COURT OF APPEAL

CANADA
PROVINCE OF QUEBEC
REGISTRY OF MONTREAL

No: 500-09-029714-219
(500-06-001088-208)

DATE: April 28, 2023

CORAM: THE HONOURABLE **ROBERT M. MAINVILLE, J.A.**
GENEVIÈVE COTNAM, J.A.
PETER KALICHMAN, J.A.

LESLIE HAND
APPELLANT – Applicant

v.

DENSO INTERNATIONAL AMERICA, INC.
DENSO SALES CANADA, INC.
TOYOTA CANADA INC.
HONDA CANADA INC.
SUBARU CANADA, INC.
RESPONDENTS – Defendants

JUDGMENT

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[1] The appellant appeals from a judgment of the Superior Court (the Honourable Pierre C. Gagnon),[1] dismissing his application to bring a class action.

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1 *Hand c. Denso International America*, 2021 QCCS 3545 [judgment under appeal].

Background

[2] Respondents, Denso International America, Inc. and Denso Sales Canada, Inc. (collectively, **Denso**), are affiliates of Denso Corporation, a manufacturer of auto parts, including fuel pumps that are integrated into fuel injection systems.

[3] In 2020, Denso issued recall notices in the U.S. and Canada regarding certain of its low-pressure fuel pumps, which, due to a defect, were prone to seizing.

[4] The affected fuel pumps had been installed in many different vehicle models sold or leased by respondents, Toyota Sales Canada, Honda Canada Inc., and Subaru Canada Inc. (collectively, the **Manufacturers**). Each of the Manufacturers issued their own recall notices, as did their American affiliates. Updated notices were issued as additional information became available to the Manufacturers regarding the nature of the defect and the vehicles affected.

[5] While the recall notices issued in Canada are not identical, they each indicate that the problem involves a component known as an impeller. The function of the impeller is to draw fuel from the tank into the pump, from which it will then flow to the engine. According to the recall notices, manufacturing conditions in certain production lots could result in impellers made of low-density materials being more susceptible to fuel absorption. Such impellers could then become warped, thus restricting the supply of fuel to the engine.

[6] The appellant leased an Acura TLX 2019 in 2020. While certain vehicles of this make and model were the subject of a recall notice issued by Honda Canada Inc., the appellant's was not.

[7] The appellant filed his initial application for the bringing of a class action in July 2020. Shortly before the authorization hearing, he filed the Re-amended Application to Authorize the Bringing of a Class Action and to Appoint the Applicant as Representative (the **Application**) on behalf of the following group: All persons, entities, or organizations resident in Quebec, who purchased and/or leased a Subject Vehicle equipped with a fuel pump designed and manufactured by DENSO, or any other group to be determined by the Court (...).

[8] The Application defines "Subject Vehicles" as being "all vehicles purchased or leased in Canada that contain defective low-pressure fuel pumps designed and manufactured by the DENSO Defendants including, but not limited to, the following vehicles known at present to be...".

[9] The appellant alleges that the fuel pumps at issue are defective because they house impellers made of low-density materials that have a propensity for excessive fuel absorption. Such pumps are dangerous to drivers, occupants and third parties since they may cause a vehicle to stall while in motion or to fail to accelerate. The appellant asserts

that he, along with anyone who purchased or leased a "Subject Vehicle", is entitled to various forms of compensation.

The judgment

[10] The judge begins by summarizing the Application, including the proposed legal syllogism, and identifying two sub-groups of potential members; those who received recall notices and those who did not.[2] He then analyzes the four criteria set out at article 575 of the *Code of Civil Procedure* (**C.C.P.**), starting with the second, namely, whether the facts alleged appear to justify the conclusions sought. With respect to the sub-group of motorists who received recall notices, the judge concludes that the facts alleged and the exhibits filed demonstrate an arguable case and that the various grounds of contestation raised by the respondents are mostly issues for the merits.

[11] The judge reaches the opposite conclusion regarding the sub-group of motorists who have not received a recall notice. He determines that it would be an error to infer from the evidence that just because certain Denso fuel pumps identified as defective were installed in vehicles of a particular make and model, that all such vehicles must be recalled. In his view, the evidence demonstrates that the respondents have proceeded methodically and diligently to limit the number of recalls to only those vehicles with a defective Denso fuel pump. He concludes that the appellant – as well as all potential members of the second sub-group - failed to make an arguable case that the fuel pumps in their vehicles were defective or that they should have received a recall notice.

