

# QUÉBEC CLASS ACTION – WHAT’S NEW? EXAMINATION OF THE DEFENDANT AT THE AUTHORIZATION STAGE

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In Québec, a defendant in a class action who wishes to introduce evidence at the pre-authorization stage by way of an affidavit must first obtain the court's approval. Once admitted, the plaintiff may ask to depose the affiant. This right to depose is the subject of conflicting case law from Superior Court judges.

Two articles of the *Code of Civil Procedure* are relevant. First, article 222 provides that a party may summon the affiant to be deposed not only on the facts alleged in the declaration, but on all other relevant facts. Inheriting the principles developed under the former article 93 C.C.P., many argue that the right to proceed with such an examination is a strict right; the only change being the broadening of the content of the examination to all relevant facts.

In matters of class action, the administration of evidence is subject to the prior approval of the court. Article 574 para. 3 C.C.P. would thus influence the principles of article 222 C.C.P. by allowing only the evidence relevant to the evaluation of the criteria for the authorization of a class action. For certain judges<sup>[1]</sup>, article 574 C.C.P. imposes on the court the duty to ensure that the examination of the declarant is necessary in the assessment of the criteria for authorization. Assessing the credibility of the affiant will not be considered sufficient, since the credibility of the witness would only be relevant for the merits of the dispute not the authorization of the class action. Invoking their judicial discretion, judges of the Superior Court have rejected requests for depositions that were deemed unnecessary or that went beyond the narrow scope of the evidence permitted at that the pre-authorization stage.

In contrast, other judges are of the opinion that the right to depose an affiant remains a strict right with the purpose of testing the veracity of the statements made by the affiant. In at least one case<sup>[2]</sup> the court has stated that judicial discretion should serve only to limit the scope of the deposition, which would be limited to questions pertaining to the content of the statements rather all the relevant facts at issue in the case.

The judges of the Superior Court thus seem to agree that their judicial discretion plays a role on how such depositions ought to be conducted. These depositions are limited in scope. They may not cover all the facts in dispute, but rather are limited to the elements relevant to the evaluation of the authorization criteria and the

statements made in the declaration.

In Québec, the right for defendants to depose the proposed class representative at the pre-authorization stage is subject to leave from the court and is often restricted to very limited topics. Whether or not class counsel has a strict right to depose the affiant (usually a Defendant) remains unsettled. However if such a strict right indeed exists it further accentuates the asymmetry of the pre-authorization process in favour of the Plaintiffs.

[1][ps2id id='1' target=''] *Sopropharm v. Groupe Jean-Coutu (PJC) inc.*, 2018 QCCS 4907; *Salazar Pasaje v. BMW Canada Inc.*, 2018 QCCS 5635; *Ouellet v. Lasik MD inc.*, 2020 QCCS 1711; *Royer v. Capital One Bank (Canada Branch)*, 2021 QCCS 1783..

[2][ps2id id='2' target=''] *Hand v. Denso International America, Inc. et al.*, 2021 QCCS 1671.

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### **A Cautionary Note**

The foregoing provides only an overview and does not constitute legal advice. Readers are cautioned against making any decisions based on this material alone. Rather, specific legal advice should be obtained.

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