

CANADA / JUDGMENT

Vivendi Canada Inc. v. Dell’Aniello

2014 SCC 1

COURT

Supreme Court of Canada

DECIDED

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Vivendi Canada Inc. v. Dell’Aniello

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Case number

34800

Judges

LeBel, Louis; Abella, Rosalie Silberman; Rothstein, Marshall; Cromwell, Thomas Albert; Moldaver, Michael J.; Karakatsanis, Andromache; Wagner, Richard

On appeal from

Quebec

Subjects

Civil procedure

Notes

SCC Case Information: 34800

Decision Content

SUPREME COURT OF CANADA

Citation: Vivendi Canada Inc. v. Dell’Aniello, 2014 SCC 1, [2014] 1 S.C.R. 3

Date: 20140116

Docket: 34800

Between:

Vivendi Canada Inc.

Appellant

and

Michel Dell’Aniello

Respondent

- and -

Alliance of Manufacturers & Exporters of Canada, carrying on business as Canadian
Manufacturers & Exporters, and Canadian Chamber of Commerce

Interveners

Official English Translation

Coram: LeBel, Abella, Rothstein, Cromwell, Moldaver, Karakatsanis and Wagner JJ.

Reasons for Judgment:

(paras. 1 to 81)

LeBel and Wagner JJ. (Abella, Rothstein, Cromwell, Moldaver and Karakatsanis JJ. concurring)

Vivendi Canada Inc. v. Dell’Aniello, 2014 SCC 1, [2014] 1 S.C.R. 3

Vivendi Canada Inc. Appellant

v.

Michel Dell’Aniello Respondent

and

Alliance of Manufacturers & Exporters of Canada,
carrying on business as Canadian Manufacturers &

Exporters, and Canadian Chamber of Commerce Interveners

Indexed as: Vivendi Canada Inc. v. Dell’Aniello

2014 SCC 1

File No.: 34800.

2013: April 24; 2014: January 16.

Present: LeBel, Abella, Rothstein, Cromwell, Moldaver, Karakatsanis and Wagner JJ.

on appeal from the court of appeal for quebec

Civil procedure — Class actions — Conditions for authorization of action — Identical, similar or related questions of law or fact — Principle of proportionality — Application for authorization to institute class action on behalf of all beneficiaries of private health insurance plan in order to challenge validity of unilateral amendment made to plan by employer and in order to recover damages related to that amendment — Whether claims of all members of proposed group raise common question that can serve to advance resolution of litigation — Whether commonality requirement means that common answer necessary for all members of group — Whether motion judge can rely on principle of proportionality to refuse to authorize class action that otherwise meets four criteria established by legislature — Code of Civil Procedure, R.S.Q., c. C-25, arts. 4.2, 1003(a).

The litigation in this case arises out of a unilateral amendment made by V to the health insurance plan (“Plan”) of which it is the sponsor for its retirees and their surviving spouses. D filed a motion for authorization to institute a class action, on behalf of all the beneficiaries of the Plan, in order to challenge the validity of the amendment. The Superior Court dismissed the motion on the basis that the claims of all the members of the proposed group did not raise questions that were identical, similar or related, given the different rules governing each member’s right to insurance benefits. The Court of Appeal concluded that the judge who heard the motion for authorization had erred in his assessment with respect to the criterion set out in art. 1003(a) of the Code of Civil Procedure (“C.C.P.”), and that there was a question common to the claims of all the members of the group.

Held: The appeal should be dismissed.

Article 1003(a) C.C.P. provides that a class action may be authorized only if the court concludes that “the recourses of the members raise identical, similar or related questions of law or fact”. This commonality requirement applies not only in Quebec law, but also in that of all the common law provinces of Canada. However, the requirement is expressed in broader and more flexible terms in art. 1003(a) than in the legislation of the other provinces that have legislated with respect to class actions. To meet the commonality requirement of art. 1003(a) C.C.P., the applicant must show that an aspect of the case lends itself to a collective decision and that once a decision has been reached on that aspect, the parties will have resolved a not insignificant portion of the dispute. All that is needed in order to meet the requirement of art. 1003(a) is therefore that there be an identical, related or similar question of law or fact, unless that

question would play only an insignificant role in the outcome of the class action. It is not necessary that the question make a complete resolution of the case possible. The common questions do not have to lead to common answers. At the authorization stage, the approach taken to the commonality requirement in Quebec civil procedure is a flexible one. As a result, the criterion of art. 1003(a) may be met even if the common questions raised by the class action require nuanced answers for the various members of the group.

The fact that members of the group live in different Canadian provinces should not prevent the court from authorizing the class action, given that it can accept proof of the law applicable in the common law provinces or take judicial notice of that law. Only substantial differences between the applicable legal schemes would cause the action to lose its collective nature.

Moreover, art. 1003 is clear: the motion judge must authorize the class action if he or she is of the opinion that the four criteria are met. The judge does not have to ask whether a class action is the most appropriate procedural vehicle. The effect of the principle of proportionality set out in art. 4.2 C.C.P. is to reinforce the discretion judges are already acknowledged to have when considering each of the four criteria of art. 1003 C.C.P. However, the motion judge cannot rely on the principle of proportionality to refuse to authorize an action that otherwise meets the established criteria. The proportionality of the class action is not a separate fifth criterion.

In this case, the motion judge made two errors in assessing the criterion of art. 1003(a) C.C.P.: first, he ruled on the merits of the case by determining that the rights to insurance benefits of certain members of the group had not crystallized, thereby overstepping the bounds of the function of screening motions to which he should have limited himself; second, he adopted the wrong methodology by seeking common answers rather than merely identifying one or more questions that were common to the claims of all the members of the proposed group. As a result, this Court, like the Court of Appeal, must reopen the analysis under art. 1003(a) in light of the applicable principles. The main question raised in D's motion for authorization to institute a class action is whether the amendments made to the Plan in 2009 are valid or lawful. Those amendments had the effect of reducing, as of January 1, 2009, certain benefits promised to the retirees and surviving spouses. Since the claims of all the group's members are based on the Plan, the question of the validity or the legality of the 2009 amendments arises for all the members. The answer to this question can serve to advance the resolution of all the claims. Hence, there is a common question. The existence of subgroups within the proposed group does not on its own constitute a sufficient basis for refusing to authorize a class action. The circumstances of the various members of the group can differ as long as the members have no conflicting interests.