[12] Since the appellant is not a member of the first sub-group and authorization is not granted for the second sub-group, the judge determines that the Application must fail. He nonetheless analyses the remaining criteria of article 575 C.C.P and determines that the first (the existence of identical, similar or related issues of law and fact) and the third (that the composition of the class makes it difficult or impractical to proceed in another manner) are met. With respect to the fourth criterion (the applicant's ability to represent the class), the judge determines that since the appellant is not a member of the first sub-group, he is not qualified to represent it.

The appeal

[13] The appellant argues that the judge ruled on the merits of the claim by rejecting his contention that the defect was one of design and consisted in the use of low-density materials in the fuel pump impellers. The judge concluded instead that the problem which led to the recall was the combination of such impellers with at least one other factor that was present at certain periods of the manufacturing process. In so doing, he argues, the

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[2] The appellant contends that the sub-groups were created by the judge and are not contemplated in the Application.

judge accepted the respondents' narrative instead of leaving this issue to be decided on the merits.

[14] According to the appellant, the judge's error led him to prematurely narrow the class to only those members who owned or leased a vehicle that had been the subject of a recall notice and then to dismiss the Application on that basis since the appellant was not a member of that group.

[15] The appellant asks the Court to overturn the judgement and authorize the class action based on a single class that makes no distinction between those who received recall notices and those who did not. In the alternative, he asks that another member – yet to be identified – be allowed to bring an application to replace him as the representative.

[16] Denso and each of the Manufacturers filed their own factums and, for the most part, raise common arguments.

[17] They maintain that the judge committed no reviewable error. More specifically, they contend that the judge simply filtered out baseless allegations that were not supported by the evidence and, contrary to what the appellant argues, did not delve into the merits of the claim. They emphasize that the proof is unequivocal that the appellant's vehicle was not the subject of a recall, has never experienced problems related to possible fuel pump issues and that the appellant does not even know if the fuel pump in his vehicle was manufactured by Denso.

[18] In their view, the appellant's position that every Denso fuel pump made with a low-density impeller is affected by a design flaw, amounts to pure speculation. They add that, contrary to what the appellant argues, the judge did not accept their narrative. His decision was based almost exclusively on evidence that the appellant himself had put forward.

[19] As far as the appellant's subsidiary conclusion is concerned, the respondents submit that it should not be entertained since no such request was made of the judge and, accordingly, this Court cannot conclude that an error was committed. Furthermore, they add, the appellant has no standing to bring such a request on behalf of a putative class member who has yet to be identified. Finally, the respondents argue that allowing the subsidiary conclusion would require that the Court bypass article 575(4) C.C.P. by authorizing a class action even though the representative plaintiff was not qualified to represent the class.

[20] The appeal thus raises two questions: First, did the judge err in concluding that the appellant had failed to establish an arguable case? Second, to the extent that the judge did not err in reaching that conclusion, are there grounds upon which the Court can or should intervene to salvage the claim?

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[21] The appellant filed an application for permission to present indispensable new evidence pursuant to art. 380 C.C.P., which was heard at the same time as the appeal. The appellant sought to introduce the following exhibits:

i. A September 2022 settlement agreement reached in a U.S. class action case involving Denso and Toyota;

ii. A new Canadian recall notice issued in November 2021 by Transport Canada targeting vehicles sold by Mazda, equipped with Denso fuel pumps;

iii. A new American recall notice issued in November 2021 by the National Highway Traffic Administration targeting vehicles sold by Mazda, equipped with Denso fuel pumps.

[22] To satisfy the requirements of art. 380 C.C.P., the new evidence must not have been available in first instance, must be indispensable and must be susceptible of leading to a different result.[3]

[23] Although none of the proposed exhibits was available in first instance, the appellant has failed to satisfy the remaining criteria.

[24] As far as the settlement agreement involving Toyota and Denso is concerned, its only possible relevance pertains to the use of prefix numbers that, according to the appellant, can be used to identify vehicles equipped with Denso fuel pumps that have low-density impellers. It is possible that such a correlation exists, but the appellant has failed to make such a demonstration. Accordingly, the Court does not agree that this exhibit is indispensable or that it would likely have had an impact on the outcome of the case.

[25] The same conclusion applies to the two recall notices issued for certain Mazda vehicles. Since the judge was aware that other recalls might be issued for Denso fuel pumps, these notices – which do not even implicate a party to these proceedings - would have had no impact on the outcome of the case.

[26] The application for indispensable new evidence will thus be dismissed.

Analysis

[27] Before examining the questions at issue, it is useful to review certain of the principles that will guide the Court's analysis.

