Pension Plans and Class Actions: the Vivendi case

January 1, 2014

On January 16, 2014, the Supreme Court of Canada[1] affirmed the Court of Appeal of Québec[2] judgment which authorized the class action brought against Vivendi Canada Inc. ("**Vivendi**"). This important decision confirms, among other things, that the rules for authorizing class actions in Quebec are more liberal than those in the common law provinces.

THE FACTS

Seagram Ltd. ("**Seagram**"), which was established in 1857, is a producer of wine and spirits. Its head office and principal place of business are in Montreal.

In 1977, Seagram set up a supplemental health insurance plan for its management and non-unionized employees (the "**Plan**"). The Plan covers eligible employees both while employed and after they retire.

In 1985, Seagram unilaterally amended the terms of the Plan, adding a clause pursuant to which it reserved its right to modify or suspend the Plan at any time.

In December 2000, Vivendi S.A. acquired Seagram, which had over 700 employees at the time.

In December 2001, Seagram's assets relating to the production of wine and spirits were sold to Pernod Ricard and Diageo, and Seagram ultimately became Vivendi.

In September 2008, Vivendi advised the retirees and beneficiaries that it would be making several amendments to the Plan which would take effect on January 1, 2009 (the "**Amendments**"):

> the annual deductible retirees and beneficiaries had to pay would be substantially increased;
> only prescription drugs on the list of drugs for the province of residence of retirees or beneficiaries would henceforth be reimbursed;
> a lifetime maximum of $15,000 for all coverage under the Plan would be introduced whereas there was none before.

In 2009, Michel Dell'Aniello applied to the Superior Court of Québec for authorization to institute a class action and asked it to ascribe to him the status of representative of the following persons:

"[TRANSLATION] All retired officers and employees of the former Seagram Company Limited who are eligible for post-retirement medical care under Vivendi Canada Inc.'s health care plan ("Plan") and eligible dependents within the meaning of the Plan ("beneficiaries"), as well as, with regard to the damages claimed, the successors of any such officers, employees or beneficiaries who have died since January 1, 2009."

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In his action, Mr. Dell'Aniello sought, among other things, a declaration that Vivendi illegally amended the Plan, and to have the Amendments cancelled and the Plan reinstated as it was before the Amendments. The proposed class includes some 250 retirees or surviving spouses of retirees who worked in six provinces—134 in Quebec, 82 in Ontario, 3 in Alberta, 16 in British Columbia, 2 in Saskatchewan and 13 in Manitoba.

THE SUPERIOR COURT OF QUÉBEC DECISION[3]

On August 3, 2010, the Superior Court of Québec dismissed Mr. Dell'Aniello's motion for authorization to institute a class action. Contrary to what Vivendi had argued, Justice Mayer held that, pursuant to article 3148 (3) C.C.Q., Quebec authorities have jurisdiction to hear the action provided the class action is authorized. He found, among other things, that it is easier and more convenient to institute the class action in Quebec since over half the potential group members, i.e. 53.7%, live in Quebec.

However, the judge refused to authorize the class action, finding that it was a range of individual recourses and that the requirement that there be similar or related questions of law or fact set out in article 1003 a) *C.C.P.* was not met. In his view, the class action is therefore not the most appropriate procedural vehicle. He was of the opinion that if the action was authorized, the judge would have to conduct a detailed review of a multitude of individual circumstances, which would constitute a multitude of mini-trials. Because the right to insurance benefits crystallizes at the time of retirement, the intention of the parties with respect to the vesting of rights must be determined as of that time. Hence, the contract together with the communications between the employer and each class member must be examined to determine whether any rights have vested.

The judge also examined the situation of certain subgroups of retirees and beneficiaries and said that their right to post-retirement insurance benefits did not crystallize, since the unilateral amendment clause added in 1985 is inconsistent with an intention to confer a vested right.

Lastly, the judge added that the diversity of the legislative schemes applicable to individual claims, which stems from the fact that the retirees had worked in six different provinces, shows the lack of homogeneity of the proposed group and supported a refusal to authorize the class action.

THE COURT OF APPEAL OF QUÉBEC DECISION[2]

On February 29, 2012, the Court of Appeal of Québec quashed the judgment in first instance and authorized Mr. Dell'Aniello to institute a class action. Justice Léger, writing for the Court, held that at the authorization stage, the court's analysis must be limited to whether there is a *prima facie* case. According to the Court of Appeal, the motion judge ruled on the merits of the case in determining that the right of certain retirees and beneficiaries to post-retirement insurance benefits had not crystallized. This showed that he conducted an in-depth analysis of individual questions rather than a preliminary analysis. The Court of Appeal was of the opinion that the authorization stage is a mere screening mechanism and that, accordingly, the motion judge overstepped the bounds of this function.

After examining the applicable criteria and the allegations in Mr. Dell'Aniello's motion, the Court of Appeal held that there was in fact a common question at the heart of the class action, namely the validity or legality of the Amendments made to the Plan. The Court held:

[Translation] "[64] In this particular context, I believe that the main question at issue is whether the *2009 Amendments*, which apply to all members of the *Class*, are valid or lawful. That issue can obviously be broken down in turn into specific questions which together constitute the following related questions which the appellant has identified in this motion for authorization. Accordingly, if the analysis is based on the questions actually at issue rather than on factual differences that are not relevant at the preliminary stage, it is inappropriate to create subgroups in order to decide the

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motion."
The Court added that the multitude of legal principles which could apply to each group member was not the core of the dispute but involved the existence of vested rights.

