COURT OF APPEAL

CANADA
PROVINCE OF QUEBEC
REGISTRY OF MONTREAL

No: 500-09-029740-214, 500-09-029791-217, 500-09-029964-228
(500-06-000816-161)

DATE: January 11, 2023

CORAM: THE HONOURABLE **MARTIN VAUCLAIR, J.A.**
STEPHEN W. HAMILTON, J.A.
GUY COURNOYER, J.A.

OPTION CONSOMMATEURS
APPELLANT – Plaintiff

v.

SAMSUNG ELECTRONICS CANADA INC.
SAMSUNG ELECTRONICS CO., LTD.
RESPONDENTS – Defendants

JUDGMENT

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[1] The Appellant was granted leave to appeal three related judgments rendered by the Superior Court in the District of Montreal (the Honourable Gregory Moore), each of which addresses issues raised during the pre-trial examination of the representative of the Respondent Samsung Electronics Canada Inc.

[2] For the reasons of Justice Hamilton, with which Justices Vauclair and Cournoyer concur, **THE COURT:**

[3] **GRANTS** the Appellant's motion for permission to present indispensable new evidence, without costs.

In file 500-09-029740-214:

[4] **ALLOWS** the appeal in part;

[5] **OVERTURNS** in part the judgment rendered by the Superior Court in the District of Montreal (the Honourable Gregory Moore) on September 13, 2021 and corrected on October 7, 2021;

[6] **DISMISSES** the objection to the request for undertaking U-17;

[7] Without legal costs given the divided outcome of the appeal;

In file 500-09-029791-217:

[8] **ALLOWS** the appeal;

[9] **OVERTURNS** in part the judgment rendered by the Superior Court in the District of Montreal (the Honourable Gregory Moore) on October 28, 2021;

[10] **ORDERS** that the examination of the Respondent Samsung Electronics Canada Inc. representative authorized by the judge cover the following additional subject: "interactions entre SECA [Samsung Canada] et les membres du groupe dans le cadre du rappel";

[11] With legal costs of the appeal;

In file 500-09-029964-228:

[12] **ALLOWS** the appeal;

[13] **OVERTURNS** in part the judgment rendered by the Superior Court in the District of Montreal (the Honourable Gregory Moore) on March 2, 2022;

[14] **ORDERS** the Respondent Samsung Electronics Canada Inc. to provide versions of the responses to undertakings U-6, U-10, U-11 and U-12 that include the names and the contact information (including address, telephone number and e-mail address, to the extent that the information is available) for all Quebec residents included in the responses;

[15] With legal costs of the appeal and in first instance.

MARTIN VAUCLAIR, J.A.

STEPHEN W. HAMILTON, J.A.

GUY COURNOYER, J.A.

Mtre Maxime Nasr
Mtre Violette Leblanc
Mtre Jean-Philippe Lincourt
Mtre Léanie Cardinal
BELLEAU LAPOINTE
For Appellant

Mtre Joséane Chrétien
Mtre Yassin Élise Gagnon-Djalo
MCMILLAN
For Respondents

Date of hearing: December 13, 2022
Date taken under advisement: December 16, 2022

REASONS OF HAMILTON, J.A.

[16] The Appellant was granted leave to appeal three related judgments rendered by the Superior Court in the District of Montreal (the Honourable Gregory Moore), each of which addresses issues raised during the pre-trial examination of the representative of the Respondent Samsung Electronics Canada Inc.:

- The first judgment, which was rendered on September 13, 2021 and corrected on October 7, 2021, maintained certain objections raised by the Respondents;
- The second judgment, rendered on October 28, 2021, authorized the examination of another representative of Samsung Canada, but limited its scope; and
- The third judgment, rendered on March 2, 2022, ordered the Respondents to comply with three undertakings, but allowed them to redact certain information from the documents to be provided.