The validity or legality of the 2009 amendments and the other questions raised by D in his motion for authorization to institute a class action are the type of questions referred to in art. 1003(a) C.C.P. Since V has admitted that the conditions of art. 1003(c) and (d) are met and has not contested the Court of Appeal's decision finding that the one set out in art. 1003(b) is met, all the criteria of art. 1003 C.C.P. are met.

Cases Cited

Considered: *Western Canadian Shopping Centres Inc. v. Dutton*, 2001 SCC 46, [2001] 2 S.C.R. 534; *Rumley v. British Columbia*, 2001 SCC 69, [2001] 3 S.C.R. 184; referred to: *Hollick v. Toronto (City)*, 2001 SCC 68, [2001] 3 S.C.R. 158; *Bouchard v. Agropur Coopérative*, 2006 QCCA 1342, [2006] R.J.Q. 2349; *Union des consommateurs v. Bell Canada*, 2012 QCCA 1287, [2012] R.J.Q. 1243; *Harmegnies v. Toyota Canada inc.*, 2008 QCCA 380 (CanLII); *Union des consommateurs v. Bell Canada*, 2010 QCCA 351 (CanLII); *Infineon Technologies AG v. Option consommateurs*, 2013 SCC 59, [2013] 3 S.C.R. 600; *Marcotte v. Longueuil (City)*, 2009 SCC 43, [2009] 3 S.C.R. 65; *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 (CanLII); *Frey v. BCE Inc.*, 2011 SKCA 136, 377 Sask. R. 156; *Comité d'environnement de La Baie inc. v. Société d'électrolyse et de chimie Alcan ltée*, [1990] R.J.Q. 655; *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011); *Riendeau v. Compagnie de la Baie d'Hudson*, 2000 CanLII 9262; *Lallier v. Volkswagen Canada inc.*, 2007 QCCA 920, [2007] R.J.Q. 1490; *Del Guidice v. Honda Canada inc.*, 2007 QCCA 922, [2007] R.J.Q. 1496; *Kelly v. Communauté des Sœurs de la Charité de Québec*, [1995] J.Q. no 3377 (QL); *Brown v. B2B Trust*, 2012 QCCA 900 (CanLII); *General Motors du Canada ltée v. Billette*, 2009 QCCA 2476, [2010] R.J.Q. 66; *Apple Canada Inc. v. St-Germain*, 2010 QCCA 1376 (CanLII).

Statutes and Regulations Cited

Civil Code of Québec, S.Q. 1991, c. 64, arts. 2809, 3118.

Class Actions Act, S.N.L. 2001, c. C-18.1, s. 5(1)(c).

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, R.S.B.C. 1996, c. 50, s. 4(1)(c).

Class Proceedings Act, R.S.N.B. 2011, c. 125, s. 6(1)(c).

Class Proceedings Act, S.A. 2003, c. C-16.5, s. 5(1)(c).

Class Proceedings Act, S.N.S. 2007, c. 28, s. 7(1)(c).

Class Proceedings Act, 1992, S.O. 1992, c. 6, s. 5(1)(c).

Code of Civil Procedure, R.S.Q., c. C-25, arts. 4.2, 999(d) "class action", 1003.

Authors Cited

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Lafond, Pierre-Claude. *Le recours collectif comme voie d’accès à la justice pour les consommateurs*. Montréal: Thémis, 1996.

Lafond, Pierre-Claude. *Le recours collectif, le rôle du juge et sa conception de la justice: impact et évolution*. Cowansville, Qué.: Yvon Blais, 2006.

APPEAL from a judgment of the Quebec Court of Appeal (Chamberland, Rochon and Léger JJ.A.), 2012 QCCA 384, 95 C.C.P.B 165, [2012] J.Q. no 1611 (QL), 2012 CarswellQue 1613, SOQUIJ AZ-50834969, reversing a decision of Mayer J., 2010 QCCS 3416, 83 C.C.P.B. 22, [2010] J.Q. no 7459 (QL), 2010 CarswellQue 7870, SOQUIJ AZ-50662009. Appeal dismissed.

Sylvain Lussier, Michel Benoit and Julien Ranger-Musioli, for the appellant.

Claude Tardif and Catherine Massé-Lacoste, for the respondent.

Michael A. Feder and Pierre-Jérôme Bouchard, for the interveners.

English version of the judgment of the Court delivered by

LeBel and Wagner JJ. —

I. Overview

- [1] The class action, which was introduced into Quebec law in 1979, is “the procedure which enables one member to sue without a mandate on behalf of all the members” of a group: art. 999(d), Code of Civil Procedure, R.S.Q., c. C-25 (“C.C.P.”). This procedural vehicle has several objectives, including facilitating access to justice, modifying harmful behaviour and conserving judicial resources: *Hollick v. Toronto (City)*, 2001 SCC 68, [2001] 3 S.C.R. 158, at para. 15; *Western Canadian Shopping Centres Inc. v. Dutton*, 2001 SCC 46, [2001] 2 S.C.R. 534, at paras. 27-29.
- [2] In art. 1003 C.C.P., the Quebec legislature has laid down the essential conditions that must be met for a court to authorize the bringing of a class action. One of these conditions is that there be one or more questions of law or fact that are “identical, similar or related” for all the members of the group. It is this criterion that is at the heart of this appeal. More specifically, a court hearing an application for authorization must decide whether art. 1003(a) C.C.P. requires a common answer, for all the members of the group in question, to the common question raised by their claims.
- [3] The litigation in this case arises out of a unilateral amendment made by Vivendi Canada Inc. to the health insurance plan (“Plan”) of which it is the sponsor for its retirees and their surviving spouses. Mr. Dell’Aniello, the respondent in this appeal, filed a motion for

authorization to institute a class action, on behalf of all the beneficiaries of the Plan, in order to challenge the validity of the amendment. The Superior Court dismissed the motion on the basis that the claims of all the members of the proposed group did not raise questions that were “identical, similar or related”, having regard to each member’s particular situation. The Court of Appeal concluded that the judge who heard the motion for authorization had erred in his assessment with respect to the criterion set out in art. 1003(a) C.C.P., and that there was a question common to the claims of all the members of the group.

