BLG represents Canadian Bankers Association in Supreme Court of Canada case

April 24, 2019

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In the Case, *Co-operators General Insurance Company v. Sollio Groupe Coopératif (formerly known as La Coop Fédérée), et al,* La Coop Fédérée (Coop), a customer of the National Bank of Canada (NBC) was a victim of a phishing scheme. A phishing scheme can occur when a fraud aimed at obtaining confidential information through messages that appeared to come from an authorized top executive of the company. In this case, the fraud was carried out through a fax payment order, resulting in the electronic transfer of US$4,946,355.26 that was borrowed by Coop.

Coop was holding insurance coverage qualified as a property and business interruption policy issued by the appellant, Co-Operators General Insurance Company (Co-Operators). Co-Operators denied coverage for several reasons. In its positioning, it was alleging that the funds that were misappropriated were owned by NBC, not Coop.

Coop instituted proceedings before the Superior Court for a declaratory judgment in order to be compensated under the insurance. In turn, the insurer forced the intervention of the NBC to the litigation. Through its appeals, Co-Operators reframed the debate and sought the declaration that NBC should be liable for the transfer of funds, not Co-Operators. Although the Quebec the Court of Appeal confirmed that electronic transfer of funds are not subject to the *Bills of Exchange Act*, it made some comments that may have implied a strict liability for banks if the funds fraudulently transferred were taken from the account of a customer in a credit position.

The primary issue of relevance to the banking industry raised in the Case before the Supreme Court of Canada (SCC) of was whether the holder of a bank account must bear the losses resulting from an electronic funds transfer fraudulently induced by a third party, or whether the loss must be borne by the issuing bank.

The Canadian Bankers Association (CBA) sought leave to intervene before the SCC on behalf of the industry to:

- Clarify the legal framework applicable to electronic transfer of funds under civil and common law;
- Confirm that electronic transfer of funds are not subject to the *Bills of Exchange Act* nor to its principles to attribute liability;
- Avoid that a decision be rendered on liability issues for banks in the context of a case that was initiated before the lower court as pertaining to questions related to insurance coverage (and therefore lacked the required evidentiary record to make such a determination); and

- Seek correction of the comment at para. 110 of the judgment of the Québec Court of Appeal pertaining to banks' liability.

Outcomes

At the end of the hearing, the SCC rejected the appeal filed by the insurer (Co-operators) by unanimous decision rendered from the bench.

Most importantly, following BLG's specific oral representations, Justice Kasirer addressed and corrected the adverse comments made by the Québec Court of Appeal implying strict liability for banks.

Mathieu Lévesque led the team, including Senior Advocate before the Supreme Court Guy Pratte, for the filing of the factum, for the strategic positioning of the CBA as well as to make representations before the Supreme Court of Canada.

By

Thoburn

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