERON'S CORNER: Punitive Damages in Class Actions, by Cameron Fiske, Milosevic Fiske LLP[44]

I. Introduction

In class actions, punitive damages are often sought, but rarely awarded. Outside of an order made at trial, it is difficult to contemplate a scenario where defence counsel settles a case that would include punitive damages on a global scale, although it can happen. In this article we set out some of the leading case law on punitive damages on certification in Ontario and suggest that punitive damages can assist with one of the main goals of class actions, which is to help deter wrongful conduct by imposing a cost on defendants that can ultimately modify bad behaviour.[45] However, there is no specific need to depart from the general rule that punitive damages should rarely be granted. Moreover, there will be some cases where it is obvious on its face that punitive damages cannot be certified as a common issue even if other potential damages can be.

II. Case Law: the *Whiten v. Pilot Insurance Co.*[46] Principle

The leading case on punitive damages is that of the Supreme Court of Canada's decision in *Whiten v. Pilot Insurance Co*.[47] In that case the Court held that punitive damages are the exception rather than the rule.[48] Punitive damages are only to be awarded when the conduct of a defendant is high- handed, malicious, or arbitrary, and such conduct must go beyond the ordinary standards of behaviour.[49] The Court held that punitive damages should be assessed in an amount that is proportionate to the harm that has been caused, the degree of misconduct, the vulnerability of the plaintiff, and the advantage/profit that has been gained by the defendant.[50] Punitive damages in Ontario differ significantly from how they are dealt with in Québec. Under the civil law regime, punitive damages are applied pursuant to Article 1621 of the *Civil Code of Québec*. This article allows courts to award punitive damages only if they are "provided for by law" (which means they must be

authorized by statute), and they "may not exceed what is sufficient to fulfil their preventive purpose." In contrast, in Ontario, it is not statutes but rather the common law that governs an award of punitive damages.

III. Punitive Damages and the Common Issues Criterion on Certification

Considering the principles set out above, we can see that the problem with extending punitive damages to class actions is that the harms caused by a tortfeasor often involve an individual analysis. Some members of the class will have been more vulnerable to the defendant than others and some will have been significantly harmed in comparison to the rest of the class. As such, many judges have not certified punitive damages as a common issue. This was precisely the case in *Robinson v. Medtronic Inc.*[51] In that case, Justice Perell refused to certify punitive damages. The Plaintiffs had alleged that the defendants manufactured and sold defective leads, which are an integral part of defibrillators, and that they conspired to conceal said defect or warn doctors or persons who had been implanted with defibrillators about this. The issues related to negligence, waiver of tort, costs of the administration, and the request for prejudgment interest were held to raise common matters of fact and law.[52] However, the punitive damages claim was not certified as individual assessments of causation and damages needed to take place, and punitive damages could not be assessed until after individual trials determined the harms done.[53] In refusing to certify questions related to punitive damages as a common issue, Justice Perell did provide a long list to that date of cases where punitive damages had been certified as a common issue to demonstrate that they are not prohibited in class actions.[54]

Justice Hoy reached a contrary result in a related medical products case, *Peter v. Medtronic Inc.*[55] The common issue on punitive damages was certified since it addressed the question of entitlement to punitive damages and the availability of it as a remedy should the plaintiffs have elected disgorgement based on the then novel (and since debunked) waiver of tort doctrine.[56] The decision demonstrates that competing views on punitive damages involving similar fact patterns do exist amongst members of the judiciary.

IV. Egan et. al. v. National Research Council of Canada et. al.

In a recent decision of the Ontario Superior Court of Justice, *Egan et. al. v. National Research Council of Canada et. al.*,[57] Justice Smith refused to certify the question of punitive damages as the pleadings on their face could not make out such a claim. In other words, the plaintiffs were not able to pass the "some basis in fact" test at the certification hearing.[58]

The case involved the following facts. The plaintiffs alleged that the National Research Council of Canada ("NRC") had allowed contaminants, such as perfluoroalkylated substances, to enter the surface water and groundwater at its National Fire Laboratory facility site and to migrate onto other properties.[59]

In their statement of claim, the plaintiffs alleged that the basis for their claim for punitive damages was NRC's failure to notify class members when they became aware of the contamination of the groundwater. The plaintiffs pleaded that awareness of the contamination took place around 2013. The defendants suggested that such awareness did not take place until 2015.[60]