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[3] *Corporatek inc. c. Éditions Francis Lefebvre*, 2021 QCCA 1241, para. 19.

[28] It is well-established that a judgment dismissing an application for authorization to bring a class action is owed deference on appeal given the discretionary nature of the analysis contemplated by article 575 C.C P.[4]

575. The court authorizes the class action and appoints the class member it designates as representative plaintiff if it is of the opinion that	**575.** Le tribunal autorise l'exercice de l'action collective et attribue le statut de représentant au membre qu'il désigne s'il est d'avis que:
(1) the claims of the members of the class raise identical, similar or related issues of law or fact;	1° les demandes des membres soulèvent des questions de droit ou de fait identiques, similaires ou connexes;
(2) the facts alleged appear to justify the conclusions sought;	2° les faits allégués paraissent justifier les conclusions recherchées;
(3) the composition of the class makes it difficult or impracticable to apply the rules for mandates to take part in judicial proceedings on behalf of others or for consolidation of proceedings; and	3° la composition du groupe rend difficile ou peu pratique l'application des règles sur le mandat d'ester en justice pour le compte d'autrui ou sur la jonction d'instance;
(4) the class member appointed as representative plaintiff is in a position to properly represent the class members.	4° le membre auquel il entend attribuer le statut de représentant est en mesure d'assurer une représentation adéquate des membres.

[29] The Court should only intervene when the judge commits an error in law or when the judge's assessment of the criteria set out in article 575 C.C.P. is clearly wrong.[5] In such circumstances, the Court can substitute its reasoning for that of the judge but only regarding the criteria which is the subject of the error.[6]

[30] The role of the authorizing judge is also limited, as Justice Kasirer (then a member of this Court), pointed out in the case of *Sibiga*:[7]

> [34] While the compass for appellate intervention is indeed limited, so too is the role of the motion judge. In clear terms, particularly since its decision in *Infineon*, the Supreme Court has repeatedly emphasized that the judge's function at the authorization stage is only one of filtering out untenable claims. The Court stressed that the law does not impose an onerous burden on the person seeking

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4 *Desjardins Cabinet de services financiers inc. c. Asselin*, 2020 CSC 30, para. 2.
5 *L'Oratoire Saint-Joseph du Mont-Royal c. J.J.*, 2019 CSC 35, para. 10.
6 *Vivendi Canada Inc. c. Dell'Aniello*, 2014 CSC 1, para. 35.
7 *Sibiga c. Fido Solutions inc.*, 2016 QCCA 1299.

> authorization. "He or she need only establish a 'prima facie case' or an 'arguable case'", wrote LeBel and Wagner JJ. in *Vivendi*, specifying that a motion judge "must not deal with the merits of the case, as they are to be considered only after the motion for authorization is granted".
>
> [35] Since *Infineon*, our Court has consistently relied upon this standard, invoking it when authorization has been wrongly denied because too high a burden was imposed.
>
> [References omitted]

[31] Accordingly, if a judge exceeds the "screening" role at the authorization stage and imposes too high an evidentiary burden on the applicant, this constitutes an error of law and warrants the Court's intervention.[8]

(1) Did the judge err in concluding that the appellant had failed to establish an arguable case?

[32] As was mentioned above, the appellant alleges that Denso fuel pumps fitted with an impeller that is manufactured with low-density material are affected by a design defect. According to him, such an impeller has a propensity for excessive fuel absorption, which causes it to warp and impede the functioning of the fuel pump. He further alleges that the vehicle he leased is equipped with such a pump.

[33] The judge accepts from the outset that not all Denso fuel pumps are affected by a defect, only those manufactured during certain periods.[9] At paragraph 5 of the judgment, he writes:

> - [...] ce ne sont pas toutes les pompes Denso qui se sont avérées défectueuses, mais plutôt certains lots d'entre elles fabriqués durant des périodes spécifiques, ce qui a amené les défenderesses (ou plutôt, leurs maisons-mères au Japon) à identifier :
>
> - quels étaient les lots de pompes défectueuses;
>
> - sur quels véhicules distribués au Canada étaient installées les pompes des lots défectueuses.
>
> [References omitted]

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8 *L'Oratoire, supra,* note 5, para. 12.

9 Paragraph 5 of the judgment.

[34] Furthermore, he determines that because the respondents underwent a thorough and meticulous recall process to trace the affected fuel pumps to the vehicles in which they were installed, it would be an error to conclude that all vehicles of the same make and model were similarly affected.[10]

> [141] Ce serait donc une erreur d'inférer que, si certaines pompes à essence Denso identifiées comme défectueuses ont été installées dans des véhicules d'un modèle donné (par exemple, certaines Acura TLX 2019), alors tous les exemplaires de ce modèle roulant aux États-Unis et au Canada (et ailleurs) doivent nécessairement être rappelés.

