COURT OF APPEAL

CANADA
PROVINCE OF QUEBEC
MONTREAL REGISTRY

N° : 500-09-028523-199
(500-06-000955-183)

DATE: December 13, 2021

BENCH : THE HONOURABLE MARTIN VAUCLAIR, J.C.A.
GENEVIÈVE COTNAM, J.C.A.
BENOIT MOORE, J.C.A.

ENVIRONNEMENT JEUNESSE
APPELLANT - Applicant
c.

ATTORNEY GENERAL OF CANADA
Respondent - Respondent
and
AMNESTY INTERNATIONAL CANADA
INTERVENOR

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[1] The Appellant appeals a judgment rendered on July 11, 2019 by the Honourable Gary D.D. Morrison of the Superior Court, District of Montreal, denying its motion for class certification. The judge finds that the Appellant's proposed class, which covers only Quebec residents aged 35 and under as of November 26, 2018 ("Class"), is both arbitrary

and inappropriate[1]. He therefore refuses to authorize the class action on this ground alone.

[2] No one can deny the importance of the global warming debate and the fact that one of the solutions is to manage greenhouse gases ("GHGs")[2]. The appeal, however, is whether the dispute, as initiated by the Appellant, is a matter for the courts, or whether it is rather a highly political matter for the government[3].

THE CONTEXT

[3] The Appellant is a non-profit organization created in 1979. Its mission is to educate Quebec youth on environmental issues. Climate change is at the heart of its concerns.

[4] The Appellant therefore seeks to be appointed as the representative of the Class to bring a class action against the Respondent in its capacity as representative of the Government of Canada ("State").

[5] Without repeating all of the allegations in the application, the Appellant accuses the State of gross negligence and inaction in its response to the serious dangers posed by climate change. Its claim is based largely on excerpts from publications of Canadian government agencies, particularly Health Canada. The Appellant argues that climate change is affecting the health of Canadians. It alleges that Canada alone generates 1.6% of the world's greenhouse gases while its population represents only 0.5% of the world's population. According to the Appellant, Canada has made four commitments to limit its GHG emissions without ever meeting the targets set. The Appellant asserts that Canada is failing to adopt adequate GHG reduction targets and that the few measures that have been put in place do not offer any hope of curbing global warming.

[6] Global warming is attributable to human activity, hence the importance of controlling GHG emissions. After listing the main risks associated with the increase in the earth's temperature, the Appellant added that the government is perfectly aware of the potential stakes on the health and well-being of its population. It then summarized the various commitments made by Canada at the international level to reduce GHG emissions, which have never been respected.

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1 *ENvironnement JEUnesse v. Attorney General of Canada*, 2019 QCCS 2885 [judgment appealed from].

2 *References to the Greenhouse Gas Pollution Pricing Act*, 202 1SCC 11, s.2.

3 *Canada (Auditor General) v. Canada (Minister of Energy, Mines and Resources)*, [1989] 2 S.C.R. 49, at 91.

[7] On the basis of this factual framework, the Appellant accuses Canada of having failed to establish GHG reduction targets in line with its international commitments. It alleges:

> 2.76 Thus, while recognizing the urgency of the situation and its clear duty to act, Canada persists in its failure to reduce or even control its GHG emissions.
>
> 2.77 Worse, Canada has adopted reduction targets that, even if achieved, will contribute to increases in GHGs beyond levels that the government itself has deemed critical to the protection of the lives and safety of future generations. Such behaviour constitutes intentional misconduct committed in bad faith.

[8] The proposed remedy seeks to:

> [...obtain a declaration that the government has failed to meet its obligations under the *Canadian Charter of Rights and Freedoms* ("*Canadian Charter*") and the *Charter of Human Rights and Freedoms* ("*Quebec Charter*") ("the Charters") to protect the fundamental rights of its citizens.

[9] In summary, the Appellant accuses the State of bad faith and adds that its inaction amounts to both a civil fault and a violation of the fundamental rights of the members of the Class. It alleges that the State is violating (1) their right to life, (2) their right to a healthy environment that respects biodiversity, as guaranteed by section 46.1 of the *Charter of Human Rights and Freedoms* ("*Quebec Charter*"), and (3) their right to equality, since the younger generations will have to bear a greater economic and social burden than their elders.

