

SUPERIOR COURT

CANADA
PROVINCE OF QUEBEC
DISTRICT OF MONTREAL

No.: 500-06-000895-173

DATE: March 24, 2023

BY THE HONOURABLE MARTIN F. SHEEHAN, J.S.C.

EMANUEL FARIAS
Plaintiff

v.

FEDERAL EXPRESS CANADA CORPORATION
Defendant

JUDGMENT

OVERVIEW

[1] Plaintiff, Mr. Emanuel Farias, seeks to have adjudicated certain objections to questions and undertakings made during the examination of Defendant’s representative.

[2] Defendant, Federal Express Canada Corporation, doing business as FedEx Express (“**FedEx**”) opposes on the basis of lack of relevance and because the requests are overly broad.

[3] The context is as follows.

[4] On December 20, 2018, the Superior Court authorized Plaintiff to institute the class action against FedEx on behalf of persons residing in Quebec “who, from September 21, 2017, until December 20, 2018, were charged and paid customs duties and/or processing fees collected by [FedEx] in respect of the import of any goods originating from a European Union country or a beneficiary of the Canada-European Union Comprehensive Economic and Trade Agreement (CETA)” (the “**Group**”).¹

¹ *Farias c. Federal Express Canada Corporation*, 2018 QCCS 5634 (confirmed by the Court of Appeal, 2019 QCCA 1954).

[5] Both parties agreed that arguments could be made via written representations. Parties submitted their position on March 10, 2023, and were allowed to file reply representations on March 17, 2023.

ANALYSIS

1. Applicable Law

[6] Both parties referred to the undersigned's summary of the applicable law in *Association pour la protection automobile (APA) c. Nissan Canada*.²

[7] For ease of reference, these principles are reiterated here:

- 7.1. Examinations for discovery and document requests are essential elements of the exploratory phase in civil matters. Their goal is to facilitate the search for truth which remains the “ultimate aim” of any civil or criminal trial. Early disclosure of evidence also ensures that trials are conducted fairly and efficiently. Finally, it allows the parties to evaluate the strength of their respective cases and encourages out of court settlements.³
- 7.2. Thus, the court should encourage the fullest and earliest possible disclosure of evidence. Such disclosure is in line with the duty of transparency and cooperation required for the sound management of proceedings and a fair judicial debate, as opposed to a trial by ambush (articles 19 and 20 C.C.P.).⁴
- 7.3. Document requests are no longer restricted to documents that the other party intends to file during the hearing. They may bear on all the facts related to the dispute or the evidence which supports them. Furthermore, a party may present a document request before or even in the absence of a pre-trial deposition of the opposing party.⁵
- 7.4. A witness may refrain from answering when an objection is made on the grounds of privilege or because a “substantial and legitimate interest” would be compromised by answering.⁶ This later notion must be interpreted restrictively. In particular, confidentiality is not a bar to disclosure of information. If the court finds that a “substantial and legitimate” interest

² *Association pour la protection automobile (APA) c. Nissan Canada inc.*, 2021 QCCS 4490, paras. 11 and 53.

³ *Imperial Oil v. Jacques*, 2014 SCC 66, paras. 24 to 26; *Glegg v. Smith & Nephew Inc.*, 2005 SCC 31, para. 22.

⁴ *Imperial Oil v. Jacques*, *supra*, note 3, para. 28; *Grid Solutions Canada c. Murphy*, 2019 QCCA 1141, para. 6; *Société financière Manuvie c. D'Alessandro*, 2014 QCCA 2332, para. 22 (Discontinuance of the motion for leave to appeal to the Supreme Court (S.C. Can., 2015-06-26) 36309); *Sotramont Gatineau Inc. c. Original Baked Quality Pita Dips Inc.*, 2020 QCCS 143; *Envac Systèmes Canada inc c. Montréal (Ville de)*, 2016 QCCS 1931, para. 27. Denis FERLAND and Benoît EMERY, *Précis de procédure civile du Québec*, 6th ed., Montréal, Éditions Yvon Blais, 2020, volume 1, para. 1-1336.

