C A N A D A

PROVINCE OF QUÉBEC
DISTRICT DE QUÉBEC

COURT OF APPEAL

C.A. : 200-09-010484-225
S.C. : 200-06-000242-209

KIM CHEVRETTE, domiciled and residing at 521, rue Saint-Anne, Sainte-Anne-de-la-Pérade, Québec, district of Trois-Rivières, G0X 2J0

and

HUGO CHAREST, domiciled and residing at 521, rue Saint-Anne, Sainte-Anne-de-la-Pérade, Québec, district of Trois-Rivières, G0X 2J0

and

BRIGITTE SOUCY, domiciled and residing at 898, Andre-Mathieu, Sherbrooke, Québec, district of Saint-François, J1N 2B3

RESPONDENTS—Plaintiffs

v.

FCA CANADA INC., legal person duly constituted and having a place of business at 3000, autoroute Trans-Canada, Pointe-Claire, Québec, district of Montréal, H9R 1B1

APPLICANT—Defendant

and

KIA CANADA INC., legal person duly constituted and having elected domicile at 1, Place Ville-Marie, suite 1300, Montréal, Québec, district of Montréal, H3B 0E6

and

LA BANQUE DE LA NOUVELLE-ÉCOSSE, legal person duly constituted and having elected domicile at 500, Grande-Allée Est, Québec, Québec, district of Québec, G1R 2J7

and

BANQUE DE MONTRÉAL, legal person duly constituted and having a place of business at 129, rue Saint-Jacques, Montréal, Québec, district of Montréal, H2Y 1L6

MISES EN CAUSE—Defendants

AMENDED APPLICATION FOR LEAVE TO APPEAL A CLASS ACTION AUTHORIZATION JUDGMENT
(Articles 357 and 578 CCP)
Applicant FCA Canada Inc.
Dated May 5, 2022

TO ONE OF THE HONOURABLE JUDGES OF THE COURT OF APPEAL, THE APPLICANT FCA CANADA INC. RESPECTFULLY SUBMITS:

I. PREAMBLE

1. The Applicant FCA Canada Inc. ("**FCA**") seeks leave to appeal a judgment of the Superior Court, District of Québec, bearing number 200-06-000242-209 rendered by the Honourable Nancy Bonsaint (the "**A Quo Judge**") on March 4th, 2022, and which, by notice dated March 25, 2022, authorized the institution of a class action based on supposed contractual nondisclosures and other breaches of the Consumer Protection Act[1] ("**CPA**") in respect of financed sales of new and used vehicles (the "**Authorization Judgment**", **Schedule 1**).

2. The Authorization Judgment authorized the institution of a class action on behalf of the following class (the "**Class**"):

> *« Toutes les personnes physiques, résidentes de la province de Québec,* ***ayant conclu un contrat de vente à tempérament pour l'achat d'un véhicule automobile auprès des défenderesses****, entre le 18 février 2017 et la date de publication de l'avis aux membres, dans lequel la dette afférente à un ancien véhicule donné en échange a été incluse dans le financement d'un nouveau véhicule et/ou dans lequel le prix d'achat du véhicule automobile affiché a été majoré. »* *(emphasis added)*

3. The Applicant FCA seeks leave to appeal the *A Quo* Judge's finding that an arguable case was demonstrated against FCA based on corporate confusion.

4. In effect, the *A Quo* Judge held that FCA and a distinct corporate entity, which was not sued by the Respondents, could be confused until trial, based solely on the fact that the latter was an FCA authorized dealer.

5. The Applicant FCA submits that the *A Quo* Judge made flagrant and determinative errors regarding her assessment of the threshold conditions for class relief set forth at Article 575(2) and (4) CCP to wit:

   (a) The *A Quo* Judge made a flagrant error when applying a presumption of truthfulness to the Respondents allegations while assessing the arguable case test

   (b) The *A Quo* Judge failed to address or consider relevant evidence which she had previously permitted FCA to adduce in the authorization record

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[1] CQLR c P-40.1.