- [4] For the reasons that follow, we are of the opinion that the appeal must be dismissed. The Court of Appeal was right to intervene, as the motion judge had erred in inquiring into the possibility that the class action would lead to a common answer to the questions raised by the claims of all the members of the group. The C.C.P. requires not a common answer, but a common question that can serve to advance the resolution of the litigation with respect to all the members of the group. Moreover, by considering the merits of the dispute, the motion judge had also overstepped the bounds of his role of screening motions at the authorization stage.

II. Facts

- [5] Seagram Ltd. was established in 1857 and over time became Canada’s leading producer and distributor of wine and spirits. Seagram’s employees had generous conditions of employment, including the Plan.
- [6] According to a description set out in a document dated 1977, the Plan covered Seagram’s employees, and their dependents, both during the employees’ working lives and after they retired. The employees were required to contribute to the Plan while they were working, but Seagram paid all the costs after they retired.
- [7] Over the years, the Plan was revised several times. In particular, in July 1985, Seagram inserted a unilateral amendment clause in a footnote in the document that set out the details of the Plan. This clause read as follows:

While Seagram expects to continue this Supplementary Health Insurance Plan indefinitely, future conditions cannot be foreseen, thus it necessarily reserves the right to modify or suspend the Plan at any time. [A.R., vol. II, at p. 104]

- [8] In December 2000, Vivendi S.A. acquired Seagram, which had about 700 employees at the time. In December 2001, Seagram’s assets related to the production and distribution of wine and spirits were sold. As part of that transaction, Seagram became Vivendi Universal Canada Inc., which in turn became Vivendi Canada Inc. (“Vivendi”). Vivendi is therefore Seagram’s successor and the Plan’s sponsor.

[9] Seagram, and later Vivendi, complied fully with the terms of the Plan for many years. In September 2008, however, Vivendi told the Plan's beneficiaries that it would be making several changes to the Plan that were adverse to their interests. These changes took effect on January 1, 2009 ("2009 amendments"). As of that date, the Plan's only remaining members were retirees and surviving spouses, since Vivendi no longer had any operations in Canada related to the production and distribution of wine and spirits.

[10] As a result of the 2009 amendments, the respondent applied to the Quebec Superior Court for authorization to institute a class action against Vivendi and asked that court 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. [A.R., vol. II, at p. 2]

[11] The identical, similar or related questions of law or fact for which the respondent seeks a decision through the class action are as follows:

[translation] (a) For group members who are retirees, do the Plan's benefits constitute deferred compensation that is paid today in the form of benefits but was earned when they were active employees?

(b) From the date of their retirement, pursuant to the Plan and other documents cited herein, did the group members who are retirees have rights with respect to health care under the Plan that had vested or crystallized as of their retirement date and that could not be diminished without their consent?

(c) From the date of their retirement, in accordance with a general legal principle or a principle developed by the courts, did the group members who are retirees have rights with respect to health care under the Plan that had vested or crystallized as of their retirement date and that could not be diminished without their consent?

(d) Is the clause unilaterally inserted into the Plan in 1985 one whose purpose is to make it possible to harmonize the Plan with and adapt it to legislative changes, or does it instead authorize the respondent to unilaterally reduce the coverage of health care under the Plan for group members who are retirees in the absence of any legislative change obliging the respondent to do so?

(e) Assuming that the clause unilaterally inserted into the Plan in 1985 permitted the respondent to unilaterally reduce the coverage of health care under the Plan for group members who are retirees in the absence of any legislative change obliging the respondent to do so,

(1o) is the clause purely potestative, and is it null for that reason?

(2o) does the clause make the Plan contract non-binding, and is it null for that reason? or

(3o) does the clause make all the Plan's contractual obligations indeterminate or indeterminable, and is it null for that reason?

(f) Is the Plan a contract of adhesion, and if so, in case of doubt, must it be interpreted in favour of the adhering parties, that is, the members of the group? [A.R., vol. II, at pp. 15-16]

The purpose of all these questions is to answer the more general question whether the 2009 amendments are valid or lawful.

III. Judicial History

A. Quebec Superior Court (Mayer J.), 2010 QCCS 3416, 83 C.C.P.B. 22

[12] As we mentioned above, Mayer J. dismissed the motion for authorization to institute a class action on the basis that there were no questions that were identical, similar or related for all the members of the group. This conclusion was based on his opinion that too many factors specific to each member had to be considered for one or more of the questions to be decided collectively. Moreover, not all the group's members had in their possession, at the time they retired, the documents the respondent had in his.

[13] Mayer J. considered whether the questions raised in the motion for authorization to institute a class action were identical, similar or related, within the meaning of art. 1003(a) C.C.P., for all the members of the group. After identifying the principles established by the courts, he concluded that because of the large number of questions requiring individualized analyses, the claims of the members of the proposed group did not lend themselves to a collective resolution.

[14] Mayer J.'s conclusion that numerous individualized analyses would be necessary arose out of his interpretation of the rules governing the right of retirees to insurance benefits. He stated that it must be determined whether the right to insurance benefits during retirement has vested, because it is settled that an employer cannot modify or abolish a vested right without the retiree's consent. In his view, 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. For this, the contract in effect at the time of retirement must be examined together with the communications between the employer and each employee in order to determine whether any rights have vested.

[15] According to Mayer J., the respondent's premise that the question of vested rights could be considered collectively was wrong. The employees covered by the action had retired on different dates between 1971 and 2003, and the various groups of retirees had not all received the same communications from the employer. In addition, individual communications had been sent to the retirees. In Mayer J.'s opinion, it was essential to rule on the rights of the various members of the proposed group on the basis of the communications each of them had actually received. To proceed in any other way would be

unfair to Vivendi.