[17] The pre-trial examination took place in the context of a class action instituted by the Appellant against Samsung Canada and its parent Samsung Electronics Co. Ltd. In brief, the Appellant alleges that the top-loading washing machines manufactured by Samsung and sold in Quebec by Samsung Canada have a hidden defect that results in excessive vibrations which can cause the machines to tip over or can cause the lids to come off. In order to reduce this risk, consumers are forced to limit their use of certain washing cycles. Prior to the institution of the class action, Samsung Canada had announced a voluntary product recall, whereby it offered consumers two choices: a free in-home repair combined with a one-year extension of the manufacturer's warranty, or a rebate that can be applied towards the purchase of a new Samsung washer. It also compensated consumers whose washers were damaged.

[18] The Appellant maintains that the recall is inadequate and that the class members are entitled to be reimbursed their purchase price and any accessory costs, as well as damages for the trouble and inconvenience resulting from the use of the washers and punitive damages.

[19] The Appellant examined a representative of Samsung Canada before trial. There were numerous objections to questions and to requests for undertakings, disputes as to the responses that were provided and a request for permission to examine a second representative on questions that the first representative could not answer, which resulted

in the three judgments under appeal. The specific issues raised in the appeals are the following:

(1) The judge maintained the Respondents' objections to the following requests for undertakings:

- **U-8:** "To provide copy of the email sent to retailers re: recall notice, with copy of responses from retailers";
- **U-14:** "To verify whether conversations with consumers were recorded; if so, to provide copy of the recordings"; and
- **U-17:** "To verify whether there is a record re: the 4,694 class members; if so, to provide copy of same".

(2) The judge allowed the Respondents to redact the names and contact information of the consumers from the responses to the following undertakings:

- **U-6:** "To provide copy of the 64 reports re: tops detaching";
- **U-10:** "To verify whether there was a record that was constituted by the Customer Service team with respect to the communication with the consumers; if so, to provide copy of same";
- **U-11:** "To verify whether any documents were sent to Health Canada with respect to the recall; if so, to provide copy of same"; and
- **U-12:** "To verify whether pre-existing documents (not drafted by Legal team) other than communication with Health Canada were forwarded to Health Canada; if so, to provide copy of same".

(3) The judge excluded from the scope of the examination of a second representative of Samsung Canada the following subject: "interactions entre SECA [Samsung Canada] et les membres du groupe dans le cadre du rappel".

[20] As part of the context in which the Court must decide these appeals, it is important to mention two other judgments rendered by the judge. On May 1, 2019, he issued a confidentiality order to restrict access to and use of "Confidential Information" by the parties. He also issued a communication order on November 29, 2019, whereby he ordered the Respondents to provide to the Appellant a list that includes the names, civic addresses and telephone numbers of individuals who purchased a washer and provided the Respondents with an address in Quebec. That list contains approximately 30,000 names.

[21] Finally, the Appellant filed shortly before the hearing a motion for permission to present indispensable new evidence, namely the redacted version of the response to undertaking U-10, which it received only after the last of the three judgments under appeal.

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[22] The first issue is the motion for permission to present indispensable new evidence, namely the redacted version of the response to undertaking U-10. This document was received by the Appellant only after the third judgment was rendered, and as such it qualifies as new evidence that the Appellant could not have produced before the judge. It is clearly relevant to the appeal on the issue of the redaction of the document. I propose that the motion be granted.

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[23] In dealing with objections to questions put or undertakings requested during an examination before trial, the Court will, as a general rule, give deference to the decisions rendered by the judge in first instance:

> [7] Soulignons d'emblée que ce type de décision fait l'objet d'une grande déférence en appel. En effet, ce sont les tribunaux de première instance qui sont chargés, au premier titre, de gérer l'administration de la preuve. Ils bénéficient d'une marge discrétionnaire importante en ce qui concerne le processus de communication de la preuve durant la phase exploratoire de l'instance. Conséquemment, la norme d'intervention à l'encontre d'une décision d'un juge d'accueillir une objection à la communication de la preuve est celle de l'erreur de principe ou de l'usage déraisonnable de la discrétion judiciaire.[1]
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> [References omitted]

[24] The same principles apply to the judge's decisions allowing the redaction of certain responses and limiting the scope of a further examination.

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[25] Across the three judgments, the judge maintained certain objections, allowed the redaction of certain responses and limited the scope of the further examination, largely on the basis that he considered that the information sought was "not relevant at this stage".