(c) The *A Quo* Judge authorized a Class, which was blatantly incongruent

(d) The *A Quo* Judge failed to consider that the Respondents agreed to abandon their Sections 219, and 228 CPA causes of action at the authorization hearing

(e) The *A Quo* Judge erred in law when ruling that the Respondents had any legal standing or adequate capacity to lead a class action against the Applicant FCA.

6. The confusion of distinct corporate entities based only on inferred and unverified name associations which are contradicted by public registry records, contravenes and circumvents fundamental tenets of corporate law and will invariably open the door to abuse.

7. Barring an appeal, the *A Quo* Judge's conclusions will also create a precedent that transforms an already intendant demonstration process into a meaningless exercise, which requires no evidence at all, and is dependant solely on contrived and other expedient allegations conjured up by class counsel.

II. PROCEDURAL BACKGROUND

8. On February 12, 2020, the Respondents/ Plaintiffs Kim Chevrette and Hugo Charest filed a *Demande pour autorisation d'exercer une action collective* (**Schedule 2**).

9. This application initially sought leave to institute a class action pursuant to the *Civil Code of Quebec* ("**CCQ**"), as well as Sections 132, 134, 148, 219, 224 c) and 228 of the CPA.

10. On January 22, 2021, the Respondents filed a *Demande pour autorisation d'exercer une action collective modifiée* which added Brigitte Soucy as a Plaintiff and allegations regarding her personal situation (the "**Modified Class Action Application**", **Schedule 3**). This Modified Class Action Application sought to institute a class action on behalf of the following class:

> *« Toutes les personnes physiques ou morales* ***ayant conclu un contrat d'achat de véhicule automobile auprès des défenderesses FCA et Kia*** *dans lequel se retrouvait une valeur négative pour un ancien véhicule automobile repris en échange et/ou dans lequel le prix d'achat du véhicule automobile affiché a été majoré. »* *(emphasis added)*

11. On March 8, 2021, the Applicant FCA filed an *Application by the Respondent FCA Canada Inc. for leave to adduce evidence* which sought to introduce, for the purposes of the authorization hearing, as Exhibit FCA-1, a sworn statement of an FCA representative which addressed the alleged fallacies of the Modified Class Action Application, a final executed copy of which is filed herewith (**Schedule 4**).

12. On April 20, 2021, the *A Quo* Judge granted the *Application by the Respondent FCA Canada Inc. for leave to adduce evidence* and permitted the filing of the sworn statement (Exhibit FCA-1) within 15 days of that judgment, for the purposes of the authorization hearing (**Schedule 5**).

13. The authorization hearing for the Modified Class Action Application took place on June 16 and 17, 2021 before the *A Quo* Judge, as appears from the minutes of that hearing (**Schedule 6 *en liasse***).

14. On July 21, 2021, the Modified Class Action Application was amended again to remove allegations related to Sections 219 and 228 of the CPA and to modify the proposed class as follows (**Schedule 7**):

> *« Toutes les personnes physiques […]* ***ayant conclu un contrat d'achat de véhicule automobile auprès des défenderesses […] depuis le 18 février 2017*** *dans lequel se retrouvait une valeur négative pour un ancien véhicule automobile repris en échange et/ou dans lequel le prix d'achat du véhicule automobile affiché a été majoré. »* *(emphasis added)*

15. The Applicant FCA hereby requests leave to appeal the Authorization Judgment for the following reasons.

III. FLAGRANT AND DETERMINATIVE ERRORS JUSTIFYING LEAVE TO APPEAL

(f) The A Quo Judge made a flagrant error when applying a presumption of truthfulness to the Respondents' allegations while assessing the arguable case test;

16. Firstly, the *A Quo* Judge flagrantly erred by presuming the truthfulness of some of the Respondents' factual allegations, when applying the arguable case test;

17. She was not permitted, as a matter of law, to presume any ownership link between FCA and a dealer who was not sued, based solely on an affirmation that the former was an "FCA authorized dealer" (Schedule 1, at par. 25-30).

