

Pension and Benefits
Class Actions

lavery
LAW ▶ BUSINESS

CLASS ACTIONS: THE COURT SAYS NO TO RETIREES

FRANÇOIS PARENT
and JOSÉE DUMOULIN

LAST AUGUST 3, THE HONOURABLE PAUL MAYER OF THE SUPERIOR COURT OF QUÉBEC DISMISSED THE MOTION FOR AUTHORIZATION TO INSTITUTE A CLASS ACTION FILED BY MR. MICHEL DELL'ANIELLO ("DELL'ANIELLO") AGAINST VIVENDI CANADA INC. ("VIVENDI"), THE SUCCESSOR OF HIS FORMER EMPLOYER (SEAGRAM). THIS DECISION DEALS WITH TWO SUBJECTS OF INTEREST, NAMELY, UNILATERAL CHANGES MADE BY AN EMPLOYER TO THE GROUP INSURANCE PROGRAM OFFERED TO THE RETIREES OF A BUSINESS, AND CLASS ACTIONS THAT ARE NATIONAL IN SCOPE.

¹ At the time, the Plan only covered retirees and their eligible dependents.

FACTS GIVING RISE TO THE DISPUTE

In 1977, the Seagram Company Ltd. implemented an extended medical benefits plan for the members of the management and its non-unionized employees (the "Plan"). Under the Plan, eligible employees were covered both during their employment and upon retirement.

In July 1985, Seagram specified, in the brochures issued to its employees, that it reserved its right to amend or terminate the Plan at any time, and to increase the share payable by the employees and retirees.

In the early 2000, following various transactions, Vivendi became the successor to Seagram.

In September 2008, Vivendi informed the retirees and other beneficiaries under the Plan¹ that certain amendments would be made to the Plan, effective January 1, 2009. The main amendments communicated were as follows:

- ▶ the annual deductible was increased;
- ▶ thenceforth, only prescription drugs included on the drug lists of the beneficiaries' province of residence would be reimbursed;
- ▶ a lifetime maximum of \$15,000 for all coverages offered under the Plan was introduced.

MOTION FOR AUTHORIZATION TO INSTITUTE A CLASS ACTION

In July 2009, Dell'Aniello filed a motion for authorization to institute a class action (the "Motion") in which he asked to be appointed class representative.

The class included all the retired members of management and the retired employees of Seagram who were eligible for post-retirement medical benefits under the Plan, and all the other eligible persons within the meaning of the Plan (the "Class"). The Class included approximately 250 retirees or surviving spouses of retirees who worked in six provinces.

The main reliefs sought in the class action were as follows:

- ▶ a declaration that Vivendi had illegally amended the Plan;
- ▶ the cancellation of the amendments made to the Plan, effective January 1, 2009, or a declaration that they were unenforceable against the class members;
- ▶ an order that Vivendi reinstate the Plan as it stood prior to the amendments in question.

ANALYSIS

Mr. Justice Mayer first considered whether he had jurisdiction over the non-Quebec class members. After analyzing the relevant doctrine and case law, he recognized that the courts of Quebec have the power to authorize national class actions provided a real and substantial connection is established between the cause of action, the Quebec court seized of the case, and each of the class members individually, including the non-Quebec members.

In this case, he concluded that he did have jurisdiction,² particularly on the basis that the class action which Dell'Aniello sought to bring was founded on the employment contract of each retiree, which was entered into at the time with Seagram, whose head office was located in Montreal.

Mr. Justice Mayer then analyzed the conditions pursuant to which a person may institute a class action, beginning with the condition which requires that the issues raised by the motion must be identical, similar or related for all members of the relevant class.³ He concluded that this condition was not met in the circumstances, accepting Videndi's argument that the recourse was not appropriate because a substantial number of issues required an individualized analysis for each class member.

To justify why an individual analysis was required, the judge stated that it was necessary to review the rules governing the rights to post-retirement insurance benefits. He summarized the rules as follows:

- ▶ there is no presumption that post-retirement insurance benefits constitute vested rights;
- ▶ to determine whether a right to post-retirement insurance benefits is vested, one must ascertain whether the parties intended to grant the retirees an irrevocable right to these benefits;
- ▶ since it is upon retirement that the right to post-retirement insurance benefits can become vested, the parties' intention must be sought in the contract that was in force at the time of each employee's retirement;
- ▶ given that the provisions concerning the group insurance are not usually all contained in a contract between the employer and the employee, it is necessary to review all the communications exchanged between the employer and the employee to determine the obligations of each of the parties;
- ▶ if the parties have agreed to reserve the employer's right to unilaterally amend or terminate the post-retirement insurance benefits, one can infer the lack of an intention to grant a vested right to the employee.

The judge noted that the position of Dell'Aniello to the effect that the issue of the vested right to post-retirement insurance benefits could be dealt with collectively, was based on the premise that his personal situation was similar to that of all the other class members, and that they had received the same documentation as him.

However, Mr. Justice Mayer found that this premise was ill-founded because the record showed that many groups of retirees had received different communications from the company at different times. He identified five main subclasses of members and found that it was essential to determine the rights of each member based on the communications he actually received.