⁵ Article 221 C.C.P.; *CMC Électronique inc. c. Procureure générale du Québec*, 2020 QCCS 124, para. 31; *Construction Canmec Euler inc. c. Groupe TNT inc.*, 2018 QCCS 637, para. 33; *Moreno c. Lallane Zéphyr*, 2017 QCCS 4149, paras 18 to 22.

⁶ Arts. 12 and 228 C.C.P.

exists, but that the implied undertaking of confidentiality or some other means of protection or control may resolve the disclosure issue, it must dismiss the objection but may decide to put measures in place to ensure that confidentiality is protected.⁷

- 7.5. Generally, when an objection does not invoke a fundamental right or a substantial and legitimate interest, the witness is required to answer. This is so for example when the objection is based on lack of relevance.⁸
- 7.6. Nonetheless, while the right to pre-trial disclosure must be interpreted broadly, it is not unlimited. The court may put an end to an examination when it considers it “excessive or unnecessary”.⁹ Parties must respect the principle of proportionality and their conduct must facilitate the progress of the proceedings rather than having them delayed, complicated, or even jeopardized by the introduction of evidence that does not assist in establishing the rights being advanced (articles 18 and 19 C.C.P.). Fishing expeditions, repeated demands and indiscriminate searches are not allowed. The court has discretion to refuse disclosure of information when complying with the request would require the analysis of a disproportionate number of documents, an excessive number of hours or impose disproportionate costs. The court may also reduce the financial and administrative burden on the party from whom documents are requested by imposing reasonable constraints.¹⁰
- 7.7. It is generally accepted that courts should not order witnesses to perform analytical work or force them to prepare a document that does not exist as is, especially when the analysis or preparation would require significant

⁷ *Sierra Club du Canada c. Canada (Minister of Finances)*, 2002 CSC 41, paras. 49, 50, 51 and 55; *Ministère des Travaux publics et Services gouvernementaux Canada c. David S. Laflamme Construction inc.*, 2017 QCCA 96, para. 6; *Southam inc. c. Landry*, J.E. 2003-518 (C.A.), para. 6; *CMC Électronique inc. c. Procureure générale du Québec*, *supra*, note 5, para. 27; *Nolicam Location de camions inc. c. Budget Rent A Car Licensor*, 2019 QCCS 747, para. 6; *Siciliano c. Éditions La Presse ltée*, 2016 QCCS 3702, paras. 24 and 29 (Out of court settlement (C.A., 2016-06-23) 500-09-026076-166); *Luxme International Ltd. c. Lasnier*, 2016 QCCS 6389, paras.10 and 11.

⁸ Art. 228 C.C.P.; *Daneault c. Tétreault*, 2021 QCCS 2739.

⁹ Art. 230 C.C.P.

¹⁰ *Imperial Oil v. Jacques*, *supra*, note 3, paras. 31 and 85; *Grid Solutions Canada c. Murphy*, *supra*, note 4, paras. 6 and 7; *Duguay c. Compagnie General Motors du Canada*, 2019 QCCA 1058, para. 8; *Digital Shape Technologies inc. c. Comte*, 2018 QCCA 955, para. 7; *Lanteigne c. Société des Casinos du Québec*, 2022 QCCS 4752, paras. 40 and 49; *Gestion Guy St-Louis inc. c. Caisse Desjardins de Brome-Missisquoi*, 2022 QCCS 1273, paras. 1, 2 and 33 to 39; *Option Consommateurs c. Société des loteries du Québec (Loto-Québec)*, 2021 QCCS 244, paras. 22 and 23; *Union des consommateurs c. Bell Canada*, 2019 QCCS 3756, paras. 23 to 25; *Kloda c. CIBC World Markets Inc. (CIBC Wood Gundy)*, 2019 QCCS 761, paras 16 to 19; *Nolicam Location de camions inc. c. Budget Rent A Car Licensor*, *supra*, note 7, paras. 6 and 16; *A. c. Frères du Sacré-Coeur*, 2019 QCCS 258, para. 28; *Axxess International courtiers en douanes inc. c. Boulay*, 2018 QCCS 5363, para. 50; *Sintra inc. (région Estrie) c. Ville de Lac-Mégantic*, 2017 QCCS 4477, para. 30; *Charland c. Hydro-Québec*, 2017 QCCS 2623, paras. 13, 39 and 46 (Permission to appeal denied, 2017 QCCA 1707); *Association professionnelle des audioprothésistes du Québec c. Procureure générale du Québec*, 2017 QCCS 1960, para. 10 (Requête pour permission d'appeler rejetée, 2017 QCCA 1112); *Distributions d'acier de Montréal c. Tubes Olympia ltée*, 2016 QCCS 1635, para. 4.

