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THE COURT OF APPEAL AUTHORIZES RETIREES' CLASS ACTION AGAINST VIVENDI

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ON FEBRUARY 29, 2012, THE QUEBEC COURT OF APPEAL REVERSED THE JUDGMENT OF THE QUEBEC SUPERIOR COURT THAT HAD DISMISSED THE MOTION TO AUTHORIZE THE BRINGING OF A CLASS ACTION FILED BY MR. MICHEL DELL'ANIELLO ("DELL'ANIELLO") IN CONNECTION WITH CHANGES MADE UNILATERALLY BY VIVENDI CANADA INC. ("VIVENDI") TO THE EXTENDED MEDICAL INSURANCE BENEFITS PLAN FOR RETIREES.

THE FACTS

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

In 1985, Seagram specified in employee brochures that it reserved the right to amend or terminate the Plan at any time, as well as to increase the portion of the costs payable by the employees and retirees.

In the early 2000s, Vivendi became the successor to Seagram and the Plan sponsor.

In September 2008, Vivendi informed retirees and beneficiaries that, effective January 1, 2009, the Plan would be amended as follows:

- ▶ the annual deductible would increase;
- ▶ only prescription drugs on the drug list of the province in which the retiree or beneficiary lived would henceforth be reimbursed;
- ▶ a lifetime maximum of \$15,000 for all coverage under the Plan would be introduced.

(hereinafter collectively referred to as the "Amendments")

THE MOTION TO AUTHORIZE THE BRINGING OF A CLASS ACTION

In July 2009, Dell'Aniello filed a motion to authorize the bringing of a class action (the "Motion") in which he asked to be ascribed the status of representative of the class, namely 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 other eligible persons under the Plan. The class includes some 250 retirees or surviving spouses of retirees who worked in six provinces.

The Motion seeks to obtain a declaration that Vivendi illegally amended the Plan, have the Amendments cancelled or declared unenforceable, order Vivendi to reinstate the Plan as it was before the Amendments and have Vivendi to reimburse the costs paid by each member of the class as a result of the Amendments.

THE DECISION OF THE SUPERIOR COURT OF QUEBEC

The presiding judge, Justice Paul Mayer, analyzed the criteria to authorize a class action¹, starting with the criterion requiring that there be identical, similar or related questions of law or fact for all class members². He concluded that this condition was not met due to the substantial number of issues requiring an individualized analysis for each class member.

The judge stated that the rules governing the right to post-retirement benefits had to be examined first. After summarizing these rules, he held that several groups of retirees received different communications from the company at different times. He identified five main subclasses of members and indicated that the rights of each class member had to be determined based on the communications and documents he or she actually received.

The judge then briefly examined the situation for these five subclasses, noting that the class members' right to post-retirement insurance benefits had not crystallized, due mainly to the right the company had reserved for itself in the employee brochures to amend or terminate the insurance coverage.

Lastly, the judge found that the alleged prejudice suffered by each class member would have to be established on an individual basis and that 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. In his opinion, these two elements added an [Translation] "*additional disparity which dilutes the collective nature of the recourse*".

THE DECISION OF THE QUEBEC COURT OF APPEAL

The Court of Appeal quashed the Superior Court decision, authorized the class action and ascribed the status of representative to Dell'Aniello.

After pointing out the objectives of a class action and the fact that the authorization stage is simply a filtering and verification mechanism, the Court held that the first judge had made a determining error of law by ruling on certain issues that were to be rather assessed by the trial judge at the stage of the hearing on the merits, including the vested rights of each subclass to the crystallization of their respective rights to post-retirement benefits. The Court noted that the first judge decided, without stating it specifically, that the reservation clause added in 1985 in the employee brochures was valid. According to the Court, such a determination cannot be made in the absence of evidence, which will only be introduced at the stage of the hearing on the merits.

The Court added that the first judge took into consideration other facts that should not have been examined at the authorization stage such as the fact that common law rules and time limitation rules applicable in other provinces would probably have to be analyzed.

The Court stated that it was sufficient for the first judge to limit his analysis to the main common issue submitted by Dell'Aniello, namely whether the Amendments were valid and legal. It held that the first judge erred in concluding that this main common issue would not significantly advance the recourses of the class members since these recourses were not sufficiently related. The Court based its reasoning on, among other things, the recent case *Collectif de défense des droits de la Montérégie (CDDM) v. Centre hospitalier régional du Suroit du Centre de santé et des services sociaux du Suroit*³ and reiterated the principle that it is not a requirement to identify several common, similar or related questions. Instead, the Court confirms that one common issue which, without being decisive, allows the claims to move forward, will satisfy the first of the four criteria stipulated at article 1003 C.C.P.

¹ Article 1003 *Code of civil procedure* ("C.C.P").

² Article 1003 a) C.C.P.

³ 2011 QCCA 826.

For the Court, the determination of whether or not the Amendments were valid and legal is a common issue of law that will benefit all class members. Further, although an individual analysis by the trial judge will ultimately be necessary, the Court held that this was not an obstacle to granting the motion for authorization.

The Court pursued its analysis and found that the criterion of the *prima facie* cause of action (set forth in article 1003 b) C.C.P.) was also satisfied. The two main arguments raised by Vivendi in this regard involved the issues of the vested rights of the retirees and whether the action was time barred. With respect to vested rights, Vivendi submitted essentially that although the legal principles which the trial judge would have to consider to determine whether the Amendments are enforceable against the class members are the same, these legal principles would not allow the debate to move forward for each class member.

The Court noted that the question of the vested rights of the class members was clearly at the heart of the dispute between the parties, and that the issue of whether Vivendi could unilaterally amend the Plan as it did should be decided by the trial judge taking all the evidence into account.

Regarding the time limitation, Vivendi argued that the action was *prima facie* time barred since Dell'Aniello was asking the court to cancel the reservation clause added to the employee brochures in 1985. Dell'Aniello argued that he only became aware of the ground of nullity of the reservation clause in 2009 while he was preparing his motion for authorization to bring a class action. He argued that at the authorization stage there is no need to pursue this issue further, as it should be decided by the trial judge.

The Court reiterated the principle that an action that is *prima facie* time barred should be dismissed at the authorization stage. However, in this case, the Court held that the issue of whether or not the action that Dell'Aniello wishes to institute is time barred is essentially a question of fact which will have to be analyzed by the trial judge.

CONCLUSION

In *Nadolny*⁴, the Ontario Superior Court of Justice held, like Justice Mayer, that a retiree's action contesting a change made to a post-retirement group insurance plan did not lend itself to a collective decision due to several issues requiring an individual analysis. In view of these two decisions concerning changes made to a post-retirement insurance plan, we wonder whether a new trend has developed, namely that a class action is not the appropriate procedural vehicle when different documents and communications are given to members of the class covered by the action, which is usually the case when a post-retirement insurance plan has been in effect for several years.

The Court of Appeal decision sets aside this problem. The Court noted that, in class actions, the authorization stage is only a filtering and verification mechanism and that the analysis to be conducted at this stage is limited to an examination of whether there are main questions in dispute, not an in-depth review of factual differences. The Court of Appeal also confirmed a recent trend favourable to petitioners, namely that the presence of a single common question of law which could contribute to the advancement of the case is sufficient to meet the first condition for bringing a class action.

⁴ *Nadolny v. Peel (Region)*, 2009 CanLII 51194 (Ont. S.C.).

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