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1 *Dupuis c. Desjardins Sécurité financière, compagnie d'assurance-vie*, 2022 QCCA 696.

[26] When the judge concludes that the information is not relevant "at this stage", it must be taken to mean at the stage of the trial on the common issues. It is not realistic to think that the voluminous information sought will be obtained during the trial. As stated by the panel that granted leave to appeal in this matter, "[w]hile it is possible that the information the Applicant seeks to obtain can be made available at trial, the nature and the volume of the information requested make such communication impractical."[2]

[27] In support of his conclusion that the information is not relevant, the judge refers to paragraph 32 of Justice Chamberland's majority reasons in *Filion c. Québec (Procureure générale)*:

> [32] Tous les membres sont égaux et bénéficient des mêmes droits. Tous (sauf, bien sûr, le représentant et l'intervenant) profitent de l'anonymat relatif du recours collectif, ils n'ont pas à s'impliquer dans les procédures jusqu'à l'étape du recouvrement (lorsque le jugement prévoit la liquidation individuelle des réclamations ou la distribution d'un montant à chacun des membres), ils n'ont pas à en supporter les coûts (en argent, en temps et en énergie) et, enfin, ils n'ont pas à retenir les services d'un avocat, et ce, tout en disposant d'un droit à l'indemnité de réparation en cas de succès.[3]

[28] The judge also raises concerns with respect to the scope of the requests and their proportionality.

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[29] In my view, the judge erred in relying on *Filion* to conclude that the information about individual class members was not relevant.

[30] *Filion* was decided in a very particular context. The Defendant was asking for the list of class members who had been in contact directly or indirectly with the Plaintiff's attorney because it wanted to contact other class members to try to find someone who would testify at trial on its behalf. The Superior Court had ordered Plaintiff to disclose this information.[4] On appeal, the Court dismissed Defendant's request on the basis that the list of class members who had been in contact directly or indirectly with the Plaintiff's attorney was privileged and that in any event, all class members were entitled to a measure of anonymity and to not participate in the proceedings.[5]

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2 *Option Consommateurs c. Samsung Electronics Canada Inc.*, 2022 QCCA 435, paragr. 23.
3 *Filion c. Québec (Procureure générale)*, 2015 QCCA 352, paragr. 32 (Chamberland, Hilton, Bélanger, JJ.A.; majority reasons of Chamberland, J.A.; Bélanger, J.A., dissenting) [*Filion QCCA*].
4 *Filion c. Québec (Procureure générale)*, 2014 QCCS 3294.
5 See notably: *Filion QCCA*, *supra*, note 3, paragr. 29 and 32-36.

[31] The scope of this anonymity/non-participation vis-à-vis the Defendant was limited by the subsequent judgment of the Court in *Belley c. TD Auto Finance Services Inc.*[6] In that case, the Defendant was also seeking the list of class members who had registered with the Plaintiff's attorney after the class action had been authorized and publicized, "notably to ascertain whether it [was] appropriate to engage further resources to adjudicate this class action given the presumed post [authorization] notice response of class members."[7] At particular issue was the fact that the group, as defined in the authorization judgment, encompassed some 240,000 members, whereas prior to authorization, the Plaintiff had only filed a list of some 140 purported class members.[8] Unlike in *Filion*, however, the Defendant undertook not to communicate with the class members.[9]

[32] Dismissing the appeal against the judgment of the Superior Court, which had once again ordered Plaintiff to disclose the information, Justice Schrager, speaking for the Court, distinguished *Filion*:

> [44] The Respondent has stated its intention to apply for leave to depose class members. Article 587 *C.C.P.* foresees the possibility for such examination of class members with leave of the court. Obviously, if the Respondent may examine then it may know the names of the class members. This is not consistent with the view that the names are privileged information or some principle that class members have a right to anonymity.
>
> [45] **On a proper reading of the reasons for judgment in *Filion*, there is no authority for the anonymity of class members *per se*. The *dicta* of the majority refers to relative anonymity. Disclosure of the list of registered members was refused by the Court in *Filion* because the stated purpose of the defendant was to meet with and interview class members who had <u>not</u> registered.** Such a meeting (i.e. without the court's permission) was deemed contrary to "le droit relatif à la norme de l'anonymat et à la quiétude qui vient avec le fait d'être membre d'un groupe". Since class members were considered as "quasi-clients", it would be inappropriate for the opposing party's attorneys to meet with them. **Thus, in *Filion*, because the purpose of the disclosure of the list of names of registered members was not proper, communication was refused.**