effort and the information requested is not available in the desired format.¹¹ However, disclosure can be ordered when the information can be prepared with relative ease and by following simple procedures.¹²

7.8. A party who wishes to obtain communication of documents has the burden of showing that they are relevant and that the request respects the principle of proportionality.¹³ However, since the judge who assesses relevance at a preliminary stage does not have the benefit of having heard all the evidence, the notion of relevance must be interpreted broadly and any doubt as to the relevance of a response must favour disclosure. At the pre-trial stage, a party must only demonstrate that disclosure of the information is useful, appropriate and likely to advance the debate based on an acceptable objective that it seeks to achieve.¹⁴

7.9. A party who wishes to oppose disclosure on the basis of privilege or a substantial interest has the burden of proving same.

[8] In summary, the court's role is to reach a delicate balance between two equally important objectives:

8.1. On the one hand, we must facilitate the timely disclosure of evidence to facilitate the search for truth, ensure that trials are conducted fairly and efficiently and allow parties to rapidly evaluate the strength of their respective cases so that settlements are encouraged.

8.2. On the other hand, we must apply the principle of proportionality to protect access to justice, promote a fair and economical application of procedural rules and ensure that cases proceed smoothly rather than being delayed or complicated by the introduction of evidence that does not contribute to the resolution of the dispute.

2. Discussion

2.1 Objection #8: Description of the Various Fees Collected by FedEx

[9] During the examination, Plaintiff's asked the witness to qualify and explain the various fees collected by FedEx. FedEx initially objected.

¹¹ Jean-Claude ROYER and Catherine PICHÉ, *La preuve civile*, 6th ed., Montréal, Éditions Yvon Blais, 2020, para. 653; *Commission scolaire des Affluents c. Commission des droits de la personne et des droits de la jeunesse*, 2006 QCCA 81, para. 36; *Mutuelle du Canada (La), Cie d'assurance sur la vie c. Cie d'assurance-vie, Manufacturers*, [1987] R.D.J. 192 (C.A.), para 5; *Entrepreneurs de construction Concordia inc. c. Régie des installations olympiques*, 2021 QCCS 3236, para. 34.

¹² *Charkaoui c. Canada (Procureur général)*, 2013 QCCS 7132, para. 39.

¹³ *Lanteigne c. Société des Casinos du Québec*, *supra*, note 10, paras. 59 and 60; *Kloda c. CIBC World Markets Inc. (CIBC Wood Gundy)*, *supra*, note 10, para. 16; *Lambert (Gestion Peggy) c. Écolait Itée*, 2017 QCCS 5429, paras 28 to 31.

¹⁴ *Société financière Manuvie c. D'Alessandro*, *supra*, note 4, para. 22; *Siciliano c. Éditions La Presse Itée*, *supra*, note 7, para. 48.

[10] In its plan of arguments, FedEx provided an additional answer:

The term “processing fee”, as used on the receipt Exhibit P-7, is only used at FedEx with respect to the ROD fee. The ROD fee is assessed when an importer does not have a FedEx account number. FedEx clears the shipment using its bond, and regardless of whether or not the importer pays FedEx, FedEx is obligated to pay customs for the duties and taxes. The ROD fee covers the additional process of collecting the duties and taxes by methods other than billing to a FedEx account. This may be done through collection at delivery or via phone call for credit card payment.

