

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 Procedure² 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).

Expertise

[Commercial Litigation](#), [Commercial Arbitration](#), [Appellate Advocacy](#)

BLG | Canada's Law Firm

As the largest, truly full-service Canadian law firm, Borden Ladner Gervais LLP (BLG) delivers practical legal advice for domestic and international clients across more practices and industries than any Canadian firm. With over 725 lawyers, intellectual property agents and other professionals, BLG serves the legal needs of businesses and institutions across Canada and beyond – from M&A and capital markets, to disputes, financing, and trademark & patent registration.

blg.com

BLG Offices

Calgary

Centennial Place, East Tower
520 3rd Avenue S.W.
Calgary, AB, Canada
T2P 0R3

T 403.232.9500
F 403.266.1395

Ottawa

World Exchange Plaza
100 Queen Street
Ottawa, ON, Canada
K1P 1J9

T 613.237.5160
F 613.230.8842

Vancouver

1200 Waterfront Centre
200 Burrard Street
Vancouver, BC, Canada
V7X 1T2

T 604.687.5744
F 604.687.1415

Montréal

1000 De La Gauchetière Street West
Suite 900
Montréal, QC, Canada
H3B 5H4

T 514.954.2555
F 514.879.9015

Toronto

Bay Adelaide Centre, East Tower
22 Adelaide Street West
Toronto, ON, Canada
M5H 4E3

T 416.367.6000
F 416.367.6749

The information contained herein is of a general nature and is not intended to constitute legal advice, a complete statement of the law, or an opinion on any subject. No one should act upon it or refrain from acting without a thorough examination of the law after the facts of a specific situation are considered. You are urged to consult your legal adviser in cases of specific questions or concerns. BLG does not warrant or guarantee the accuracy, currency or completeness of this publication. No part of this publication may be reproduced without prior written permission of Borden Ladner Gervais LLP. If this publication was sent to you by BLG and you do not wish to receive further publications from BLG, you may ask to remove your contact information from our mailing lists by emailing unsubscribe@blg.com or manage your subscription preferences at blg.com/MyPreferences. If you feel you have received this message in error please contact communications@blg.com. BLG's privacy policy for publications may be found at blg.com/en/privacy.

© 2024 Borden Ladner Gervais LLP. Borden Ladner Gervais LLP is an Ontario Limited Liability Partnership.