The judge then briefly reviewed the situation of the subclasses, noting that the members' right to post-retirement insurance benefits had not crystallized because the company had reserved the right to terminate or amend the insurance coverage in the brochures issued to the employees. More specifically, certain brochures provided that the coverage would end automatically in the event the group insurance contract was terminated, while others provided for the right of the company to amend or terminate the program at any time.

² Under section 3148(3) of the *Civil Code of Québec*.

³ Section 1003(a) of the *Code of Civil Procedure*.

Furthermore, Justice Mayer added, an individualized analysis would also be necessary within each subclass because each member may have received different communications, representations and documents. He noted that the record contained at least two letters which showed that individual communications had been made in specific cases.

Lastly, the judge found that the following factors also supported the conclusion that the recourse of Dell'Aniello was not properly suited to a collective determination:

- the issue of the prejudice suffered by each class member could only be determined on an individual basis and would require many individual factors to be taken into account, such as the type of protection (individual or family) and the claims that were made;
- the presence of members in five provinces other than Quebec meant that the issues raised by Dell'Aniello would have to be analyzed not only on the basis of civil law, but also on the basis of the relevant common law rules, and the time limitation rules applicable in these provinces.⁴

Considering the existence of the five main subclasses and the legal rules applicable to each member, Mr. Justice Mayer identified a minimum of 22 subclasses. In his view, this situation added [translation] "*an additional disparity which dilutes the collective nature of the recourse.*"

COMMENTS

Although this decision reiterates that the Quebec courts may authorize the institution of a national class action, it appears that in certain cases the presence of non-Quebec class members will add further disparities, which may lead the court to prefer an individualized – rather than collective – approach to the issues raised.

It should be noted that Mr. Justice Mayer's conclusion to the effect that Dell'Aniello's recourse was not properly suited to a collective determination due to the numerous issues requiring an individualized analysis, is very similar to the conclusion reached in the judgment of the Superior Court of Justice of Ontario in the *Nadolny*⁵ case.

In light of these two judgments, it appears that a class action is not the appropriate procedural vehicle where different documents and communications have been sent to the class members, which will generally be true where the post-retirement insurance plan has been in place for several years.

Another interesting aspect of Mr. Justice Mayer's decision relates to the interpretation of the documents and his conclusion that the language used in the employee brochures negated the intention to grant vested rights.

An appeal of Mr. Justice Mayer's decision was filed on September 2, 2010.

FRANÇOIS PARENT

514 877-3089
fparent@lavery.ca

JOSÉE DUMOULIN

514 877-3088
jdumoulin@lavery.ca

⁴ An argument on prescription was raised by Vivendi during the arguments on authorization.

⁵ *Nadolny v. Peel (Region)*, 2009 CanLII 51194 (Ont S.C.).

YOU CAN CONTACT THE MEMBERS OF THE FOLLOWING GROUPS WITH ANY QUESTIONS CONCERNING THIS NEWSLETTER.

PENSION AND BENEFITS

KARINE CORMIER 514 877-2955 kcormier@lavery.ca
JOSÉE DUMOULIN 514 877-3088 jdumoulin@lavery.ca
GUY LEMAY, CRIA 514 877-2929 glemay@lavery.ca
CATHERINE MAHEU 514 877-2912 cmaheu@lavery.ca
FRANÇOIS PARENT 514 877-3089 fparent@lavery.ca
MARIE-CLAUDE PERREAULT, CRIA 514 877-2958 mcperreault@lavery.ca
EVELYNE VERRIER 514 877-3075 everrier@lavery.ca

CLASS ACTIONS

PIERRE BOURQUE, c.r., Ad. E. 514 878-5519 pbourque@lavery.ca
LOUIS CHARETTE 514 877-2946 lcharette@lavery.ca
C. FRANÇOIS COUTURE 514 878-5528 cfcouture@lavery.ca
EUGÈNE CZOLIJ 514 878-5529 eczolij@lavery.ca
BERNARD LAROCQUE 514 877-3043 blarocque@lavery.ca
GUY LEMAY, CRIA 514 877-2929 glemay@lavery.ca
ANNE-MARIE LÉVESQUE 514 877-2944 amlevesque@lavery.ca
JEAN-PHILIPPE LINCOURT 514 877-2922 jplincourt@lavery.ca
ROBERT W. MASON 514 877-3000 rwmason@lavery.ca
J. VINCENT O'DONNELL, c.r., Ad. E. 514 877-2928 jvodonnell@lavery.ca
IAN ROSE 514 877-2947 irose@lavery.ca
JEAN SAINT-ONGE, Ad. E. 514 877-2938 jsaintonge@lavery.ca
LUC THIBAudeau 514 877-3044 lthibaudeau@lavery.ca

SUBSCRIPTION: YOU MAY SUBSCRIBE, CANCEL YOUR SUBSCRIPTION OR MODIFY YOUR PROFILE BY VISITING PUBLICATIONS ON OUR WEBSITE AT lavery.ca OR BY CONTACTING CAROLE GENEST AT 514 877-3071.

► lavery.ca

© Copyright 2010 ► LAVERY, DE BILLY, L.L.P. ► BARRISTERS AND SOLICITORS

The content of this text provides our clients with general comments on recent legal developments.

The text is not a legal opinion. Readers should not act solely on the basis of the information contained herein.

MONTREAL QUEBEC CITY OTTAWA