[10] By way of remedy, the Appellant does not seek compensatory damages, but seeks cessation of the violation and punitive damages of $100 per member. Recognizing that the distribution of such sums would be impractical, it suggests that the Tribunal instead order "the implementation of a remedial measure to curb global warming" without further specification.

[11] The State contests the application for leave. It considers that the class action is neither an appropriate nor an effective remedy to obtain the remedies sought by the Appellant. An individual action would possibly achieve the same ends. Moreover, the dispute as it stands raises issues that are not within the authority of the courts. The decision of the State to adopt certain measures or to legislate in certain matters is a matter of legislative power and is not subject to judicial review. The proposed class action is therefore not justiciable and should not be permitted.

THE TRIAL JUDGMENT

[12] After recalling the legal framework applicable to the authorization of a class action, the trial judge briefly examined the arguments raised by the Respondent.

[13] He first looks at the nature of the action taken. He notes that the application is declaratory in nature, since it seeks to have the violation of the rights of the members of the Group recognized, and also "injunctive and dissuasive" in nature, since it seeks to put an end to the violation and to obtain punitive damages or an order in lieu thereof.

[14] He considered, without much conviction, that the claim can, at this preliminary stage, be considered justiciable. Although the courts should not intervene to review the exercise of the legislative power of the state, they remain competent when the claim alleges that an action or, in this case, an inaction by the state violates the rights guaranteed by the *Canadian*[4] *Charter*.

[15] Relying on the *Crown Liability and Proceedings Act,*[5] the judge added that a claim based on the *Quebec*[6] *Charter* was also justiciable and could give rise to punitive damages in the circumstances.

[16] Without specifically addressing all of the criteria set out in article 575 *C.C.P.* the judge rejected the application for authorization, considering that the proposed group was both arbitrary and not rational. According to the judge, there is no justification, given the criticisms made of the Respondent, for limiting the group strictly to Quebec residents under 35 years of age and excluding other residents of the province, who will also be affected by the potential impact of climate change. The alleged facts do not explain the rationale for setting an age limit of 35 rather than, for example, 25 or 60. The judge added that the proposed class could not include minors since they- were not of legal age to exercise their full civil rights and there was no authority for the Appellant to represent them. Exercising his discretion, the judge concluded that it was impossible to define a "group that could balance efficiency and fairness in an objective and rational manner". On balance, given the conclusions sought, the class action vehicle is unnecessary here.

THE MEANS OF APPEAL

[17] The Appellant submits three grounds of appeal: the judge erred (1) in finding that the class description was a bar to certification of the class action, (2) in finding that the certification application was unnecessary, and (3) in failing to rule on the other criteria for certification.

[18] In addition to challenging these grounds of appeal, the Respondent argues that the judge erred in his analysis of the justiciability of the action.

[19] The Respondent submits that the Appellant has not shown an appearance of right under article 575(2) *C.C.P., because (1) the action is not justiciable, (2) the government*

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4 *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [*Canadian Charter*].

5 *Crown Liability and Proceedings Act*, R.S.C. (1985, c. C-50).

6 *Charter of Human Rights and Freedoms*, RLRQ, c. C-12 [*Quebec Charter*].

cannot be sued for its failure to legislate and (3) the facts alleged are hypothetical. because (1) the action is not justiciable, (2) the government cannot be sued because of its failure to legislate and (3) the facts alleged are hypothetical. He added that the claim based on sections 7 and 15 of the *Canadian Charter* is clearly ill-founded since these sections do not impose a positive obligation on the State to legislate in order to protect the guaranteed rights, but only to respect them in the exercise of legislative and executive power. In his view, the *Quebec Charter* cannot serve as a basis for the Appellant's action either, since the cause of action invoked by the Appellant does not allow for the special regime provided for in the *Crown Liability and Proceedings Act*[7]. The latter subjects the federal government to the civil law only when the action concerns the act of property in its custody or the fault of one of its employees.

