Favourable judgement issued by Québec Court of Appeal in Pilon class action

April 23, 2021

On March 15, 2021, the Québec Court of Appeal issued its judgment (as penned by Justice Stéphane Sansfaçon) on the appeal launched by the class representative in the *Pilon* class action contesting over the limit spending on credit cards.

BLG acted for BMO, BNS, Tangerine Bank and PC Bank and took a leadership position throughout, via Guy Pratte, Mathieu Lévesque, Patrick Plante, Anais Bussières McNicoll, Alex De Zordo, Jean Saint-Onge, Karine Chênevert, Anne Merminod and Alexandra Hébert. The defendant banks were successful in defeating certification.

The plaintiff, Ms. Mélissa Pilon, was seeking the authorization to institute a class action against 16 banks and the *Fédération des Caisses Desjardins du Québec*. She claimed the defendants engaged in an illegal practice by allowing a credit card holder to get into debt beyond the contractually agreed credit limit (*i.e.* over-the-limit transactions), allegedly resulting in over-indebtedness that is detrimental to the consumer. She argued that these over-the-limit transactions are prohibited by both the Federal and Québec legal schemes. Justice Pierre Gagnon denied authorization in his judgment on Aug. 23, 2019, agreeing with our submissions to the effect that over-the-limit transactions are distinct from credit limit increases.

Decision

Citing the recent Supreme Court of Canada decision in *Oratoire Saint-Joseph*, the Court of Appeal held that the authorization judge was entitled to rule on a pure question of law, which was at stake in this class action even with all of the facts taken as true. Moreover, the Court found that even a complex question of law can be ruled on and nothing prevents the authorization judge from conducting a complete and thorough legal analysis. This is refreshing for the authorization process that is essentially considered as a filtering exercise to exclude those claims that are clearly unfounded in law. The Court also ruled the first judge did not err in exercising his discretion to rule on this question of law. Considering all of the comments below, the Court of Appeal dismissed the appeal with costs.

Findings

A) Under Québec law

The Court of Appeal first upheld Justice Gagnon's ruling that s. 128 CPA (as applicable until July 31, 2019) did not apply to over-the-limit transactions, since it only pertained to credit limit increases. The Court analyzed, *inter alia,* s. 128 CPA in light of the recent amendments resulting from the provisions of Bill 134, which, as of Aug. 1, 2019, further regulate over-the-limit transactions without prohibiting them, consistent with the parliamentary debates cited. Therefore, the Court found that the facts alleged did not appear to justify the conclusions sought and that the plaintiff therefore did not meet the requirement of s. 575 (2) the *Code of Civil Procedure* (CCP).

B) Under federal law

Under federal law, the Court concluded that s.5 of the *Credit Business Practices (Banks, Authorized Foreign Banks, Trust and Loan Companies, Retail Associations, Canadian Insurance Companies and Foreign Insurance Companies) Regulations* (the Federal Regulation) did not prohibit banks from processing over-the-limit transactions and charging a fee. The Court of Appeal went along our representations to the effect that over-the-limit transactions are distinct from credit limit increases, for which express consent from consumers must be obtained.

As with the arguments under Québec Law, the Court found that the facts alleged did not appear to justify the conclusions sought on the basis of the Federal Regulation and that the plaintiff therefore did not meet the requirement of s. 575 (2) CCP.

C) Court's decision

In light of the foregoing, the Court found that it was not necessary to rule upon whether Ms. Pilon was unfit to represent the putative class members.

Takeaways

This decision affirms that an authorization judge has full discretion to rule upon a pure question of law at the authorization stage. This decision also clarifies that a pure question of law need not necessarily be an obvious one – a complex question of law can be ruled upon and the authorization judge is empowered to conduct a thorough and complete analysis in law.

By

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