- [16] In support of his conclusion that it was necessary to conduct individual analyses, Mayer J. identified five subgroups. Subgroup 1 consisted of the surviving spouses of employees who had retired before January 1, 1977. According to Mayer J., the rights of these members could not be governed by the documents applicable to the respondent, since those documents had not existed at the time the employees in question retired. To determine the scope of the rights of the members of subgroup 1, it was instead necessary to consider the communications between the deceased employees and the employer before or at the time of their retirement. Mayer J. found that, according to the documents in the record, a surviving spouse was no longer eligible for insurance benefits after the retired employee died.
- [17] Subgroup 2 was made up of employees who had retired between January 1, 1977 and July 14, 1985, and the surviving spouses of such employees. When the employees in question retired, they had the 1977 benefit guide in their possession as well as the insurance policy issued by Sun Life of Canada. Mayer J. stated that because Seagram had reserved the right to terminate the insurance contract, the rights of the members of this subgroup to insurance benefits had not crystallized.
- [18] Subgroup 3 consisted of employees who had retired between July 15, 1985 and December 31, 1995, and the surviving spouses of such employees. At the time they retired, the employees in question had in their possession a letter from Mr. Kosiuk, a representative of Seagram, and the benefit guide prepared in 1985, which contained the unilateral amendment clause. As a result, Mayer J. found, that clause, according to which Vivendi could modify the insurance benefits, prevented the rights of the members of subgroup 3 from crystallizing.
- [19] Subgroup 4 was made up of employees who had retired between January 1, 1996 and June 20, 2000, and the surviving spouses of such employees. The employees in question had in their possession a letter from Mr. Wilson dated November 20, 1995 and the 1996 benefit guide. As with the members of subgroups 2 and 3, Mayer J. concluded that because Vivendi had retained the right to modify the Plan unilaterally, the rights of the members of subgroup 4 had not crystallized.
- [20] Finally, the members of subgroup 5, which included the respondent, were employees who had retired after June 21, 2000. A number of documents relating to the Plan, namely three emails from Mr. Borgia and a letter from Mr. Wilson, were sent, the first dated June 21, 2000, but not all the members of this subgroup had them in their possession when they retired.
- [21] This division into five subgroups of the group covered by the motion for authorization to institute a class action showed that not all the group's members had in their possession, at the time they retired, the documents the respondent had in his. As a result, Mayer J. found that the various group members had different rights. He also asserted that individual analyses would be required within each subgroup, since each member of a subgroup could have received documents or communications that the others had not received.

- [22] Mayer J. also noted that the unilateral amendment clause did not apply to those who had retired before July 15, 1985, who made up 20 percent of the group. It was therefore irrelevant to the analysis on the vesting of the rights of those retirees, and a decision concerning the interpretation or the validity of the clause would not serve to advance the resolution of the litigation with respect to those individuals.
- [23] Mayer J. also stated that the injury allegedly suffered by the group's members could be established only on an individual basis. This was another factor that weighed against authorizing the class action.
- [24] Finally, given that the proposed group's members had worked in six different provinces, this lack of homogeneity was, in Mayer J.'s view, another relevant factor that supported a refusal to authorize the class action. The law of the common law provinces would apply to the retirees who had worked in those provinces, whereas Quebec law would apply to those who had worked in Quebec. In light of the number of subgroups and different legislative schemes that would apply to the various questions, he concluded that a minimum of 22 separate analyses would be needed to answer the questions the respondent said to be "common".
- [25] Mayer J. therefore found that, because of this [translation] "range of individual recourses", the requirement set out in art. 1003(a) C.C.P. was not met: para. 137. As a result, he dismissed the respondent's motion for authorization to institute a class action.

B. Quebec Court of Appeal (Chamberland, Rochon and Léger JJ.A.), 2012 QCCA 384, 95 C.C.P.B. 165

- [26] The Court of Appeal unanimously allowed the appeal, authorized the institution of a class action and ascribed the status of representative to the respondent. It held that Mayer J. had erred in finding that the condition set out in art. 1003(a) C.C.P. was not met. It also concluded that the question whether the 2009 amendments were valid or lawful was common to all the members of the group.
- [27] The Court of Appeal found that the motion judge had erred in law by ruling on the merits on the question whether the 2009 amendments were valid in relation to the members of the group. All the Superior Court had to do at the authorization stage was decide whether the questions relating to the validity or the legality of the 2009 amendments were identical, similar or related for the claims of all the members of the proposed group.
- [28] According to the Court of Appeal, Mayer J. had instead focused on the individual questions that might arise in light of the different rules governing each member's right to insurance benefits. In so doing, Mayer J. had ruled on the merits of the arguments raised by the appellant and the respondent, thereby overstepping the bounds of his function of screening motions at the authorization stage.

- [29] The Court of Appeal concluded that, [translation] “by taking the fragmentation of the subgroups too far and deciding the question of vested rights, [Mayer J.] disregarded the prima facie case requirement and, without saying so, indirectly ruled on the validity of the 1985 clause in which the employer reserved the right to modify the Plan in the future”: para. 53.
- [30] The Court of Appeal then considered whether the validity or the legality of the 2009 amendments was a question common to all the members of the group for the purposes of art. 1003(a) C.C.P. The court held that it was. First of all, the court stated on the basis of this Court’s decision in Dutton that questions that are common to all the members of the group can coexist with questions that concern individuals; all that is needed is that there be a common, related or similar question. In the context of the case at bar, the Court of Appeal accepted that the main question at issue was whether the 2009 amendments were valid or lawful and that this question applied to all the members of the group. The members had all entered into a contract of employment with Seagram, and subsequently Vivendi, that provided for certain benefits, including the Plan. According to the Court of Appeal, the main question raised by the motion could give rise to serious argument. If the analysis with respect to the criterion set out in art. 1003(a) C.C.P. is based on the questions actually at issue rather than on factual differences that are not relevant at the preliminary stage, it is inappropriate for the judge hearing the motion for authorization to create subgroups in order to decide the motion.
- [31] The Court of Appeal also stated that the prima facie case requirement of art. 1003(b) C.C.P. was met. Therefore, since the criteria of art. 1003(a) and (b) C.C.P. were met and the appellant had admitted that the motion met the criteria set out in art. 1003(c) and (d), the Court of Appeal set aside the motion judge’s judgment and authorized the class action.