Justice Smith held that a delay in notification of less than thirty days, as per the arguments of the defendants, would not justify an award of punitive damages. However, a delay of two years could justify such an award. The Judge found that at the certification stage the pleadings are deemed to be proven. However, there was no basis in fact with respect to contamination in 2013. His Honour went on to say that if evidence ultimately surfaced that the NRC had failed to advise proposed class members of possible contamination of their drinking water for approximately two years, then it would not be plain and obvious that the punitive damages claim could not succeed. The Judge indicated that if such evidence materializes in the future, the pleadings can always be amended and the certification of punitive damages as a common issue could be revisited. As an aside, other statutory and common law causes of action/damages questions were certified. [61]

V. Concluding Remarks

An award of punitive damages is a rare remedy available to plaintiffs in class actions. The purpose of punitive damages is to deter rather than to provide compensation. In order to allocate said damages the court will be looking into the scope of the defendants' misconduct, and the plaintiff's vulnerability to the defendant.[62] In coming to an award that will serve the purpose of punishment, deterrence, and denunciation, it is next to impossible to avoid some degree of individual analysis. However, as a matter of public policy, it would be unwise to remove punitive damages from class actions. There are cases where plaintiffs will have experienced similar harms. Moreover, the harm or potential harm to the plaintiff is simply one of the criteria in the final analysis, as noted in *Whiten*.[63] Overall, the same principles with respect to punitive damages ought to apply to class actions just as they do to civil proceedings in the ordinary course. Punitive damages should be sparingly awarded but they must remain a viable option to combat outrageous conduct on the part of defendants.

1 Please note that these submissions will also be published, in English, in the *Canadian Class Action Review* and, in French, in *La référence* (Éditions Yvon Blais).

2 Me Catherine Piché, professeure, Université de Montréal, Faculté de droit, "Perspectives de réforme de l'action collective au Québec : Rapport préparé à l'attention du ministère de la Justice du Québec - septembre 2019".

3 *Western Canadian Shopping Centres Inc. v. Dutton*, [2001] 2 SCR 534, pars. 26-29.

4 See notably the Preliminary Provision and articles 1, 2, 9, 18, 19 and 20 C.C.P.

5 *Hryniak v. Mauldin*, 2014 SCC 7 (CanLII), [2014] 1 SCR 87 and *Brunette v. Legault Joly Thiffault, s.e.n.c.r.l.*, 2018 SCC 55 (CanLII), [2018] 3 SCR 481.

6 CQLR c V-1.1

7 *Quebec (Public Curator) v. Syndicat national des employés de l'hôpital St-Ferdinand*, [1996] 3 SCR 211, pars. 31- 33; *Bisaillon v. Concordia University*, [2006] 1 SCR 666, pars. 17-19.

8 CQLR c P-40.1

9 CQLR c C-12

10 Assemblée nationale, Journal des débats, Commissions parlementaires, Troisième session - 31e législature, March 7, 1978 - No. 7, pp. B-261-B-264. For a description of the legislative history of the Québec class action, see André Ryan and Shaun E. Finn, *Québec Class - Actions - collectives au Québec: Articles, notes, directives, jurisprudence & illustrations* (Montreal: LexisNexis, 2020), pp. 1-2.

11 This was achieved by removing the requirement that the applicant file a sworn statement, limiting contestation to oral representations, and only allowing relevant evidence to be filed with leave of the court. See *Pharmascience inc. c. Option Consommateurs*, 2005 QCCA 437, in which the Court of Appeal determined that these modifications were constitutional.

12 Art. 575 C.C.P.

13 *Western Canadian Shopping Centres Inc. v. Dutton*, [2001] 2 SCR 534; *King & Dawson v. Government of PEI*, 2019 PESC 27.

14 For a recent example, see *Pelletant c. Hyundai Auto Canada Corp.*, 2021 QCCS 793 and *McBain v. Hyundai Auto Canada Corp.*, 2021 ONSC 1734, in which the undersigned were counsel of record for the defendants in the Québec proceeding.