18. In effect, it is trite law that authorization judges cannot lawfully apply a presumption of truthfulness to vague and baseless allegations. This necessarily and equally applies to vague and unfounded corporate control inferences which are contradicted by a class applicant's own evidence[2];

19. The only allegations of the Modified Class Action Application pertaining to FCA read as follows:

> 3. Au mois de janvier 2018, les demandeurs Kim Chevrette et Hugo Charest ont fait l'acquisition d'un véhicule automobile de marque Hyundai, modèle Élantra GLS, année 2015 (ci-après le « Véhicule ») auprès du concessionnaire de la défenderesse FCA Canada inc. situé à Sainte-Anne-de-la-Pérade (La Pérade Chrysler).
>
> 4. Les demandeurs ont conclu des contrats de consommation et d'adhésion avec la défenderesse FCA Canada inc.

[2] *Cozak c. Procureur général du Québec*, 2021 QCCA 1376, par. 7. See also : *L'Oratoire Saint Joseph du Mont Royal c. J.J.*, 2019 SCC 35, par. 60 and 210; *E.L. c. Procureur général du Québec*, 2021 QCCA 782, par. 10; *Ehouzou c. Manufacturers Life Insurance Company*, 2021 QCCA 1214, par. 41.

> 5. Les demandeurs ne pouvaient en effet modifier les clauses contractuelles qui leur ont été imposées.
>
> 6. La défenderesse FCA Canada inc. (ci-après « FCA ») est une entreprise spécialisée dans la vente de véhicules automobiles, tel qu'il appert de l'État de renseignements d'une personne morale au registre des entreprises déposé en pièce P-1.
>
> 12. Le prix de vente affiché du Véhicule est de quinze mille neuf cent quatre-vingt-quinze dollars (15 995$), tel qu'il appert de l'annonce affichée sur le site Web du concessionnaire de la défenderesse FCA déposée en pièce P-5.
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> 13. Au début du mois de janvier 2018, les demandeurs Kim Chevrette et Hugo Charest se rendent à la place d'affaires du concessionnaire de la défenderesse FCA afin d'explorer la possibilité d'acquérir le Véhicule.
>
> 17. Or, au cours des négociations précédant l'entente, le vendeur insiste sur les mensualités qui seront dues pour l'achat du Véhicule et indique qu'ils s'arrangeront pour le solde toujours dû sur l'ancien véhicule.
>
> 18. C'est ainsi qu'au moment de signer le contrat de vente, le montant de vente du Véhicule et la valeur de reprise du véhicule sont modifiés par le représentant de la défenderesse FCA et ne correspondent plus à la réalité.

20. These allegations were contradicted by Respondents' own Exhibits P-5, P-6 and P-7 (together **Schedule 8 *en liasse***) which established, on their face, that FCA never entered into any retail instalment sale contract with either of the Respondents or ever made any financing offer to either of them.

21. The *A Quo* Judge had no basis in fact or in law to presume that the Applicant FCA had any dealings whatsoever with the Respondents and should have dismissed the Modified Class Action Application on this basis alone.

(g) The A Quo Judge failed to address or consider additional evidence which she had previously permitted FCA to adduce in the authorization record

22. Secondly, the *A Quo* Judge could not *a fortiori* rely on these baseless allegations since they were also entirely contradicted by the additional evidence which she herself had permitted FCA to adduce into the Court record, prior to the authorization hearing (Schedules 4 and 5)[3].

23. The relevant evidence adduced by FCA as Exhibit FCA-1, with the court's leave, did not merely confirm that the dealer named in the proceedings (9229-3786 Québec inc. aka La Pérade Chrysler) was authorized to sell new FCA vehicles. This evidence also clearly established[4]:

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[3] *Ibid*.

[4] See in Schedule 4: Exhibit FCA-1, as well as the supporting exhibit "A" containing extracts from the Quebec entreprise registry.