IV. Analysis

A. Issues

- [32] In this appeal, the Court must resolve two issues. First, did the motion judge make an error that justified the Court of Appeal’s intervention? Second, if the motion judge erred, we will decide whether the respondent’s questions are identical, similar or related within the meaning of art. 1003(a) C.C.P.

B. Did the Motion Judge Make an Error That Justified the Court of Appeal’s Intervention?

- [33] Article 1003 C.C.P., which establishes the conditions for authorizing a class action, confers significant discretion on the court hearing a motion for authorization. In its opening words, the expression “if of opinion that” introduces an enumeration of the criteria to be met:

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.
- [34] The Quebec Court of Appeal, mindful of the importance of the motion judge's discretion with respect to the criteria set out in art. 1003 C.C.P., has stated on many occasions that its power to intervene in this regard is limited and that it must show deference to the motion judge's decision. It will therefore intervene in an appeal from a decision on a motion for authorization to institute a class action only if the motion judge erred in law or if the judge's assessment with respect to the criteria of art. 1003 C.C.P. is clearly wrong: *Bouchard v. Agropur Coopérative*, 2006 QCCA 1342, [2006] R.J.Q. 2349, at para. 42; *Union des consommateurs v. Bell Canada*, 2012 QCCA 1287, [2012] R.J.Q. 1243, at paras. 45-46; *Harmegnies v. Toyota Canada inc.*, 2008 QCCA 380 (CanLII), at paras. 25-26; *Union des consommateurs v. Bell Canada*, 2010 QCCA 351 (CanLII), at para. 23.
- [35] A class action may be authorized only if the four criteria of art. 1003 C.C.P. are met. If the motion judge errs in law or if his or her assessment with respect to any criterion of art. 1003 C.C.P. is clearly wrong, the Court of Appeal can substitute its own assessment, but only for that criterion and not for the others. An error in relation to one criterion does not give the Court of Appeal carte blanche to reconsider all the other criteria to be met before the bringing of a class action may be authorized.
- [36] In the instant case, the appellant argues that the Court of Appeal erred in substituting its own assessment for that of the Superior Court on the basis that the Superior Court had decided certain aspects of the case on the merits. The appellant further argues that even if the motion judge did make such an error, the error did not authorize the Court of Appeal to substitute its own analysis with respect to the identical, similar or related question criterion of art. 1003(a) for that of the motion judge. For the reasons that follow, we are of the opinion that the Court of Appeal was right to intervene.
- (1) Role of a Judge Hearing an Application for Authorization to Institute a Class Action
- [37] The judge's function at the authorization stage is one of screening motions to ensure that defendants do not have to defend against untenable claims on the merits: *Infineon Technologies AG v. Option consommateurs*, 2013 SCC 59, [2013] 3 S.C.R. 600, at paras. 59 and 61. However, the law does not impose an onerous burden on the applicant at this stage, as he or she need only establish a "prima facie case", or an "arguable case": *Infineon*, at paras. 61-67; *Marcotte v. Longueuil (City)*, 2009 SCC 43, [2009] 3 S.C.R. 65, at para. 23. Thus, all the judge must do is decide whether the applicant has shown that the four criteria of art. 1003 C.C.P. are met. If the answer is yes, the class action will be authorized. The Superior Court

will then consider the merits of the case. In considering whether the criteria of art. 1003 are met at the authorization stage, the judge is therefore deciding a procedural question. The judge must not deal with the merits of the case, as they are to be considered only after the motion for authorization is granted: *Infineon*, at para. 68; *Marcotte*, at para. 22.

[38] Article 1003(a) C.C.P. provides that a class action may be authorized only if the court concludes that “the recourses of the members raise identical, similar or related questions of law or fact”. This commonality requirement applies not only in Quebec law, but also in that of all the common law provinces of Canada.

[39] We will therefore turn now to the principles to be applied in deciding whether a class action raises a common question that meets the criterion of art. 1003(a). These principles can be found, *inter alia*, in the decisions of this Court and of the Quebec Court of Appeal.

(a) Principles From *Dutton* and *Rumley*

[40] We must consider a few important decisions of this Court. Although they were rendered in cases based on the common law, they are nevertheless often relied on and discussed in decisions of the Quebec courts. However, a few caveats are in order as regards their application in Quebec civil procedure. We will return to this point below.

[41] In *Dutton*, this Court laid down certain principles to be applied in deciding whether a class action raises one or more issues that are common to the claims of all the members of a class. *McLachlin C.J.*, writing for the Court, stated the following:

Commonality tests have been a source of confusion in the courts. The commonality question should be approached purposively. The underlying question is whether allowing the suit to proceed as a representative one will avoid duplication of fact-finding or legal analysis. Thus an issue will be “common” only where its resolution is necessary to the resolution of each class member’s claim. It is not essential that the class members be identically situated vis-à-vis the opposing party. Nor is it necessary that common issues predominate over non-common issues or that the resolution of the common issues would be determinative of each class member’s claim. However, the class members’ claims must share a substantial common ingredient to justify a class action. Determining whether the common issues justify a class action may require the court to examine the significance of the common issues in relation to individual issues. In doing so, the court should remember that it may not always be possible for a representative party to plead the claims of each class member with the same particularity as would be required in an individual suit. [Emphasis added; para. 39.]

[42] Although *Dutton* was based on the procedural law of Alberta, the principles laid down by this Court with respect to the commonality requirement have been applied by the Quebec Court of Appeal on many occasions. In *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 (CanLII), for example, the Court of Appeal noted that an issue will be considered common for the purposes of art. 1003(a) C.C.P. if addressing the issue enables all

the claims to move forward:

[translation] A single common, related or similar issue of law suffices to meet the condition in article 1003(a) CCP if it is significant enough to affect the outcome of the class action; however, it need not be determinative of the final resolution of the case: *Comité d'environnement de la Baie inc. v. Société de l'électrolyse et de chimie de l'Alcan ltée*, [1990] R.J.Q. 655 (C.A.), at paras. 22 and 23. It is sufficient that it allows the claims to move forward without duplication of the judicial analysis (Pierre-Claude Lafond, *Le recours collectif, le rôle du juge et sa conception de la justice*, Cowansville, Yvon Blais, 2006, at p. 92; *Western Canadian Shopping Centres Inc. v. Dutton*, [2001] 2 S.C.R. 534, at para. 39).