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6 *Belley c. TD Auto Finance Services Inc./Services de financement auto TD inc.*, 2018 QCCA 1727 [*Belley QCCA*].

7 *Belley c. TD Auto Finance Services Inc./Services de financement auto TD inc.*, 2017 QCCS 2668, paragr. 14.

8 *Id.*, paragr. 30-34.

9 *Id.*, paragr. 39-40.

> [46] **In the present case, the Respondent has the full list of 240,000 potential class members whose information was stolen. It seeks the list of registered members to obtain an idea of the scope of the action (deemed relevant by the judge)** with the stated intention of potentially seeking court leave to depose all or some of the "registered" class members presumably to ascertain what, if any damages they may have suffered resulting from the data tape loss. **This is not an improper purpose as was present in *Filion*. The Respondent has undertaken before the judge not to contact members without court leave.**
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> [47] Consequently, I see no error in the judge's treatment of professional secrecy nor his application of the judgment of this Court in *Filion*.[10]
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> [References omitted; underlining in the original; emphasis added]

[33] More on point, there are Superior Court judgments which have declined to apply *Filion* to limit communication by the Defendant to the Plaintiff of information relating to class members. In *Association pour la protection automobile (APA) c. Nissan Canada inc.*,[11] the Superior Court (the Honourable Martin F. Sheehan) ordered the Defendant to provide the Plaintiff with the list of class members it had in its possession. In his judgment, Justice Sheehan distinguished the circumstances of the case before him from those of *Filion*. He held as follows:

> [19] In any event, far from assisting Nissan, the *Filion* case rather supports the arguments of the Plaintiffs. Once a class action is authorized, class counsel represents the interests of all class members who have not excluded themselves. Class action notices must include contact information for the representative and class counsel. <u>This is to ensure that proper communication can take place between the members, the representative and class counsel. The disclosure sought here is in line with the objective of facilitating discussions between class counsel and the class members</u>.[12]
>
> [References omitted; emphasis added]

[34] Subsequently, a similar judgment, which relies on *APA*, was rendered in *Lévy c. Nissan Canada inc.*[13] These two decisions are also consistent with the judgment rendered in *Dick c. Johnson & Johnson Inc.*, where the Superior Court held that:

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10 *Belley QCCA*, *supra*, note 6, paragr. 44-47.

11 *Association pour la protection automobile (APA) c. Nissan Canada inc.*, 2021 QCCS 4490.

12 *Id.*, paragr. 19. The judge also distinguished the facts of the case from those of *Dupuis c. Desjardins Sécurité financière, compagnie d'assurance-vie*, 2016 QCCS 6349.

13 *Lévy c. Nissan Canada inc.*, 2021 QCCS 5063.

> [20] [...] le Tribunal doit permettre aux procureurs du groupe de remplir leurs obligations déontologiques et professionnelles à l'égard des membres qu'ils représentent; le Tribunal doit en conséquence leur permettre de préparer adéquatement le dossier, dans le meilleur intérêt de tous les membres du groupe qui, rappelons-le, ont choisi de ne pas s'exclure du recours intenté en leurs noms.
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> [21] Une fois le recours collectif autorisé, les procureurs du groupe doivent veiller aux intérêts de tous les membres du groupe. Dans le cadre de cette représentation, il est tout à fait justifié que les procureurs du groupe puissent prendre contact avec leurs clients, non seulement pour les informer mais aussi pour réviser avec eux, s'ils y consentent, leur dossier médical et l'impact que peut avoir eu, à leur égard, la chirurgie de révision. Les procureurs du groupe voudront aussi certainement discuter avec certains membres de l'opportunité de les faire entendre au procès.
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> [...]
>
> [49] De l'avis du Tribunal, la situation des procureurs du groupe qui cherchent simplement à prendre contact avec les membres qu'ils représentent, dans le but de mieux représenter leurs intérêts dans le cadre du recours collectif, n'a aucune commune mesure avec la partie de pêche entreprise par le Procureur général dans l'affaire Filion.[14]
>
> [Emphasis added]

