

SUPERIOR COURT
(Class Action)

CANADA
PROVINCE OF QUÉBEC
DISTRICT OF MONTREAL

N° : 500-06-000956-181

DATE : May 1st, 2023

BY THE HONOURABLE

SYLVAIN LUSSIER, J.S.C.

VANESSA GARTNER
Plaintiff

v.

FORD MOTOR COMPANY OF CANADA LIMITED
FORD MOTOR COMPANY
Defendants

JUDGMENT

(ON APPLICATION FOR LEAVE TO ADDUCE EVIDENCE, ARTICLE 574 C.C.P.)

THE CONTEXT

[1] On November 29, 2018, Plaintiffs Vanessa Gartner and Brian Nicholson filed an initial Application for Authorization to Institute a Class Action.

[2] Plaintiffs were seeking to obtain authorization to institute a class action against Defendants on behalf of :

Sub-Group A:

All residents of Canada (or subsidiarily Quebec), who own, owned, lease and/or leased one or more of the Subject Vehicles, namely:

2013-2014 Ford Escape;

2013-2014 Ford Fusion;

2013 Ford Fiesta;

2014-2015 Ford Transit Connect.

Sub-Group B:

All residents of Canada (or subsidiarily Quebec), who have suffered damages and/or disbursed costs as a result of the defects affecting the Subject Vehicles;

Or any other Group(s) or Sub-Group(s) to be determined by the Court;

[3] According to Plaintiffs, the said vehicles were equipped with « defective engines and related parts which are prone to overheating, leak solvent liquid or fuel, stall and in certain circumstances, catch fire ». ¹

[4] On June 20, 2019, Plaintiffs filed an Amended Application for Authorization to Institute a Class Action to add allegations and mention the partial Transaction Agreement signed by Plaintiffs and Defendants.

[5] On December 20, 2019, Defendants obtained permission to file in evidence the affidavit of Mr. Gregory West and to examine Plaintiffs. Plaintiffs were also authorized to cross-examine Mr. West on the statements made in his affidavit.

[6] On September 29, 2020, Plaintiffs filed an Application for Permission to Amend the Amended Application for Authorization to Institute a Class Action in order to remove Mr. Nicholson as Plaintiff, add further allegations and file comments from putative class members.

[7] On November 12, 2020, Plaintiffs' application was granted in part. The modifications to the Amended Application for Authorization to Institute a Class Action were authorized, except for the allegations bearing on similar problems having allegedly affected vehicles manufactured by Defendants and given rise to an investigation in South Africa, along with the corresponding exhibits. Plaintiffs were also authorized to file a list of the names and coordinates of the putative class members, but without their comments.

[8] On February 12, 2021, Plaintiff's Application for Leave to Appeal the November 12, 2020 judgment was rejected by the Court of Appeal. ²

[9] On July 20, 2021, Ms. Vanessa Gartner filed the new Application to Amend.

¹ Paragraph 6 of Amended Application for Authorization to institute a class action.

² *Gartner c. Ford Motor Company of Canada Limited*, 2021 QCCA 236.

[10] On January 10, 2022, the Application to Amend was granted in part. The Plaintiff was authorized to amend the Re-Amended Application for Authorization to Institute a Class Action in order to, inter alia, modify the proposed class to add new vehicle models and model years, add allegations relating to EcoBoost® engines and add exhibits relating to class action pleadings filed in the United States.

[11] On February 3, 2022, the Plaintiff filed the Application for Authorization to reflect the newly authorized amendments.

[12] On July 26, 2022, Plaintiff's counsel advised Defendants' counsel that no further amendments to the Application for Authorization were contemplated for the time being.

[13] As the Application for Authorization now stands, Plaintiff seeks authorization to bring a class action against the Defendants on behalf of the following putative class members:

Sub-Group A:

All residents of Canada (or subsidiarily Quebec), who own, owned, lease and/or leased one or more of the Subject Vehicles, namely:

2013-2019 Ford Escape;

2013-2019 Ford Fusion;

2014-2015 Ford Fiesta;

2013-2015 Ford Transit Connect;

2015-2018 Ford Edge;

2017-2019 Lincoln MKC;

2017-2019 Lincoln MKZ. (the "Subject Vehicles")

Sub-Group B:

All residents of Canada (or subsidiarily Quebec), who have suffered damages and/or disbursed costs as a result of the defects affecting the Subject Vehicles;

or any other Group(s) or Sub-Group(s) to be determined by the Court.

[14] Plaintiff alleges that the Defendants have marketed, promoted, distributed, leased and sold the Subject Vehicles to the putative class members, which were defectively designed and manufactured, namely with defective engines and related parts.³

[15] Plaintiff alleges that the Subject Vehicles are all equipped with Ford EcoBoost® engines, which would all share the same engine block design and suffer from the same defects.⁴

[16] Defendants seek leave to adduce as evidence the second proposed affidavit of Mr. Gregory West, Design Analysis Engineer at Ford.⁵

[17] They advance that an understanding of the engines present in each Subject Vehicle is essential to the Court's analysis under Articles 574 and 575 C.C.P.

