



Common questions, not answers: Supreme Court of Canada affirms Québec's flexible approach to authorization of class proceedings

January 23, 2014

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In its first decision of the New Year, the Supreme Court of Canada upheld the Québec Court of Appeal's ruling in [Vivendi Canada Inc. v. Dell'Aniello](#), finding that the commonality requirement for authorization of a class proceeding under the Québec [Code of Civil Procedure](#) (the Code) is met if there is a common question that will resolve a significant portion of the dispute; it is not a requirement that common answers be found. The Court's decision affirms the flexible nature of the approach to the commonality requirement on a motion for authorization in Québec.

Background

In 2008, the spirit producer Vivendi Canada Inc. (Vivendi), made unilateral amendments to its health insurance plan (the Plan) of which it is the sponsor for its retirees and their surviving spouses. The amendments came into effect in 2009, and were adverse to the interests of the plan beneficiaries. Mr. Dell'Aniello, a retiree of Vivendi, brought a motion for authorization to commence a class action pursuant to article 1003 of the Code, to challenge the validity of the Plan amendment.

Article 1003 of the Code sets out four requirements that must be met for the Court to authorize a class action:

1003. The court authorizes the bringing of the class action and ascribes the status of representative to the member it designates if of opinion that:

- (a) the recourses of the members raise identical, similar or related questions of law or fact;
- (b) the facts alleged seem to justify the conclusions sought;
- (c) the composition of the group makes the application of article 59 or 67 difficult or impracticable; and
- (d) the member to whom the court intends to ascribe the status of representative is in a position to represent the members adequately.

Article 1003(a) is analogous, although broader and much more flexible, to the requirement set out in section 5(c) of Ontario's [Class Proceedings Act, 1992](#) that "the claims or defences of the class members raise common issues".

The Decisions Below

The motion judge held that the members of the proposed group did not raise questions that were “identical, similar or related” as required by article 1003(a). He found that individual inquiries were required to determine whether the right to insurance benefits in retirement had vested for each group member. As a result, the potential class would fall into five subgroups based on each individual’s time of retirement, communications received from Vivendi, and documents within their possession. He held that the unilateral Plan amendment did not apply to those who retired before July 15, 1985, which constituted 20% of the individuals in the group. The motion judge also found that because the proposed group members lived across six different provinces, 22 separate analyses would be required to answer the purported common questions. For these reasons, he found that the requirements in article 1003 had not been met and dismissed the motion.

The Québec Court of Appeal overturned the Superior Court’s ruling, finding that the motion judge erred in his interpretation of the common element requirement of article 1003(a), and that the question of whether the 2009 amendments were valid or lawful was common to the claims of all class members of the group. The Court of Appeal also found that the motion judge further erred by overstepping his role at the authorization stage and ruling on the merits of the claim through his finding that the right to insurance benefits had vested for some group members. The Court of Appeal relied on the Supreme Court of Canada’s decision in [Western Shopping Centres Inc. v. Dutton](#) for the proposition that questions which are common to all members of the group can coexist with questions that concern individuals.

As the Court found that the *prima facie* case requirement of article 1003(b) was met, and Vivendi admitted that 1003(c) and (d) were met, the Court of Appeal overturned the ruling in the Superior Court and authorized the class proceeding. Vivendi appealed.

The Decision of the Supreme Court of Canada

The Supreme Court of Canada held that the Court of Appeal was right to intervene because the motion judge had erred in his assessment article 1003(a) of the Code for two reasons. First, the inquiry under article 1003(a) is purely procedural, and does not require consideration of the merits. Second, the motion judge applied the wrong methodology by asking whether there were common answers to the questions raised in the motion for authorization rather than determining whether the claims advanced by the members of the proposed group raised common questions.

The Court reviewed the principles set out in its earlier decisions in [Dutton](#) and [Rumley v. Colombie-Britannique](#) with respect to commonality, acknowledging that the common law tests must be adapted to the broader, more flexible and less stringent statutory provisions in Québec, a province which has generally favoured easier access to class actions. In affirming the flexible nature of the test, the Court held:

On this basis, the Supreme Court of Canada confirmed that motion judge was mistaken in emphasizing the individual questions that would need to be resolved. The fact that the employees worked in six different provinces would not bar the action, as courts can accept proof of, or take judicial notice of, the law applicable in common law provinces. Only substantial differences between the applicable legal schemes would cause a class action to lose its collective nature.

The appellants argued that an interpretation of article 1003(a) that encouraged a multiplicity of substantive analyses violated the principle of proportionality recognized in article 4.2 of the Code. The Supreme Court disagreed, holding that as the criteria of article 1003 are exhaustive, the principle of proportionality is not to be considered as a fifth criterion. The Court noted that the Code is clear that a motion judge must authorize the class proceeding if the criteria are met and need not ask if a class action is the most appropriate procedural vehicle.

Since the claims of all group members were based on the Plan, the Supreme Court held that the question of the validity or legality of the 2009 amendments arose for all members. As the answer to that question

could serve to advance the resolution of all claims, there was a common question, satisfying the requirement in article 1003(a). The appeal was dismissed.

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