[20] The Respondent also alleges that the declaratory judgment is premature because there is no reason to believe that the facts alleged in the application for leave will come to pass, especially in a context where the harm alleged could occur even if Canada were to comply fully with its international obligations, since the solution to climate issues depends on the commitment of all countries.

[21] Thus, the Respondent challenges the admissibility of the class action and the core of its arguments rests on the justiciability of the action. For the reasons that follow, this question determines the fate of the appeal, since it is preponderant. It is not necessary to dwell on all of the grounds invoked

ANALYSIS

[22] The trial judge addressed and rejected the challenge to the justiciability of the action. Although not specifically discussed under article 575 (2) *C.C.P.*, this paragraph requires that the facts alleged in the application for leave support the conclusions sought. This presupposes that the action is justiciable. This is the understanding of the Respondent, who argues that the lack of justiciability makes the class action in this case untenable. That being said, it is true that in his judgment, with its peculiar structure, the judge did not proceed with a systematic examination of the criteria of article 575 *C.C.P.*[8], and treated the criteria of article 575 as a whole and dealt with all the causes of action invoked by the Appellant in a single block. In its application for leave, the Appellant insists on the urgency of acting to avoid the irreversible consequences of global warming on the planet and its inhabitants. No one questions this observation. It further asserts that the government's inaction in this matter infringes on "the rights of all Canadians, but particularly those of young people, who will have to live and survive with the consequences of the negligence of previous generations.[9]

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7 (1985), c. C-50.

8 *Fortier v. Meubles Léon ltée*, 2014 QCCA 195, para. 66 (references omitted).

9 Application for authorization to bring a class action and to be designated as a representative, November 26, 2018.

[23] As mentioned, the Appellant is not seeking any compensatory damages, but is claiming, as an appropriate remedy under section 24 (1) of the *Canadian Charter* and 49 of the *Quebec Charter, the* following

> DECLARE that the Government of Canada, by adopting dangerous greenhouse gas reduction targets and failing to put in place the measures necessary to limit global warming to 1.5, is violating :
>
> - The right of group members to life, integrity and security, as protected by the Canadian Charter and the Quebec Charter
>
> - The right of group members to a healthy environment respectful of biodiversity protected by the Quebec Charter
>
> - Treats group members in a discriminatory manner, thereby violating their right to exercise their rights in full equality as protected by the Canadian and Quebec Charters
>
> DECLARE that the failure of the Government of Canada to adopt dangerous greenhouse gas reduction targets and to put in place the measures necessary to limit global warming to 1.5 violates the fundamental rights of these people;
>
> ORDER the cessation of these violations;
>
> ORDER the Government of Canada to pay the sum of $100 to each member as punitive damages;
>
> DECLARE that distribution of the monies would be impractical or too onerous and, therefore, ORDER that a remedial measure be implemented to help curb global warming;
>
> ORDER any other remedy that the Court deems appropriate to impose on the government to ensure respect for the fundamental rights of class members;

Justiciability of the proposed class action

[24] The principle of separation of powers between the legislative, executive and judicial branches is intrinsic to the Canadian constitutional system. Some issues, because of their complexity, cannot be adequately dealt with by judicial orders. According to the Supreme Court, "All three branches have distinct institutional capacities and play critical and complementary roles in our constitutional democracy. However, each branch will be unable to fulfill its role if it is unduly interfered with by the others.[10]

[25] In the absence of a statute, constitutional review of government inaction by the courts is highly problematic. The point is not to find that a person or group is excluded

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[10] *Ontario v. Criminal Lawyers' Association of Ontario*, 2013 SCC 43, para. 29.

from a statutory regime, which sometimes allows a court to force the government to act[11]. Nor is it to require the state to expand the scope of an overly restrictive statute[12], or to find that by conferring a right on one, the state must provide it to another[13]. In these cases, specific statutes have been challenged. In the present case, the Appellant seeks to compel the legislature to act, but without telling it what it believes to be the appropriate actions to take, let alone what enforceable court orders would be appropriate.