It is quite possible that the determination of common issues does not lead to the complete resolution of the case, but that it results instead in small trials at the stage of the individual settlement of the claims. This does not preclude a class action suit. Professor Lafond, *supra*, writes at pages 88-89:

Differences in members' claims and the possible need for each member to prove the personal damages suffered no longer bar a class action suit. As pragmatically stated by a court magistrate: "In the event of a monetary award, some accounting work would be inevitable, at the most." [paras. 22-23]

See also *Union des consommateurs* (2012), at paras. 67-68.

[43] In *Dutton*, this Court also stated that, for there to be a "common issue", success for one member of the class must bring with it a benefit for all the others:

All members of the class must benefit from the successful prosecution of the action, although not necessarily to the same extent. A class action should not be allowed if class members have conflicting interests. [para. 40]

[44] In *Rumley v. British Columbia*, 2001 SCC 69, [2001] 3 S.C.R. 184, this Court confirmed the principles from *Dutton*. In the case of the commonality requirement, the purpose of the analysis is to determine "whether allowing the suit to proceed as a representative one will avoid duplication of fact-finding or legal analysis": para. 29, quoting *Dutton*, at para. 39. The Court also stated that a question can remain common even though the answer to the question could be nuanced to reflect individual claims: para. 32.

[45] Having regard to the clarifications provided in *Rumley*, it should be noted that the common success requirement identified in *Dutton* must not be applied inflexibly. A common question can exist even if the answer given to the question might vary from one member of the class to another. Thus, for a question to be common, 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.

- [46] Dutton and Rumley therefore establish the principle that a question will be considered common if it can serve to advance the resolution of every class member's claim. As a result, the common question may require nuanced and varied answers based on the situations of individual members. The commonality requirement does not mean that an identical answer is necessary for all the members of the class, or even that the answer must benefit each of them to the same extent. It is enough that the answer to the question does not give rise to conflicting interests among the members.
- [47] There is nothing new about this flexible approach to the commonality requirement. It was adopted by the Saskatchewan Court of Appeal in *Frey v. BCE Inc.*, 2011 SKCA 136, 377 Sask. R. 156:

Having regard for these authorities, the common issue requirement, "success for one is success for all", may in appropriate cases be met in circumstances where different results may be possible for different class members, provided there is no conflict among the class members, in the sense that success for one class member must not mean failure for another. [para. 60]

(b) Application of the Principles in Light of the C.C.P.

- [48] Caution must be exercised when applying the principles from Dutton and Rumley to the rules of Quebec civil procedure relating to class actions. Although those decisions have now been recognized in Quebec law and have been cited and applied many times by Quebec courts, the issue that is central to this appeal nonetheless shows that it is necessary to clarify the relevance and scope of the principles in question in the context of Quebec procedural law. Dutton and Rumley certainly provide a general framework for analyzing the application of the commonality requirement, but it must be borne in mind that tests established in a common law context cannot necessarily be imported without adaptation into Quebec civil procedure.
- [49] To determine how the principles from Dutton and Rumley apply in Quebec law, we will analyze the wording of the C.C.P. first, before considering the principles developed by the Quebec courts.
- [50] The source of the commonality requirement in Quebec civil procedure is art. 1003 C.C.P., which requires that "the recourses of the members raise identical, similar or related questions of law or fact".
- [51] Two observations are in order with respect to the wording of art. 1003(a) C.C.P. First, this paragraph provides that a class action can be authorized only if the questions are common. Nowhere has the legislature stated that there must be common answers.
- [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).

- [53] Although the expression “common issues” is frequently used by Quebec judges and authors, its content is not exactly the same as that of the expression “identical, similar or related questions of law or fact”. It would be difficult to argue that a question that is merely “related” or “similar” could always meet the “common issue” requirement of the common law provinces. The test that applies in Quebec law therefore seems to be less stringent. Because of the differences in the wording of the applicable legislation, the case law on class actions from the common law provinces is not determinative where the application of the criterion of art. 1003(a) is concerned.
- [54] In addition, it can be seen from the Quebec courts’ interpretation of art. 1003(a) C.C.P. that their approach to the commonality requirement has often been broader and more flexible than the one taken in the common law provinces. The Quebec courts propose a flexible approach to the common interest that must exist among the group’s members: P.-C. Lafond, *Le recours collectif comme voie d’accès à la justice pour les consommateurs* (1996), at p. 408.
- [55] As this Court noted in *Marcotte*, at para. 22, the courts have, by interpreting and applying the criteria of art. 1003 C.C.P. broadly, favoured easier access to the class action: see also *Infineon*, at para. 60.
- [56] In the specific case of the commonality requirement, the Quebec Court of Appeal has consistently favoured a broad definition of the conditions that make it possible to satisfy the requirement of art. 1003(a). It laid the groundwork for this approach in *Comité d’environnement de La Baie inc. v. Société d’électrolyse et de chimie Alcan ltée*, [1990] R.J.Q. 655, in which it made the following comment:

But Article 1003(a) does not require that all of the questions of law or of fact in the claims of the members be identical or similar or related. Nor does the article even require that the majority of these questions be identical or similar or related. From the text of the article, it is sufficient if the claims of the members raise some questions of law or of fact that are sufficiently similar or sufficiently related to justify a class action. [*Italics in original; underlining added; p. 659.*]

- [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.

[58] There is one common theme in the Quebec decisions, namely that the C.C.P.’s requirements for class actions are flexible. As a result, even where circumstances vary from one group member to another, a class action can be authorized if some of the questions are common: *Riendeau v. Compagnie de la Baie d’Hudson*, 2000 CanLII 9262 (Que. C.A.), at para. 35; *Comité d’environnement de La Baie*, at p. 659. To meet the commonality requirement of art. 1003(a) C.C.P., the applicant must show that an aspect of the case lends itself to a collective decision and that once a decision has been reached on that aspect, the parties will have resolved a not insignificant portion of the dispute: *Harmegnies*, at para. 54; see also *Lallier v. Volkswagen Canada inc.*, 2007 QCCA 920, [2007] R.J.Q. 1490, at paras. 17-21; *Del Guidice v. Honda Canada inc.*, 2007 QCCA 922, [2007] R.J.Q. 1496, at para. 49; *Kelly v. Communauté des Sœurs de la Charité de Québec*, [1995] J.Q. no 3377 (QL), at para. 33. All that is needed in order to meet the requirement of art. 1003(a) C.C.P. is therefore that there be an identical, related or similar question of law or fact, unless that question would play only an insignificant role in the outcome of the class action. It is not necessary that the question make a complete resolution of the case possible: *Collectif de défense des droits de la Montérégie (CDDM)*, at paras. 22-23.