[18] In his proposed affidavit, Mr. West would confirm which engine can be found in each Subject Vehicle. The affidavit would also establish that each engine has its own characteristics, distinguishing it from other engines.

[19] Defendants submit that this information is non-controversial and would allow the Court to understand the different engines that can be found in the Subject Vehicles. In their view, this information is also relevant to the analysis of the existence and size of the proposed group and to determine whether the Plaintiff is presenting an arguable case.

[20] Plaintiff's counsel submits to the Court's discretion regarding the Defendants' Application.⁶

[21] Having stated so, he proceeds to argue that the proposed new evidence is not "indispensable, necessary and required at the authorization stage."

[22] Then, rightly so, he reserves his right to challenge the probative value of the Proposed Affidavit at the authorization hearing.

QUESTION AT ISSUE

[23] Should the Court allow the filing of the new evidence proposed by Defendants?

[24] For the reasons that follow, the Court exercises its discretion to allow the production of Mr. West's second sworn declaration.

³ Application for Authorization, paragr. 6.

⁴ Application for Authorization, paragr. 8.1.

⁵ Exhibit D-2.

⁶ Email of August 16, 2022.

ANALYSIS

[25] The principles governing the submission of relevant evidence are well known. It is constant that the evidence may only be filed for the purpose of determining whether the criteria of article 575 C.C.P. are met.⁷ As Justice Dominique Bélanger wrote in *Lambert (Gestion Peggy) v. Écolait Itée*:⁸

[38] Dans tous les cas, la preuve autorisée doit permettre d'évaluer les quatre critères que le juge de l'autorisation doit examiner et non le bien-fondé du dossier. Et si, par malheur, le juge de l'autorisation se retrouve devant des faits contradictoires, il doit faire prévaloir le principe général qui est de tenir pour avérés ceux de la requête pour autorisation, sauf s'ils apparaissent invraisemblables ou manifestement inexacts.

[26] The allegations of the Motion for authorization are to be taken as averred but evidence may be filed to demonstrate the falsity or the ludicrous character of certain allegations.⁹

[27] In addition, it is useful to allow the production of evidence explaining the business and operations of Defendant.¹⁰

[28] The Court is mindful of the teachings of the Court of Appeal respecting the probative value of defendants' evidence, as stated in *Durand c. Subway Franchise Systems of Canada*:¹¹

[54] Bref, la preuve déposée par un intimé au soutien de sa contestation ne change pas le rôle du juge de l'autorisation qui peut, certes, trancher une pure question de droit et interpréter la loi pour déterminer si l'action collective projetée est frivole, mais qui ne peut, pour ce faire, apprécier la preuve comme s'il y avait eu un débat contradictoire ou encore présumer vraie celle déposée par l'intimé alors qu'elle est contestée ou simplement contestable.

[29] The Court is also mindful, however, of the fact that when the allegations of Plaintiffs are vague and imprecise, "some evidence" (*une certaine preuve*) is necessary in order to accept these allegations as averred:

"Where allegations of fact are "vague", "general" or "imprecise", they are necessarily more akin to opinion or speculation, and it may therefore be difficult to

⁷ *Asselin c. Desjardins cabinet de services financiers inc.*, 2017 QCCA 1763.

⁸ *Lambert (Gestion Peggy) v. Écolait Itée* 2016 QCCA 659.

⁹ *Asselin c. Desjardins cabinet de services financiers inc.*, 2017 QCCA 1763 (CanLII), permission d'appeler à la Cour suprême accordée, N : 37898, paragr. 91.

¹⁰ *Ehouzou c. Manufacturers Life Insurance Company*, 2018 QCCS 4908 (CanLII), paragr. 23; *Gagné c. Rail World inc.*, 2014 QCCS 32 (CanLII), paragr. 67, 137 et 162.

¹¹ *Durand c. Subway Franchise Systems of Canada*, 2020 QCCA 1647.

assume them to be true, in which case they must absolutely “be accompanied by some evidence to form an arguable case.”¹²

[30] Plaintiff makes the general “allegation” that “the Subject Vehicles are equipped with Ford EcoBoost® engines... The EcoBoost engines in question all share the same engine block design and suffer from the same defects, as detailed herein.”¹³

[31] The evidence that Defendants wish to introduce is to the following effect:

5 Each Subject Vehicle can be equipped with a different engine, depending on the model and the model year. The available engines are as follows:

| MODELS | MODEL YEARS | AVAILABLE ENGINES |
|----------------------|--------------------|---|
| Ford Escape | 2013-2016 | <ul style="list-style-type: none"> ▪ 1.6L EcoBoost ▪ 2.0L EcoBoost ▪ 2.5L Duratec |
| | 2017-2019 | <ul style="list-style-type: none"> ▪ 1.6L EcoBoost ▪ 2.0L EcoBoost ▪ 2.5L Duratec |
| Ford Fusion | 2013-2014 | <ul style="list-style-type: none"> ▪ 1.5L EcoBoost ▪ 1.6L EcoBoost ▪ 2.0L EcoBoost ▪ 2.5L Duratec |
| | 2015-2016 | <ul style="list-style-type: none"> ▪ 1.5L EcoBoost ▪ 2.0L EcoBoost ▪ 2.5L Duratec |
| | 2017-2017 | <ul style="list-style-type: none"> ▪ 1.5L EcoBoost ▪ 2.0L EcoBoost ▪ 2.5L Duratec ▪ 2.7L EcoBoost |
| Ford Fiesta | 2014-2015 | <ul style="list-style-type: none"> ▪ 1.0L EcoBoost ▪ 1.6L Duratec ▪ 1.6L EcoBoost |
| Ford Transit Connect | 2013 | <ul style="list-style-type: none"> ▪ 2.0L |
| | 2014-2015 | <ul style="list-style-type: none"> ▪ 1.6L EcoBoost ▪ 2.5L Duratec |
| Ford Edge | 2015-2018 | <ul style="list-style-type: none"> ▪ 2.0L EcoBoost ▪ 2.7L EcoBoost ▪ 3.5L Duratec |

¹² *L'Oratoire Saint-Joseph du Mont-Royal v. J .J.*, 2019 SCCS 35, at paragr. 59.

¹³ Paragr. 8.1 of the Third Amended Application for Authorization.

| | | |
|-------------|-----------|--|
| Lincoln MKC | 2017-2019 | <ul style="list-style-type: none"> ▪ 2.0L EcoBoost ▪ 2.3L EcoBoost |
| Lincoln MKZ | 2017-2019 | <ul style="list-style-type: none"> ▪ 2.0L EcoBoost ▪ 3.0L EcoBoost |

- 6 Each engine listed above has different characteristics, meaning that all these engines are not identical and do not share identical design and manufacturing features.
- 7 As mentioned in my previous affidavit sworn on February 7, 2020, of the seven safety recall programs cited in the Application, only 12S39, 12S41 and 13S12 applied to the Vehicle. All three of these programs applied to certain 2013 model year Ford Escape or Fusion vehicles equipped with a 1.6L EcoBoost engine only.

[32] Defendants argue that the proposed class action is based on Plaintiff's personal case, being the problems she encountered with her 2013 Ford Escape SE.¹⁴ Initially, the proposed class was defined in relation with four models, spanning some years.

[33] The most recent amendment proposes a class defined in respect of seven models, or 29 year-models.

[34] Plaintiff advances that all these vehicles are affected by a common defect stemming from Ford's EcoBoost® engine, which would be similar for all vehicles, whether it be a subcompact Fiesta, a Ford Transit minivan, or a Lincoln MKZ, a mid-size luxury sedan.

[35] Defendants submit that the Court cannot take these allegations as averred and want to set the record straight.

[36] It is not appropriate to make a determination at this stage of the proceedings as to the vague and general character of Ms Gartner's assertions as to the identical nature of the EcoBoost® engines installed in numerous and very different vehicle models. She makes "affirmations" which may not qualify as "allegations".

[37] As Justice Gary D.D. Morrison wrote in *Zouzout c. Canada Dry Mott's Inc.*:¹⁵

[34] Essentially, Applicant's so-called allegations of fact do not appear to refer to specific sources of proof demonstrating that there is no ginger in Canada Dry Ginger Ale. They appear to be more like conclusions drawn by Applicant than

¹⁴ Email of August 26, 2022.

¹⁵ *Zouzout c. Canada Dry Mott's Inc.*, 2019 QCCS 2271.

facts, which may or may not be correct. Hence, it is arguable that Respondents are not simply seeking to adduce contradictory proof.

[35] In the Court's view, the affidavit of Steven Kramer, except for paragraph 4 regarding dictionary definitions, may possibly demonstrate for authorization purposes that Applicant's allegations as regards the absence of ginger in the product, being essential and indispensable to his legal syllogism, is improbable, manifestly exact or simply false.

[38] But it is too early to conclude on the issue and the Court is of the opinion that Mr. West's sworn declaration is liable to help its decision at the authorization stage, as allowing it to verify that the "facts alleged appear to justify the conclusions sought".


CONCLUSION

FOR THESE REASONS, THE COURT:

[39] **GRANTS** the Application for Leave to Adduce Evidence of August 5, 2022;

[40] **AUTHORIZES** the Defendants to adduce as evidence the proposed affidavit of Mr. Gregory West (Exhibit D-2);

[41] **THE WHOLE**, with costs to follow suit.



SYLVAIN LUSSIER, J.S.C.

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