[35] I am of the view that the reasons of the majority in *Filion* do not constitute a basis for withholding information about the class members from the person who has been authorized to institute a class action on their behalf. Relying on *Filion* in this context to maintain objections and allow redaction is an error in principle that allows the Court to intervene.

[36] The Appellant explains that it requires the information for the purposes of preparing for the trial of the common issues. At that trial, the Appellant will want to have witnesses other than the designated representative testify about problems that they experienced or damages that they suffered that are different than those experienced or suffered by the designated representative but are nonetheless common to a number of class members.

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[14] *Dick c. Johnson & Johnson Inc.*, 2015 QCCS 6049, paragr. 20-21 and 49, confirmed by *Johnson & Johnson inc. c. Dick*, 2016 QCCA 447 (application for leave to appeal to the Supreme Court dismissed, 15 September 2016, nº 36996). See also: *Tremblay c. Capitale (La), assureur de l'administration publique inc.*, 2010 QCCS 2761; *Conseil québécois sur le tabac et la santé c. JTI-MacDonald Corp.*, 2011 QCCS 4090, paragr. 5-7 (In this case, as in *Belley*, the Superior Court ordered the Plaintiff to disclose to the Defendants a list of class members, as well as their contact information, provided that the Defendants did not communicate with them. This part of the judgment was not challenged on appeal: *Imperial Tobacco Canada Ltd. c. Létourneau*, 2012 QCCA 2013, paragr. 13-14).

[37] Looking at the redacted version of the response to undertaking U-10, it is clear that this document, if unredacted, would be very useful to allow the Appellant to identify potential witnesses on different issues and to contact them, and also to prepare for the cross-examination of its witnesses. These are legitimate purposes for a pre-trial examination.

[38] On the issue of proportionality, it obviously is not any significant work to remove the redaction and provide complete documents.

[39] I would therefore propose to allow the appeal with respect to the redacted responses and order the Respondents to provide versions of the responses to undertakings U-6, U-10, U-11 and U-12 that include the names and the contact information for all Quebec residents included in the responses. The contact information should include the address, telephone number and e-mail address, to the extent that the information is available.

[40] As for the objections that were maintained, undertaking U-8 was "To provide copy of the email sent to retailers re: recall notice, with copy of responses from retailers". The Appellant explained that the retailers were middlemen between the Respondents and the consumers and that it hoped to find in the responses from retailers details of the communications between them and consumers. The judge concluded that the relevance of these communications was questionable, and that the request was not proportional. I see no basis for intervening in that conclusion.

[41] Undertaking U-14 was "To verify whether conversations with consumers were recorded; if so, to provide copy of the recordings". These conversations are relevant, on the basis set out above. However, the Respondents argue that there are hundreds of hours of telephone conversations. Moreover, it seems that these conversations should also be summarized in the response to undertaking U-10. In the absence of any indication that the summaries in the response to undertaking U-10 are incomplete, this request appears disproportionate. I would dismiss the appeal.

[42] Finally, undertaking U-17 was "To verify whether there is a record re: the 4,694 class members; if so, to provide copy of same". These are the class members who benefitted from the extended warranty under the recall program. Those records are relevant for the same reasons as set out above. The fact that the respondents have identified the exact number of class members suggests that there will be no practical difficulty in responding to the undertaking. I would allow the appeal and dismiss the objection.

[43] The last issue is the scope of the examination of the further representative for Samsung Canada. The judge excluded from the scope of that examination the following subject: "interactions entre SECA [Samsung Canada] et les membres du groupe dans le cadre du rappel". For the reasons set out above, I would allow the appeal on this issue.

STEPHEN W. HAMILTON, J.A.