The ancillary fees are assessed for work done relating to a customs declaration/entry. It could be that a permit is required by another government agency, or additional data relating to the government agency is required in the customs entry or any of the other items listed on the ancillary services fee schedule. Ancillary fees, as listed in undertaking #46 provided to the Plaintiff, are used for a variety of services while not being specifically referred as a “processing fee”.

[11] Plaintiff declared itself satisfied with this answer.

[12] The objection is thus moot.

2.2 Objection # 11: Provide Service Guides for Years 2017, 2019, 2020, 2021 and 2022

[13] Paragraph 86 of FedEx’s Plea states:

86. The customers part of the class sought by the Plaintiff are subject to the “2016 FedEx Service guide”, which includes the “FedEx Express Terms and conditions”, communicated herewith as Exhibit D-15 or to the “2018 FedEx Service guide”, which includes the “FedEx Express Terms and conditions”, communicated herewith as Exhibit D-16.

[14] FedEx has confirmed that the 2016 FedEx Service guide applied in 2017. They submit that the class action is limited to fees collected between September 21, 2017, and December 20, 2018, and thus that the applicable guides for 2019 to 2022 are irrelevant to the class action as authorized.

[15] It is true that information relating to periods outside the scope of the class period is sometimes considered irrelevant.¹⁵ Furthermore, modifications to one’s conduct subsequent to the alleged fault usually do not constitute an admission of guilt.¹⁶

[16] Nonetheless, the inadmissibility of *ex post facto* evidence is not automatic and has no real legal basis. The admissibility of subsequent facts into evidence is subject only to the rule of relevance of article 2857 C.C.Q.¹⁷

¹⁵ *Charland c. Hydro-Québec*, *supra*, note 10, paras. 18 to 23.

¹⁶ *Hervé Matte & Fils camionneurs Ltée c. Donnacona (Ville de)*, [1984] R.D.J. 495 (C.A.), p. 3.

¹⁷ C. PICHÉ et J.-C. ROYER, *supra*, note 11, para. 242.; *Gestion finance Tamalia inc. c. Garrel*, 2012 QCCA 1612, par. 24; *Lamoureux c. Blanchard*, 2013 QCCS 1922, para. 14; *Descamps c. Hébert*, 2011

[17] Here, Plaintiff seeks punitive damages in part because FedEx allegedly continued its breaches of the CPA after the filing of the Motion to authorize the class action.¹⁸ Plaintiff submits that the FedEx guides for years 2019 to 2022 will allow Plaintiff to verify whether, and if so when, FedEx changed its position with respect to the alleged unlawful practices.

[18] The Supreme Court of Canada has indeed confirmed that one of the elements to consider when deciding whether it is appropriate to award punitive damages is a party's conduct "at the time of and after the violation".¹⁹

[19] The documents are thus potentially relevant to an argument that Plaintiff wishes to present. Their objection is dismissed.

2.3 Objection #12: Financial statements

[20] Plaintiff asks that FedEx produce its financial statements for years 2017 and 2018.

[21] FedEx alleges that it is not a public company and that its financial statements are treated as highly confidential.

[22] This may be the case but, as discussed, confidentiality is not a bar to disclosure.²⁰ This rule applies to financial statements.²¹ Thus, financial statements can be disclosed when they are relevant to one of the issues at play.²²

[23] The financial situation of a debtor is relevant to the quantification of punitive damages.²³ Plaintiffs are claiming such damages and one of the common issues relates to their assessment.

[24] Thus, the request is relevant.

[25] On that basis, courts have ordered disclosure of financial documents in the context of a punitive damage claim in the past.²⁴

QCCS 7490, paras. 7 and 8; *Lok c. Onmark Corp.*, J.E. 2004-208 (C.S.), para. 52; *Weidemann c. Intrawest Resort Corp./Corp. de villégiature Intrawest*, [2000] R.R.A. 353 (C.S.), paras. 80 to 90.

¹⁸ Originating Application, para. 35 a).