[26] The situation would be different if the Appellant were challenging the validity of a particular law enacting measures to address GHG emissions. The state must ensure that the measures adopted respect the rights guaranteed by the *Canadian Charter*. Section 52 of the *Constitution Act*[14] confirms the power and obligation of the courts to declare inoperative "any provision of law that is inconsistent with the Constitution". The courts may then determine whether a violation of a *Canadian Charter* right has occurred and whether it is justified under section 1.

[27] However, the Appellant limits itself to invoking the *Greenhouse Gas Pollution Pricing Act*[15], without however challenging any of its provisions. The question of justiciability must therefore be addressed in the context of the litigation as it has developed.

[28] As Professor Sossin points out:

> To conclude, justiciability is properly seen as an aspect of a court's jurisdiction relating specifically to the subject matter of a case brought before a court. Justiciability is a necessary condition for the court to exercise its discretion to grant standing to a party wishing to bring a matter before the court, although a matter that is justiciable may nonetheless be unenforceable. Determining whether subject-matter is justiciable involves an analysis of its suitability for adjudication, in light of the institutional capacity and legitimacy of the court in the circumstances. Further, delineating the boundaries of justiciability requires an understanding of Canada's evolving doctrine of the separation of powers.[16]

[29] It is the role of the legislature to choose the policy directions of the government and the executive to implement them[17]. However, the control of the legislative branch and the appropriateness of its actions are, in principle, beyond the control of the judiciary.

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11 *Dunmore v. Ontario (Attorney General),* [2001] 3 S. C. R. 1016.
12 *Vriend v. Alberta*, [1998] 1 S.C.R. 493.
13 *Native Women's Association of Canada v. Canada*, [1994] 3 S.C.R. 627 at 667.
14 *Constitution Act, 1982,* being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. C-4. 11.
15 S.C. 2018, c..12.
16 Lorne Mitchell Sossin, *Boundaries of Judicial Review: The Law of Justiciability in Canada*, 2nd eedition (Toronto: Carswell, 2012).
17 *Ontario v. Criminal Lawyers' Association of Ontario*, 2013 SCC 43, para.28; *Mikisew Cree First Nation v. Canada (Governor General in Council)*, 2018 SCC 40.

[30] This was reiterated by the Supreme Court in *Ontario* v. *Criminal Lawyer's Association of Ontario*:

> [28] [...] The legislative branch makes policy choices, adopts laws and holds the purse strings of government, as only it can authorize the spending of public funds. The executive implements and administers those policy choices and laws with the assistance of a professional public service. The judiciary maintains the rule of law, by interpreting and applying these laws through the independent and impartial adjudication of references and disputes, and protects the fundamental liberties and freedoms guaranteed under the Charter.
>
> [...]
>
> [30] Accordingly, the limits of the court's inherent jurisdiction must be responsive to the proper function of the separate branches of government, lest it upset the balance of roles, responsibilities and capacities that has evolved in our system of governance over the course of centuries.
>
> [31] Indeed, even where courts have the jurisdiction to address matters that fall within the constitutional role of the other branches of government, they must give sufficient weight to the constitutional responsibilities of the legislative and executive branches, as in certain cases the other branch will be "better placed to make such decisions within a range of constitutional options".[18]

[31] It must sometimes be recognized that the exercise of legislative power or the conduct of state affairs by the executive branch requires the weighing of many external considerations and the making of policy choices that are not for the courts to evaluate[19]. It is difficult to imagine the courts, by means of a class action, dictating to the state, in the absence of legislative challenge or affirmative action, the course it should take.

[32] In fact, on the whole the alleged facts accuse the Canadian government of a fault of omission resulting from its inaction in the face of global warming. However, the conclusions sought by the Appellant essentially ask the courts to find that the government has failed to act and to require it to legislate in order to put in place measures likely to lead to a reduction in GHG emissions in order to give effect to Canada's international commitments. This is tantamount to asking the courts to tell the legislature what to do. Such is not their role.

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[18] *Ontario v. Criminal Lawyers' Association of Ontario*, 2013 SCC 43, at paras. 28 and 30-31 (citations omitted). See also *Mikisew Cree First Nation v. Canada (Governor General in Council)*, 2018 SCC 40, para. 118.