15 https://www.cba.org/Our- Work/Resolutions/Resolutions/2011/Canadian-Judicial-Protocol-for- the-Management-of-M?lang=en-CA

16 According to the former Minister of Justice, the Honourable Stéphanie Vallée, the report that paved the way for the adoption of the new *Code* "présentait une nouvelle vision de la procédure civile et indiquait les objectifs de la révision: humanisation de la justice, célérité et adéquation des coûts de la justice".

17 [2014] 1 SCR 87 [*Hryniak*].

18 *Ibid*, par. 34.

19 [2018] 3 SCR 481 [*Brunette*].

20 *Ibid*, par. 19.

21 *Ibid*.

22 For a more detailed analysis of the culture shift enunciated in *Hryniak* and *Brunette*, see André Ryan, "Chronique - Le jugement sommaire comme moyen d'assurer la proportionnalité et l'économie judiciaire : un virage culturel dans l'administration de la justice civile québécoise ?", La référence, EYB2019REP2778, *Repères*, June 2019.

23 Report, pp. 27, 66 : "Nous recommandons de réformer les règles applicables à l'action collective pour que l'apparence de droit ne soit analysée qu'une seule fois" (bold in the original).

24 2019 SCC 35. For a more detailed analysis of this case, see Shaun E. Finn "Commentaire sur la décision *L'Oratoire Saint-Jospeh du Mont-Royal c. J.J.* - La désolante complexification des critères d'autorisation", La référence, EYB2019REP2813, *Repères*, July 2019.

25 2020 SCC 30.

26 *Marcotte v. Longueuil (City)*, [2009] 3 SCR 65, pars. 43 (majority opinion) and 72-75 (dissenting opinion); *Vivendi Canada Inc. v. Dell'Aniello*, [2014] 1 SCR 3, par. 68.

27 2018 QCCA 1206, par. 29: "Certains prônent la suppression de cette autorisation, d'autres, dont je suis, suggèrent plutôt de la renforcer. Mais dans l'attente de la révision de cette question, que ce soit par le législateur ou la Cour suprême, il faut s'assurer que l'action collective puisse jouer son véritable rôle et ne soit pas utilisée à des fins autres que celles pour lesquelles une telle voie procédurale existe."

28 [2015] 2 SCR 106, par. 38.

29 *Ibid*, par. 39.

30 *Theratechnologies inc. c. 121851 Canada inc.*, 2013 QCCA 1256, pars. 122-126.

31 According to article 18 C.C.P., "[t]he parties to a proceeding must observe the principle of proportionality and ensure that their actions, their pleadings, including their choice of an oral or a written defence, and the means of proof they use are proportionate, in terms of the cost and time involved, to the nature and complexity of the matter and the purpose of the application". Moreover, "[j]udges must likewise observe the principle of proportionality in managing the proceedings they are assigned, regardless of the stage at which they intervene. They must ensure that the measures and acts they order or authorize are in keeping with the same principle, while having regard to the proper administration of justice".

32 Report, p. 21.

33 See Shaun E. Finn, "Commentaire sur l'arrêt *Desjardins Cabinet de services financiers inc. c. Asselin* - Un point de rupture en matière d'action collective au Québec ? ", La référence, EYB 2021REP3246, *Repères*, March 2021.

34 *Canada Post Corp. v. Lépine*, [2009] 1 SCR 549, pars. 56-57.

35 See André Ryan and Shaun E. Finn, *Québec Class - Actions - collectives au Québec: Articles, notes, directives, jurisprudence & illustrations* (Montreal: LexisNexis, 2020), pp. 82-83.

36 Pierre-Claude Lafond, *Libres-propos sur la pratique de l'action collective* (Montreal: Thomson Reuters, 2020), pp. 144- 146.

37 *Guilbert c. Sony BMG Musique (Canada) inc.*, 2007 QCCS 432 [*Guilbert*]; appeal dismissed, *Sony BMG Musique (Canada) inc. c. Guilbert,* 2009 QCCA 231. See also Jean Lortie, Lisa Chamandy and Shaun Finn, "Putting a Price on Legal Services: Determining Reasonable Class Counsel Fees in the Settlement Context", *The Canadian Class Action Review*, Vol. 9, No. 2, February 2014, pp. 419-444.

38 *Ibid*, Guilbert, pars. 40-45.