> (a) Authorized dealers which sold FCA vehicles since February 12, 2017 were not owned or controlled by FCA;
>
> (b) Authorized dealers who processed retail sales and installment sale contracts for FCA vehicles were independent and distinct legal entities;
>
> (c) FCA had not entered into any retail vehicle sales contracts with Quebec residents since February 12, 2017;
>
> (d) FCA did not participate in any manner in the used sales agreement (Exhibit P-6) and installment sale agreement (Exhibit P-7) filed by the Applicants and was evidently not a party to these contracts;
>
> (e) FCA was not in any way engaged in the used vehicle retail business and did not monitor used vehicle market prices;
>
> (f) FCA did not collect or otherwise benefit from any interest or other amount charged in such vehicle retail installment sale contracts since February 12, 2017, in any event;
>
> (g) FCA did not make or approve any disclosure in any retail installment sale contract executed in Quebec since February 12, 2017;
>
> (h) FCA was not a financial institution and did not approve or regulate vehicle loan agreements;
>
> (i) The dealer website referred to in Exhibit P-5 did not belong to and was not operated by FCA. The website extract does not even refer to FCA or an FCA offer and was not approved by the latter.

24. This evidence was not contradicted in any fashion, either before, during or following the cross-examination of FCA's affiant, which the *A Quo* Judge also authorized (**Schedule 9**).

25. Consequently, the only evidence which the *A Quo* Judge could and ought to have considered was set forth in the sworn statement (Exhibit FCA-1) and supporting exhibit "A" filed by the Applicant FCA, which established that the contracting dealer was a distinct entity from FCA, and that FCA played no role in any dealer retail financing for new or used vehicles.

26. There was no factual issue or controversy to be determined regarding the corporate status of FCA and the independent dealer at the authorization stage or on the merits and the *A Quo* Judge ought to have immediately concluded no arguable case had been demonstrated as regards the Applicant FCA.

(h) ***The* A Quo *Judge authorized a Class, which was blatantly incongruent***

27. Thirdly, the *A Quo* Judge's conclusion that she was not required, at the authorization stage to examine the "legal relationship" between FCA and the dealer who contracted with the Respondents Kim Chevrette and Hugo Charest, also led to a blatant incongruity in the class definition she authorized (which was amended in the Authorization Judgment at par. 94 to read as follows):

> *« Toutes les personnes physiques, résidentes de la province de Québec,* ***ayant conclu un contrat de vente à tempérament pour l'achat d'un véhicule automobile auprès des défenderesses****, entre le 18 février 2017 et la date de publication de l'avis aux membres, dans lequel la dette afférente à un ancien véhicule donné en échange a été incluse dans le financement d'un nouveau véhicule et/ou dans lequel le prix d'achat du véhicule automobile affiché a été majoré. »* *(emphasis added)*

28. As defined and authorized, this Class cannot include FCA since it never entered into any retail instalment sale contracts in Québec or elsewhere since February 18, 2017.

29. The *A Quo* Judge's erroneous refusal to rely on the only veritable and truthful evidence before her, is underscored by the absence of any authorized questions pertaining to corporate identity which were supposedly ripe for the merits.

(i) The A Quo Judge failed to consider that the Class Plaintiffs agreed to abandon their Sections 219 and 228 CPA causes of action at the authorization hearing

30. The *A Quo* Judge also overlooked the Respondents' decision to abandon their misrepresentation causes of action based on Sections 219 and 228 of the CPA at the authorization hearing, confirmed in their July 21, 2021 amendments to the Modified Class Action Application (Schedule 7), in order to rely exclusively on Section 224 c) CPA.

31. Indeed, the *A Quo* Judge nevertheless erroneously relied on Sections 219 and 228 CPA when concluding an arguable case had been demonstrated[5].

32. Moreover, a Section 224 c) cause of action could not, on its face, apply to FCA either since no price offer issued by FCA was even alleged let alone demonstrated. Only the contractual price disclosures of a non-party dealer were alleged and invoked.

(j) The A Quo Judge erred in law when ruling that the Class Plaintiffs had any legal standing or adequate capacity to lead a class action against the Applicant FCA

33. Finally, the *A Quo* Judge patently erred in law when ruling that the Respondents were adequate class representatives *vis-à-vis* FCA.

34. In effect, no legal standing against FCA was ever demonstrated, given it was not a party to the alleged dealer sale contracts (Exhibits P-5, P-6 and P-7, Schedule 8 *en liasse*).