[19] *Hupacasath First Nation v. Canada (Foreign Affairs and International Trade Canada)*, 2015 FCA 4, para. 66.

[33] Beyond the pure question of division of powers, the justiciability of the remedy also requires consideration of the appropriateness for the courts, "as a matter of constitutional policy, to decide a given question or, alternatively, to defer it to other decision-making bodies of the government.[20]" In this case, deference is warranted and it must be concluded that the legislature is better placed to weigh the myriad issues of global warming.

[34] It is not disputed that Canada's international agreements become binding in domestic law, with certain exceptions, only after Parliament has passed an Act giving effect to them[21]. The mere existence of an international obligation does not support a finding of a principle of fundamental justice justifying judicial interference at this stage[22].

[35] The reality is that what the Appellant wants on global warming cannot be decided in the abstract. There is a role to be played by provinces with competing constitutional jurisdictions, particularly in environmental matters. Collaboration among governments often involves delicate negotiations. Beyond these political obstacles, the search for a solution requires an appreciation of scientific factors, weighing its impacts on health, transportation, economic and regional development, employment, etc. It is not the role of the courts to engage in such analysis. Even if they did, the measures advocated must be translated into budgetary priorities since their implementation will necessarily require financial investments and mobilization of state resources. Again, it is not the role of the courts to make such choices by prioritizing the means to address the challenge of climate change at the expense of other government expenditures.

[36] The answers to the common questions raised are clearly at the center of societal issues, both national and international. It is up to the democratically elected government to answer them, not up to the courts to dictate to the state what choices it should make[23].

[37] The Federal Court, faced with an application that bears important similarities to the present action, found that the action was not justiciable. [24] It stated:

> [40] The Plaintiffs' position fails on the basis that there are some questions that are so political that the Courts are incapable or unsuited to deal with them. These include questions of public policy approaches – or approaches to issues of significant societal concern. As found in PHS, above at paragraph 105, and Chaoulli, above at paragraph 107, to be reviewable under the Charter, policy responses must be translated into law or state action. While this is not to say a

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20 *Canada v. Minister of Energy*, [1989] 2 S.C.R. 49; *New Brunswick Broadcasting Co. v. Nova Scotia (Speaker of the Legislative Assembly),* [1993] 1 S.C.R. 49. C. S. 319.

21 *Kazemi v. Islamic Republic of Iran*, 2014 SCC 62, para 149.

22 *Kazemi v. Islamic Republic of Iran*, 2014 SCC 62, para. 149; *Operation Dismantle* v. *R.*, [1985] 1 S.C.R. 441, at 484.

23 *Canada (Attorney General) v. PHS Community Services Society*, 2011 SCC 44, para. 105; *Chaoulli v. Quebec (Attorney General)*, 2005 SCC 35, para. 107.

24 *La Rose v. Canada*, 2020 FC 1008.

> government policy or network of government programs cannot be subject to Charter review, in my view, the Plaintiffs' approach of alleging an overly broad and unquantifiable number of actions and inactions on the part of the Defendants does not meet this threshold requirement and effectively attempts to subject a holistic policy response to climate change to Charter review.
>
> [41] My finding on justiciability is supported both by the undue breadth and diffuse nature of the Impugned Conduct and the inappropriate remedies sought by the Plaintiffs.

[38] In another case, the Court refused to rule on an application for a declaratory judgment and injunction based on alleged breaches by the government of the *Kyoto Protocol Implementation Act*. The *Act* was introduced in Parliament without the support of the elected government and the legislative policy it set out was not government policy.[25]

[39] The Federal Court reiterates that a request for a declaratory judgment and injunction to limit global warming to between 1.5 and 2 ˚C is not justiciable[26]. It is worth quoting certain passages from the decision that, with necessary adaptations, apply to this case:

> [19] Not everything is suitable to be judged in a court of law. Generally, questions of policy, while not outside of the jurisdiction of the courts, should be left to the executive branches to determine, and law making to the legislature. It is hard to imagine a more political issue than climate change.
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> [21] But, if policy choices are to be justiciable, they must be translated into law or state action.
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> [...]
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> [47] When the Dini Ze' are asking this Court to rule on the constitutionality of the failure to enact what they consider adequate laws to fulfil international obligations, they are really asking the Court to tell the legislature to enact particular laws. This is not the role of the Court and thus not justiciable. Enacting laws is within the jurisdiction of Parliament. If those laws violate the constitution, then there can be striking out, reading down or reading in of provisions.
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> [...]
>
> [72] I find that this matter is not justiciable as it is the realm of the other two branches of government. This broad topic is beyond the reach of judicial interference. I do not fin that there is sufficient legal component to anchor the

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25 *Friends of the Earth v. Canada (Governor in Council)*, 2008 FC 1183 (appeal to Federal Court of Appeal dismissed, 2009 FCA 297; application for leave to appeal to Supreme Court dismissed, No. 33469).

26 *Misdzi Yikh v. Canada*, 2020 FC 1059.

> analysis as this action is a political one that may touch on moral/ strategic/ ideological/ historical or policy-based issues and determinations within the realm of the remaining branches of government.
>
> [73] In the present case, not only is there not sufficient legality, but the remedies sought are not appropriate remedies, but rather solutions that are appropriate to be executed by the other branches of government.
>
> [74] Looking to the guidance of Highwood, this Court does not have the institutional capacity to adjudicate this matter, and a set of declarations and orders flowing from this Court would not be an "economical and efficient investment of judicial resources' that would have a real effect on climate change. There are also vast economic, social and international elements to any decision on the limitation of industry and trade.[27]

[40] For the foregoing reasons, the trial judge erred in finding the action justiciable as brought. The nature of the issues, in the context described, requires the courts to leave it to the legislature to make the appropriate choices. This does not mean, however, that the courts may not be called upon, in another context, to review the state's conduct with respect to global warming.

[41] Since the alleged facts cannot, in these circumstances, give rise to the conclusions sought, the second criterion of article 575 (2) *C.C.P.* is not met and this justifies the dismissal of the application for authorization.

[42] In this case, the declaratory findings sought demonstrate a desire to invite the court into the sphere of legislative power and complex social and economic policy choices. Ordering an end to inaction is tantamount to forcing the government to act, and the findings suggesting that remedial measures be substituted for exemplary damages force the courts to interfere with the choice of measures. Moreover, even if it were to be found that the courts could do so, the generality of the findings sought is so imprecise as to give no means for their implementation through enforceable orders. This is the case, for example, with the declaration that the government's failure to put in place the measures necessary to limit global warming to 1.5 $^{\circ}$C violates the fundamental rights of the class and the order to stop it. So too does the request to order the government to put in place a remedy to help curb global warming and to order any other remedy the Court deems appropriate, which offers no useful guidance. The Appellant offers nothing concrete, nothing specific.

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[27] *Misdzi Yikh v. Canada*, 2020 FC 1059.

[43] Furthermore, a comment is in order regarding the composition of the Class and the utility of the action. Without agreeing with all of the trial judge's analysis on this subject, it must be noted that the class proposed by the Appellant seems arbitrary, especially insofar as its theory of the case on age discrimination cannot be accepted. On this point, in the absence of a specific measure or decision by the State, it is difficult to establish a breach of equality, especially since the phenomenon of global warming is a reality that affects the entire Canadian population. If young people will undoubtedly feel the impact more, it is only because they will be affected for a longer period of time.

[44] In these circumstances, the judge was justified in questioning the composition of a group that does not include all potential victims. There is nothing in the facts alleged to explain why the Appellant chooses to limit the membership of the class to residents of the province under the age of 35. The Appellant argues that it is entitled to describe the class it wishes to represent and that another action may be brought by citizens over the age of 35. The legal system is not comfortable with the multiplication of similar actions in a context where the objective of the class action is precisely to promote the accessibility of justice.

[45] For all these reasons, the appeal should be dismissed with costs.

FOR THESE REASONS THE COURT :

[46] **DISMISSES** the appeal;

[47] **THE WHOLE,** with costs.

MARTIN VAUCLAIR, J.C.A.

GENEVIÈVE COTNAM, J.C.A.

BENOIT MOORE, J.C.A.

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Hearing Date: February 23, 2021