[35] He concludes that the recalls were sufficient and that only those potential members who received a recall notice have an arguable claim. In reaching this conclusion, the judge rejects the appellant's allegation that all Denso fuel pumps equipped with impellers made of low-density materials are defective. He thus adopts the respondents' narrative rather than accepting the allegations of the Application as true.

[36] The judge was not bound to take the allegations of the Application as true if they were found to be implausible, manifestly inaccurate, vague, or imprecise.[11] However, with respect, the Court does not agree that that was the case here. The allegations of the Application coupled with the evidence, support the appellant's contention that he has an arguable case. More specifically, the appellant has demonstrated the possibility that he may succeed on the merits in proving that the defect consists in the use of low-density impellers and not, as the respondents contend, various problems in the manufacturing process which impact on such impellers.

[37] The Manufacturers identity three different situations in which a Denso fuel pump has been found to be defective, namely:

i. When low-density impellers are exposed to product solvent drying for long periods;[12]

ii. When low-density impellers have lower surface strength;[13] and

iii. When low-density impellers are affected by fuel pump controllers.[14]

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10 Paragraphs 141-143 of the judgment.

11 *L'Oratoire, supra,* note 5, paras 58 and 59; *Infineon Technologies AG c. Option consommateurs*, 2013 CSC 59, para. 67.

12 R-19, R-21, R-22, R-24, R-44 and R-61.

13 R-21, R-24 and R-46.

14 Schedule III.

[38] In the Court's view, where a common denominator – in this case, a low-density impeller – is present in three separate scenarios which can cause a fuel pump to cease functioning, it is more than mere speculation to suggest that the impeller itself may be the source of the defect.

[39] This view is reinforced by reports filed with the National Highway Traffic Safety Administration in the U.S. (the **NHTSA**), in which Denso indicates than the component used to remedy the fuel pump problem is a "higher density" impeller.[15] In fact, as the appellant points out, the problem which led to the recalls appears to have been definitively resolved as of 2019 after Denso began using a higher density impeller in its fuel pumps.[16]

[40] In addition, the appellant alleges that according to certain NHTSA complaints, motorists who have not received a recall notice have still experienced problems associated with the alleged defect.[17] This further supports the appellant's contention that the problem extends beyond the scope of the recalls.

[41] Contrary to what the respondents argue, authorizing the class action in this case does not signify that such an action may be brought by anyone who, without evidence, feels that they should have received a recall notice. The question here – as in any application for authorization to bring a class action – is whether the applicant satisfies the criteria of article 575 C.C.P., including the demonstration of an arguable case. In the Court's view, the appellant satisfies these criteria.

[42] Whether low-density impellers are the source of the problem that led to the recalls, a factor that contributed to the problem or neither of these, is a question for the merits. The judge erred in law by disposing of this question at the application stage of the proceedings, thus imposing too high an evidentiary burden on the appellant.

[43] The respondents further argue that the appellant has failed to demonstrate a personal cause of action because he never experienced a problem with the fuel pump in his vehicle, does not even know if that pump houses a low-density impeller and has failed to establish on a *prima facie* basis that he has suffered any damage.

[44] None of these arguments is convincing.

[45] First, as the respondents themselves acknowledge, not all motorists who received a recall notice had experienced problems with their fuel pumps so the fact that the appellant hasn't experienced such problems is immaterial.[18]

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15 R-21, R-24, R-59 and R-64.
16 This is contained in a safety recall report filed by Subaru as R-19.
17 Paragraph 58.9 of the Application as was as his argument plan, Annex B.
18 See for example R-14, R-22, R-44, R-61, R-19, R-46 and R-19.