35. As the contracting dealers were not sued whatever standing had been demonstrated *vis-à-vis* the two Defendant Banks, could not in any event be extended to FCA given these proposed Defendants were not at all similarly situated.

[5] See Schedule 1 at par. 59 and ff.

36. Thus, the *A Quo* Judge patently erred in law when applying the relaxed standing rule, adopted by the Supreme Court of Canada in the *Marcotte* decision[6], to defendants that had absolutely nothing in common.

37. This question of law was determinative and had to be ruled upon immediately as it affected the outcome of the Modified Class Action Application of July 2021 insofar as the Applicant FCA[7].

IV. CONCLUSIONS SOUGHT

38. There is no veritable filtering mechanism if authorization judges can utilize their discretion to ignore that class application allegations are contradicted by the very exhibits they invoke.

39. There is no longer any legislative purpose to confer authorization judges with the discretion to permit the filing of relevant evidence if they can merely ignore this uncontradicted proof altogether[8].

40. It is therefore imperative that a panel of this Honourable Court intervenes to determine whether the demonstration of an arguable case can be obviated entirely and replaced by unproven and contradicted inferences.

41. Public perception of the administration of justice in Québec will not be enhanced by the dissemination of notices to members confirming the authorization of incomprehensible or misleading classes either.

42. As appears from its Notice of Appeal, which is being filed concurrently with this Application, the Applicant FCA will ask the Court of Appeal to:

ALLOW the appeal;

REVERSE the Authorization Judgment rendered on March 4, 2022, by the Honourable Nancy Bonsaint, J.C.S., in the Superior Court of Québec file bearing number 200-06-000242-209

DISMISS the *Demande pour autorisation d'exercer une action collective modifiée* of the Respondents/Plaintiffs against the Appellant/Defendant, FCA Canada Inc.

ORDER the Respondents to pay the legal costs both in first instance and on appeal.

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[6] *Bank of Montreal v. Marcotte*, 2014 SCC 55, par. 43 and ff.

[7] *L'Oratoire Saint-Joseph du Mont-Royal c. J.J.*, supra, note 2, par. 55; *Desjardins Cabinet de services financiers inc. c. Asselin*, 2020 SCC 30, par. 27; *Benamor c. Air Canada*, 2020 QCCA 1597, par. 48.

[8] *Brunette c. Legault Joly Thiffault, s.e.n.c.r.l.*, 2018 CSC 55, par. 48.

FOR THESE REASONS, MAY IT PLEASE THE COURT TO:

GRANT this Application;

GRANT the Applicant FCA Canada Inc. leave to appeal the Authorization Judgment rendered on March 4, 2022, by the Honourable Nancy Bonsaint, J.C.S., in the Superior Court of Québec file bearing number 200-06-000242-209;

STAY the proceedings until final judgment on the present appeal;

THE WHOLE, with costs to follow the outcome of the appeal.

This 5th day of May 2022, in Montréal

INF S.E.N.C.R.L./LLP

INF LLP
Lawyers for the Applicant, FCA Canada Inc.

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Within 10 days after notification, the respondent, the intervenors and the impleaded parties must file a representation statement giving the name and contact information of the lawyer representing them or, if they are not represented, a statement indicating as much. If an application for leave to appeal is attached to the notice of appeal, the intervenors and the impleaded parties are only required to file such a statement within 10 days after the judgment granting leave or after the date the judge takes note of the filing of the notice of appeal. (Article 358, para. 2 C.C.P.).

The parties shall notify their proceedings (including briefs and memoranda) to the appellant and to the other parties who have filed a representation statement by counsel (or a non-representation statement). (Article 25, para. 1 of the Civil Practice Regulation)

If a party fails to file a representation statement by counsel (or non-representation statement), it shall be precluded from filing any other pleading in the file. The appeal shall be conducted in the absence of such party. The Clerk is not obliged to notify any notice to such party. If the statement is filed after the expiry of the time limit, the Clerk may accept the filing subject to conditions that the Clerk may determine.

(Article 30 of the Civil Practice Regulation)