[59] In short, it can be concluded that the common questions do not have to lead to common answers. At the authorization stage, the approach taken to the commonality requirement in Quebec civil procedure is a flexible one. As a result, the criterion of art. 1003(a) may be met even if the common questions raised by the class action require nuanced answers for the various members of the group.

[60] In light of these principles, we are of the opinion that the motion judge was mistaken in emphasizing the possibility that numerous individual questions would ultimately have to be analyzed. He should instead have inquired into whether the condition provided for in art. 1003(a) was met, that is, whether the applicant had established the existence of a common question that would serve to advance the resolution of the litigation with respect to all the members of the group, and that would not play an insignificant role in the outcome of the case.

(c) Places of Residence of the Group’s Members

[61] The group proposed by the respondent includes 250 retirees or surviving spouses of employees who worked in six provinces: Quebec (134 members), Ontario (82 members), Alberta (3 members), British Columbia (16 members), Saskatchewan (2 members) and Manitoba (13 members). Since no applicable law was designated in the contracts of employment of the various employees, the law of the province where each employee worked would have to apply to that employee’s case (art. 3118 of the Civil Code of Québec, S.Q. 1991, c. 64 (“C.C.Q.”)). According to the motion judge, the multitude of legal schemes applicable to

the individual claims is an additional difficulty that demonstrates the proposed group's lack of homogeneity.

[62] However, the fact that the employees worked in six different provinces is not in itself a bar to the authorization of the class action. In a class action, the court can accept proof of the law applicable in the common law provinces or take judicial notice of that law: art. 2809 C.C.Q. Only substantial differences between the applicable legal schemes would cause a class action to lose its collective nature: *Union des consommateurs* (2012), at paras. 120 and 123.

[63] In the case at bar, the fact that members of the group live in different Canadian provinces should not prevent the court from authorizing the class action. There are common questions in the claims of the members of the proposed group with respect to the legality or the validity of the 2009 amendments.

(d) Principle of Proportionality

[64] The principle of proportionality, which is recognized in Quebec civil procedure, is set out in art. 4.2 C.C.P.:

4.2. In any proceeding, the parties must ensure that the proceedings they choose are proportionate, in terms of the costs and time required, to the nature and ultimate purpose of the action or application and to the complexity of the dispute; the same applies to proceedings authorized or ordered by the judge.

[65] The appellant submits that an interpretation of art. 1003(a) that encourages a multiplicity of substantive analyses is contrary to the principle of proportionality. It bases its position primarily on the reasons of the majority in *Marcotte*, in which LeBel J. stated that the principle of proportionality must not be limited “to a principle of interpretation that confers no real power on the courts in respect of the conduct of civil proceedings in Quebec”: para. 42.

[66] In our view, the approach proposed by the appellant is wrong. *Marcotte* confirmed the importance of the principle of proportionality in civil procedure, and as a source of the courts' power to intervene in the management of a case: paras. 42-43. In the class action context, however, the judge's discretion in respect of the application of the four criteria of art. 1003 C.C.P. must be reconciled with the power provided for in art. 4.2 C.C.P.: *Bouchard*, at paras. 37, 41 and 44; *Harmegnies*, at paras. 20-22. In our view, insofar as the four criteria set out in art. 1003 C.C.P. are exhaustive, and it is our opinion that they are, the principle of proportionality must be considered in the assessment with respect to each of these criteria. The proportionality of the class action is not a separate fifth criterion.

[67] This conclusion is supported by the wording of the legislation and by the case law. In enacting the class action provisions of the C.C.P., the Quebec legislature did not consider it appropriate to require that a class action be the “preferable” procedure for the resolution of the dispute or the common issues, which is the criterion found in the legislation of other provinces. Caution therefore dictates that such a criterion not be introduced indirectly into

Quebec's rules of civil procedure. Article 1003 is clear: the motion judge must authorize the class action if he or she is of the opinion that the four criteria are met. The judge does not have to ask whether a class action is the most appropriate procedural vehicle.

- [68] The Quebec case law leads to the same conclusion. As Baudouin J.A. stated in *Harmegnies*, the judge's discretion [translation] "is exercised in the context, and only in the context, of the four requirements established by the legislature": para. 22; see also *Brown v. B2B Trust*, 2012 QCCA 900 (CanLII), at para. 67; *General Motors du Canada ltée v. Billette*, 2009 QCCA 2476, [2010] R.J.Q. 66, at para. 44; *Apple Canada Inc. v. St-Germain*, 2010 QCCA 1376 (CanLII), at paras. 55-57; P.-C. Lafond, *Le recours collectif, le rôle du juge et sa conception de la justice: impact et évolution* (2006), at pp. 153-54; É. M. David, "La règle de proportionnalité de l'article 4.2 C.p.c. en matière de recours collectif — Premières interprétations jurisprudentielles", in *Service de la formation continue du Barreau du Québec, Développements récents en recours collectifs* (2007), 315, at p. 335. The effect of the principle of proportionality is to reinforce the discretion judges are already acknowledged to have when considering each of the four criteria of art. 1003 C.C.P.: Marcotte, at para. 85. However, the motion judge cannot rely on the principle of proportionality to refuse to authorize an action that otherwise meets the established criteria.