¹⁹ *Richard v. Time Inc.*, 2012 SCC 8, para. 180.

²⁰ *Southam inc. c. Landry*, *supra*, note 7, para. 6.

²¹ *Pomerleau-Bouygues inc. c. Acier Gendron Itée*, [1993] R.D.J. 564 (C.A.); *Maskatel inc. c. Télécom Québec inc.*, 2006 QCCS 1885, para. 206.

²² *Pierre Giguère Consultants inc. c. Pierre Landry Électrique inc.*, J.E. 97-225 (C.A.); 9227-1899 *Québec inc. c. Gosselin*, 2013 QCCS 3527, para. 9; *Camiré c. Paradis (Architectes Deschamps, Paradis, s.e.n.c.)*, 2012 QCCS 6976, para. 13.

²³ *Richard v. Time Inc.*, *supra*, note 19, para. 201; *Fillion c. Chiasson*, 2007 QCCA 570, para. 107; *Conseil québécois sur le tabac et la santé c. JTI-Macdonald Corp.*, 2012 QCCS 3566, para. 8 (Leave to appeal dismissed, 2012 QCCA 1848 and 2012 QCCA 1847).

²⁴ *Association pour la protection automobile (APA) c. Nissan Canada inc.*, *supra*, note 2, paras. 47 to 54; *Lussier c. Expedia Group Inc.*, 2019 QCCS 4927, paras. 42 to 49; *Bolduc c. Arthur*, 2008 QCCS 6085; *Gauvin c. Arthur*, J.E. 2002-1577 (C.S.), para. 19; *Grenier c. Arthur*, [2001] R.J.Q. 674 (C.S.), para. 50.

[26] FedEx suggests that, subject to the signature of the Confidentiality Agreement, it would agree to provide the following information for the relevant years during the class period (2017-2018):

- 1) The total amount of revenue of FedEx;
- 2) The total amount of expenses of FedEx;
- 3) The net income of FedEx.

[27] This information would not be sufficient to allow Plaintiff and the court to assess the financial situation of a company like FedEx.

[28] Any concern with regard to confidentiality is attenuated by the implied undertaking that surrounds pre-trial disclosures.²⁵ To further protect FedEx, an order is issued imposing on Plaintiff a 30-day prior notice before they intend to file the financial statements in the court record in order to allow FedEx to make representations on measures which should be taken to protect any substantial interest in confidentiality.

[29] The objection is dismissed.

2.4 Objection #13: The Percentage of Quebec Revenue Represented by Fees

[30] FedEx objects to providing this information on the basis that it constitutes a fishing expedition.

[31] It adds that it has already provided all invoices and thus that the calculation can easily be done by Plaintiff.

[32] The calculation can also be easily done by FedEx.

[33] The question is relevant to the issues. However, disclosure will be limited to the years covered by the class action period.

FOR THESE REASONS, THE COURT:

[34] **PRAYS ACT** of Defendant's answer to the question subject to Objection #8;

[35] **DISMISSES** Objections #11, #12 and #13 (for years 2017 and 2018) and **ORDERS** Defendant, Federal Express Canada Corporation, to provide Plaintiff, with answers to the objected questions within 30 days of the present judgment;

²⁵ *Lac d'amiante du Québec Ltée v. 2858-0702 Québec inc.*, 2001 SCC 51, para. 69; *Société financière Manuvie c. D'Alessandro*, *supra*, note 4, para. 48 (Discontinuation of the motion for leave to appeal to the Supreme Court (Can C.S., 2015-06-26) 36309).

[62] **DECLARES** that any document disclosed further to the present judgment is subject to the implied confidentiality rule *Lac d'Amiante du Québec Ltée v. 2858-0702 Québec Inc.*;

[36] **ORDERS** Plaintiffs to give Defendant a 30-day prior notice before filing the financial statements of Federal Express Canada Corporation into the Court record to allow Defendant to make representations on whether measures should be imposed to protect their confidentiality;

[37] **THE WHOLE** with costs to follow suit.

MARTIN F. SHEEHAN, J.S.C.

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