The Court of Appeal Confirms That Prescription of the Representative Plaintiff's Personal Right of Action Requires Dismissal of the Class Action at the Authorization Stage

December 13, 2019

In a judgment handed down on December 11, 2019, the Court of Appeal (Morissette, Cotnam and Sansfaçon, JJ.C.A) reaffirmed the principle that a representative plaintiff whose personal action is *prima facie* prescribed lacks the necessary interest to sue on behalf of the group that he or she wishes to represent.[1] As a result, the criterion of article 575(4) of the *Code of Civil Procedure*[2] is not satisfied.

The Procedural Context

The appellant subscribed to several Registered Education Savings Plans (RESPs) marketed by the defendants in consideration of subscription fees of $200 **per unit**. They contended that the practice was in breach of subsections 1.1(7) and (11) of *Regulation No. 15 respecting Conditions Precedent to Acceptance of Scholarship or Educational Plan Prospectuses*.[3]

The appellant argued that the Regulation capped such subscription fees at $200 **per subscribed plan**. At the authorization stage, the defendants maintained that the appellant's personal right of action was prescribed (time-barred). The Superior Court, finding that December 31, 2011 was the starting point of the appellant's prescriptive period, being the date on which he had paid all the aforementioned subscription fees, held that the filing of his application to institute a class action, on June 19, 2016, was late, and thus dismissed the application.

Decision

The Court of Appeal upheld the analysis that applications for authorization to institute class actions, under the test laid down by article 575(4) of the CCP, must take several factors into account:

1. the representative plaintiff's interest in suing;

2. his or her competence; and
3. the absence of any conflict of interest.

All of this requires that the representative plaintiff's personal action not be prescribed. Accordingly, although the appellant had attempted to alter his theory of the case in order to invoke new facts that could postpone the date on which prescription began to run, authorization had to be denied, absent any clear factual allegations supporting such arguments in the original application. The plaintiff in any class action must therefore meet the conditions governing the suit, as set forth in article 575 of the CCP, including proving that he or she is an adequate representative plaintiff duly qualified to take suit on behalf of the group in question.

The Court of Appeal also reiterated that a party who is successful in the first instance does not need to file a cross-appeal to challenge the reasons of the trial judge to which it does not subscribe. In fact, the respondents pleaded that the judge had erred in law by concluding that the condition stipulated in paragraph 575(2) of the CCP was met, i.e. the requirement to demonstrate an arguable case. The Court of Appeal dismissed the appellant's argument that the respondents were obliged to file a cross-appeal to raise that ground of appeal. However, the Court did not deem it premature to revise Justice Riordan's conclusion in that regard at this stage of the proceedings.

The appeal was therefore dismissed, confirming that the class action could not be authorized.

Conclusion

Under article 575(4) of the CCP, selecting a representative plaintiff whose right of action is not prescribed is crucial. Failure to comply with that requirement could lead to dismissal of the application to authorize the class action, unless the petitioner is replaced during the proceedings by a representative whose personal right to litigate is valid. Another interesting aspect of this judgment is that the Court of Appeal reaffirmed the principle that appeals are designed to challenge the conclusions of trial judgments, and not their reasons. Respondents may therefore validly attack certain conclusions of a judgment that are unfavourable to them, without having to cross-appeal.

We wish to emphasize that, in this case, our BLG partners Stéphane Pitre and Anne Merminod represented the respondents Canadian Scholarship Trust Foundation and C.S.T. Consultants Inc., both in first instance and in appeal.

[1] *Segalovich* c. *C.S.T. Consultants inc.*, C.A. (Montréal), no. 500-09-027725-183, December 11, 2019, Morissette, Cotnam, Sansfaçon, JJ. C.A.

[2] CQLR, c. C-25.01 (the CCP).

[3] CQLR, c. V-1.1, r. 44 (the Regulation).

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