(2) Errors Made by the Motion Judge

- [69] In assessing the criterion of art. 1003(a) C.C.P., the motion judge made two errors. First, he ruled on the merits of the case by determining that the rights to insurance benefits of certain members of the group had not crystallized. Second, he adopted the wrong methodology by seeking common answers rather than merely identifying one or more questions that were common to the claims of all the members of the proposed group. We will consider each of these errors in turn.
- [70] It is clear from the motion judge's reasons that he ruled on the merits of the case. When discussing the reasons why the rules governing the retirees' right to insurance benefits would require an individualized analysis, he decided on the right of certain members to receive such benefits following the insertion of the unilateral amendment clause and the making of the 2009 amendments. It is clear from the following paragraphs from his reasons that he considered the merits on certain of the questions raised in the motion for authorization, thereby overstepping the bounds of the function of screening motions to which he should have limited himself:

[translation] The right of the members of Subgroup 2 to post-retirement insurance benefits did not crystallize, since the employer reserved the power to terminate the insurance coverage. A right to resiliate such as this is in fact inconsistent with an intention to confer a vested right.

The section of the 1977 benefit guide entitled "Termination of Coverage" / "Cessation de l'assurance" indicates clearly that the employer is free to terminate the insurance coverage at any time by resiliating the group insurance contract:

...

The right of the members of Subgroup 3 to post-retirement insurance benefits did not crystallize, since the employer expressly reserved the right to modify or terminate the insurance coverage.

...

The right of the members of Subgroup 4 to post-retirement insurance benefits did not crystallize, since the employer expressly reserved the right to modify or terminate the insurance coverage. [Emphasis added; paras. 92-93, 98 and 103.]

[71] The appellant argues that the motion judge expressly stated that he was not ruling on the prima facie case requirement of art. 1003(b) C.C.P. and that, as a result, the above-quoted passages cannot be interpreted as decisions on substantive questions. With respect, the appellant is confusing the conclusion required by art. 1003(b) — that the facts alleged in the motion for authorization seem to justify the conclusions being sought — with a ruling on the merits by the motion judge on certain questions. As we have already said, the motion judge performs a function of screening motions; this is a procedural stage that does not involve consideration of the questions on the merits. The motion judge must inquire into whether the four criteria of art. 1003 C.C.P. are met. The questions can be decided on the merits only by the trial judge, after authorization to institute the class action has been granted.

[72] The motion judge also took the wrong approach in his analysis with respect to the criterion of art. 1003(a) C.C.P. Rather than determining whether the claims of all the members of the proposed group raised an identical, similar or related question that could serve to advance the resolution of the litigation, he asked whether there were common answers to the questions raised in the motion for authorization to institute a class action. This approach is clear from paras. 69 and 70 of his reasons:

[translation] In the case at bar, the Court finds that because of the large number of questions requiring an individualized analysis for each member of the proposed group, the Applicant's action does not lend itself to a collective resolution.

If the action is authorized, the trial judge will have to conduct a detailed review of a multitude of individual circumstances before he or she will be able to determine whether the 2009 amendments apply to each member of the group.

At the authorization stage, the judge must simply determine whether one or more questions exist that are common to the claims of all the members of the proposed group. As we mentioned above, at this stage, the threshold that must be met to find that there are common questions is a low one.

[73] In this case, the errors made by the motion judge warranted the intervention of the Court of Appeal.

C. Are the Questions Raised in the Motion for Authorization to Institute a Class Action Identical, Similar or Related Within the Meaning of Article 1003(a) C.C.P.?

- [74] We have found that the motion judge erred in law in requiring answers that were common to the claims of all the members of the proposed group. As a result, this Court, like the Court of Appeal, must reopen the analysis under art. 1003(a) in light of the applicable principles.
- [75] In this case, the main question raised in the respondent's motion for authorization to institute a class action is whether the amendments made to the Plan in 2009 are valid or lawful. Those amendments had the effect of reducing, as of January 1, 2009, certain benefits promised to the retirees and surviving spouses. Since the claims of all the group's members are based on the Plan, the question of the validity or the legality of the 2009 amendments arises for all the members. The answer to this question can serve to advance the resolution of all the claims. Hence, there is a common question.
- [76] A few comments must be made about the existence of subgroups in light of the motion judge's conclusion that the large number of subgroups was a factor that supported the dismissal of the motion for authorization. With respect, that conclusion conflicts with the principles established by the courts regarding the relevance of subgroups at the authorization stage. In several Canadian provinces, including Quebec, the existence of subgroups within the proposed group does not on its own constitute a sufficient basis for refusing to authorize a class action: W. K. Branch, *Class Actions in Canada*, vol. 1 (loose-leaf), at p. 4-103; Dutton, at para. 54; Rumley, at para. 32. As we mentioned above, the circumstances of the various members of the group can differ as long as the members have no conflicting interests.
- [77] Moreover, as this Court stated in Dutton, if material differences emerge, the court will deal with them at trial: para. 54. The creation of subgroups will become relevant at that stage, when the judge answers the questions in light of the facts applicable to each member of the group. We therefore agree with the Court of Appeal that a subgroup analysis is neither necessary nor relevant at the authorization stage: para. 66.
- [78] In the instant case, if the review of the claims led to different outcomes for the different subgroups or for different members of the subgroups, that would not necessarily mean that their interests are in conflict. It is more likely that the success or failure of the claims will depend on a key date or a specific term in the subgroup's contract of employment. The possible answers are therefore not mutually exclusive. Success for one subgroup or one member does not mean failure for another. In other words, there are no conflicting interests among the members of the group.

[79] In our opinion, there is in this case, as required by art. 1003(a) C.C.P., a question common to the claims of all the members of the proposed group: whether the 2009 amendments are valid or lawful. The answer to this question may have to be nuanced on the basis of the retirement dates of the various members of the group, or of other circumstances specific to individual members.

V. Conclusion

[80] The validity or legality of the 2009 amendments and the other questions raised by the respondent in his motion for authorization to institute a class action are the type of questions referred to in art. 1003(a) C.C.P. Since Vivendi has admitted that the conditions of art. 1003(c) and (d) are met and has not contested the Court of Appeal's decision finding that the one set out in art. 1003(b) is met, all the criteria of art. 1003 C.C.P. are met.

[81] We would therefore affirm the judgment of the Court of Appeal and dismiss the appeal with costs.

Appeal dismissed with costs.

Solicitors for the appellant: Osler, Hoskin & Harcourt, Montréal.

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Solicitors for the interveners: McCarthy Tétrault, Vancouver.

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