39 See, for example, *Boal v. International Capital Management Inc.*, 2021 ONSC 2018, in which the defendants were awarded approximately $547,000 in costs.

40 See, for example, *Canada (Attorney General) v. MacQueen*, 2014 NSCA 96, in which the defendants were awarded over $730,000 in costs; application for leave to appeal to the Supreme Court of Canada dismissed, *Neila Catherine MacQueen, et al. v. Attorney General of Canada*, et al., 2015 CanLII 17890. For a discussion of costs awards in the class action context, see Cameron Fiske, "Costs in Class Actions", *BCF Class Action NetLetter*, April 1, 2020 - Issue 16, pp. 1-3.

41 *Hotte c. Servier Canada inc.*, 1999 CanLII 13363 (QC CA).

42 *Schmidt c. Johnson & Johnson inc.*, 2012 QCCA 2132.

43 See Pierre-Claude Lafond, *Libres-propos sur la pratique de l'action collective* (Montreal: Thomson Reuters, 2020), pp. 144-146 and Cameron Fiske, "Class Action Reform in Québec and Ontario", *BCF Class Action NetLetter*, July 1, 2021 - Issue 31, pp. 3-5.

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45 *AIC Limited v. Fischer*, 2013 SCC 69 (CanLII), [2013] 3 SCR 949 at para. 8.

46 [2002] 1 S.C.R. 595, 2002 SCC 18.

47 *Whiten v. Pilot Insurance Co.,* [2002] 1 S.C.R. 595, 2002 SCC 18.

48 *Whiten v. Pilot Insurance Co.,* [2002] 1 S.C.R. 595, 2002 SCC 18 at para. 94.

49 *Whiten v. Pilot Insurance Co.,* [2002] 1 S.C.R. 595, 2002 SCC 18 at para. 36.

50 *Whiten v. Pilot Insurance Co.,* [2002] 1 S.C.R. 595, 2002 SCC 18 at para. 94.

51 *Robinson v. Medtronic Inc.* 2009 CarswellOnt 6337, [2009] O.J. No. 4366 (S.C.).

52 *Robinson v. Medtronic Inc.* 2009 CarswellOnt 6337, [2009] O.J. No. 4366 (S.C.) at para. 10.

53 *Robinson v. Medtronic Inc.* 2009 CarswellOnt 6337, [2009] O.J. No. 4366 (S.C.) at para. 164-191.

54 *Boulanger v. Johnson & Johnson Corp.*, [2007] O.J. No. 179 (Ont. S.C.J.) at para. 22, leave to appeal ref'd (Ont. Div. Ct.); *Cloud v. Canada (Attorney General)* (2004), 73 O.R. (3d) 401 (Ont. C.A.), leave to appeal to the S.C.C. ref'd, (S.C.C.), rev'g (2003), 65 O.R. (3d) 492 (Ont. Div. Ct.); *Heward v. Eli Lilly & Co.*, [2007] O.J. No. 404 (Ont. S.C.J.), aff'd (Ont. Div. Ct.) ; *Peter v. Medtronic Inc.*, [2007] O.J. No. 4828 (Ont. S.C.J.), leave to appeal ref'd [(Ont. Div. Ct.); *Andersen v. St. Jude Medical Inc.*, [2003] O.J. No. 3556 (Ont. S.C.J.) at para. 81, leave to appeal ref'd (Ont. Div. Ct.); and *Serhan Estate v. Johnson & Johnson* (2004), 72 O.R. (3d) 296 (Ont. S.C.J.), leave to appeal granted (Ont. Div. Ct.), aff'd (2006), 85 O.R. (3d) 665, leave to appeal to C.A. ref'd Oct. 16, 2006, leave to appeal to S.C.C. ref'd, (2007) (S.C.C.).

55 2007 CarswellOnt 7975, [2007] O.J. No. 4828.

56 *Ibid* at para. 105.

57 2021 CarswellOnt 9942, 2021 ONSC 4561

58 *Ibid* at para. 43.

59 *Ibid* at para. 6-21.

60 *Ibid* at para. 28-38.

61 *Ibid* at para. 44-49.

62 *Whiten v. Pilot Insurance Co.,* [2002] 1 S.C.R. 595, 2002 SCC 18 at para. 94.

63 *Ibid*.

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