The Court of Appeal held that the common question raised in Mr. Dell'Aniello's application for authorization to institute a class action is related for all the group members and that the subsequent questions the Court will have to decide if the action is authorized cannot be examined at the authorization stage.

THE SUPREME COURT OF CANADA DECISION[1]
The Court affirmed the Court of Appeal judgment and held that the Superior Court judge should have authorized the class action pursuant to the criteria set forth in article 1003 *C.C.P*.

Firstly, the Court of Appeal was justified in intervening and amending the authorization judgment. It is not up to the authorization judge to rule on the merits of the case. By acting as he did, the motion judge committed an error in assessing the relatedness criterion of article 1003 a) *C.C.P*.

For a question to be common in a class action, success for one member of the class does not necessarily have to lead to success for all the members. However, success for one member must not result in failure for another.

Thus, and particularly in Quebec, the relatedness requirement set out in the *Code of Civil Procedure* must be interpreted liberally. The Supreme Court warns against importing common law principles into the analysis of the tests set out in the *Code of Civil Procedure* and states:

"[52] Second, if art. 1003(a) is compared with the legislation of the common law provinces, it can be seen that the wording used to establish the commonality requirement is different in the latter. For example, the requirement is expressed in broader and more flexible terms in Quebec's *C.C.P.* than in Ontario's legislation, which requires the existence not merely of similar or related questions, but of "common issues": *Class Proceedings Act, 1992*, S.O. 1992, c. 6, s. 5(1)(c). Moreover, the wording of the Ontario statute is used in the legislation of all the other common law provinces of Canada that have legislated with respect to class actions: *Class Proceedings Act*, S.A. 2003, c. C 16.5, s. 5(1)(c); *Class Proceedings Act*, R.S.B.C. 1996, c. 50, s. 4(1)(c); *The Class Actions Act*, S.S. 2001, c. C 12.01, s. 6(1)(c); *Class Proceedings Act*, C.C.S.M. c. C130, s. 4(c); *Class Proceedings Act*, S.N.S. 2007, c. 28, s. 7(1)(c); *Class Proceedings Act*, R.S.N.B. 2011, c. 125, s. 6(1)(c); *Class Actions Act*, S.N.L. 2001, c. C 18.1, s. 5(1)(c)."

(emphasis added)

and further on:

"[57] Thus, the Quebec approach to authorization is more flexible than the one taken in the common law provinces, although the latter provinces do generally subscribe to an interpretation that is favourable to the class action. The Quebec approach is also more flexible than the current approach in the United States: *Wal-Mart Stores, Inc*. v. *Dukes*, 131 S. Ct. 2541 (2011). As Professor Lafond says, [TRANSLATION] "Quebec procedure surpasses in this regard the procedure of the other Canadian provinces, and of England and the United States, which struggle with the rigid concepts of 'same interest' or 'common interest', and of 'predominance of the common issues'": *Le recours collectif comme voie d'accès à la justice pour les consommateurs*, at p. 408."

In short, authorization judges should not place undue emphasis on the fact that several individual questions might have to be analyzed. Instead, they should ask themselves whether the person who wishes to bring a class action has established the presence of an identical, similar or related

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question that can serve to advance the resolution of all the class members' claims and that could ultimately have an effect on the outcome of the case.

According to the Supreme Court, the diversity of the legislative schemes that could apply to the individual claims also does not constitute a sufficient basis for refusing to authorize the class action.

The Supreme Court also points out that the principle of proportionality set out in article 4.2 *C.C.P*. is not a separate fifth criterion to be considered in assessing the authorization of a class action. Although the principle of proportionality may be used in assessing each of the criterion of article 1003 C.C.P., they are exhaustive. Where the authorization judge is of the opinion that the four criteria of article 1003 C.C.P. are met, he must authorize the class action without asking whether it is the most appropriate procedural vehicle.

The Supreme Court therefore held that the questions raised in Mr. Dell'Aniello's motion are sufficiently related and similar to justify a class action.

CONCLUSION

This decision reminds us firstly that the conditions for authorizing a class action are more liberal in Quebec than elsewhere in Canada, as the Supreme Court also recently noted in *Infineon*[4]. Although decisions involving the commonality requirement rendered by common law courts may sometimes be used as a guide, they must be analyzed with caution. In the United States, the courts apply the concept of the predominance of the common issues. In Quebec, it need only be shown that there is a common issue which is relevant and significant enough for all the class members, as the Court of Appeal pointed out in *Suroît*[5]. Furthermore, in our opinion, some class actions which raise intrinsically individual questions (such as misrepresentation in contractual matters) should not meet the requirements for authorizing an action.

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[1] *Vivendi Canada Inc.* v. *Dell'Aniello*, 2014 SCC 1, LeBel, Abella, Rothstein, Cromwell, Moldaver, Karakatsanis and Wagner, JJ. (reasons drafted by LeBel and Wagner, JJ.).

[2] *Dell'Aniello* v. *Vivendi Canda Inc.*, 2012 QCCA 384 (Jacques Chamberland, André Rochon and Jacques A. Léger, JJ.).

[3] *Dell'Aniello* v. *Vivendi Canada Inc.*, 2012 QCCS 3416 (Paul Mayer, J.).

[4] *Infineon Technologies A.G.* v. *Option consommateurs*, 2013 CSC 59.

[5] *Collectif de défense des droits de la Montérégie (CDDM)* v. *Centre hospitalier régional du Suroît du Centre de santé et de services sociaux du Suroît*, 2011 QCCA 826.

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