[46] Second, though it is true that the appellant has not disassembled the fuel pump in his vehicle to determine if it is equipped with a low-density impeller, it is equally true that the Manufacturers have access to this information. They were, after all, able to identify the vehicles equipped with a fuel pump containing a potentially defective impeller for the purposes of the recalls. The Manufacturers – or, more accurately in the case of the appellant's vehicle, Honda Canada Inc. – either have this information and have failed to provide it or have not bothered to check. Either way, given the informational imbalance between the parties, the respondents' argument is disingenuous and cannot be relied upon to refuse authorization of the class action.[19]

[47] Finally, as far as damages are concerned, the appellant alleges that he has suffered a loss as a direct result of the alleged defect as well as the respondents' omissions and misrepresentations. The damages he claims include overpayment for the lease on his vehicle, lower resale value, pain, suffering, trouble and inconvenience. It is far from clear that the appellant has made out an arguable case for each of these heads of damage. However, as a consumer alleging the breach of obligations under the *Consumer Protection Act*, he benefits from a presumption of prejudice.[20]

[48] The Court thus concludes that the judge erred in determining that the appellant had failed to demonstrate that the facts alleged in the Application appear to justify the conclusions sought. Since the judge held that the appellant was not in a position to properly represent class members because he was not himself a member, this conclusion must also fall.

[49] Given the Court's answer to the first question, there is no need to address the second.

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[50] Since the appellant has made a sufficient demonstration of a cause of action, it is unnecessary to divide the class into two sub-groups. Based on the allegations of the Application, there is no basis – at least at this point in time – to distinguish between those who have received a recall notice and those who have not.

[51] That said, contrary to what the appellant argues, the Court does not agree the definition of the group should incorporate prefix numbers. As was indicated earlier in the context of the appellant's application for permission to adduce indispensable new evidence, these numbers may indeed be useful in identifying vehicles with defective fuel pumps, but that demonstration was not made to the Court's satisfaction and is certainly

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19 *Sibiga, supra,* note 7, para. 62.

20 *Vidéotron c. Union des consommateurs*, 2017 QCCA 738, para. 55 citing *Richard c. Time Inc.*, 2012 CSC 8, para.112.

not acknowledged by the Manufacturers. Consequently, adding prefix numbers to the definition of the class may cause more confusion than it alleviates.

[52] Lastly, the class definition proposed by the appellant is overly broad and must be confined to the alleged defect, namely low-pressure fuel pumps designed and manufactured by Denso which are equipped with low-density impellers.

FOR THESE REASONS, THE COURT:

[53] **DISMISSES** the Application for Permission to Present Indispensable New Evidence, with legal costs;

[54] **GRANTS** the appeal;

[55] **SETS ASIDE** the judgment of the Superior Court;

[56] **GRANTS** the appellant's Re-Amended Application to Authorize the Bringing a Class Action and to appoint the Applicant as representative;

[57] **ASCRIBES** to Leslie Hand the status of representative for the purpose of bringing a class action on behalf of:

> All persons or entities resident in Quebec, who purchased and/or leased a vehicle from Toyota Sales Canada, Honda Canada Inc., or Subaru Canada Inc., equipped with a low-pressure fuel pump designed and manufactured by Denso which is equipped with a low-density impeller.

[58] **IDENTIFIES** the following as the principal questions of fact and of law to be treated collectively in the action:

a) Did Denso manufacture faulty fuel pumps?

b) Did the defendants delay, after learning of the damage, in informing the members?

c) Did the defendants delay in repairing the pumps?

d) Did the defendants make an inadequate and unsatisfactory remedy?

e) Have the members suffered compensable damage as a result of:

- repair costs?
- towing costs?
- costs of renting a replacement vehicle?

- loss of use of their vehicle?

- trouble and inconvenience?

f) Are the members entitled to a partial reimbursement of the purchase price or the rental price of their vehicle, in particular because of the defendants' false representations concerning the pumps?

g) Have members who are consumers (within the meaning of the Consumer Protection Act) suffered a loss in the resale value of the vehicle they own?

h) Are members who are consumers entitled to punitive damages?

i) In all cases, what are the damages?

[59] **IDENTIFIES** the following as the principal conclusions that relate to the questions set out above:

a) **GRANT** the class action of the Plaintiff and each of the members of the Class;

b) **ORDER** the Defendants to recall the vehicles equipped with Denso manufactured fuel pumps containing a low-density impeller and to repair and/or replace said defect free of charge;

c) **DECLARE** the Denso Defendants solidarily liable for the damages suffered by the Plaintiff and each of the members of the Class;

d) **CONDEMN** the Defendants to pay to each member of the Class a sum to be determined in compensation of the damages suffered, and **ORDER** collective recovery of these sums;

e) **CONDEMN** the Defendants to pay to each of the members of the Class who are consumers, punitive damages, and **ORDER** collective recovery of these sums;

f) **CONDEMN** the Defendants to pay interest and additional indemnity on the above sums according to law from the date of service of the motion to authorize a class action;

g) **CONDEMN** the Defendants to bear the costs of the present action including expert and notice fees;

h) **RENDER** any other order that this Honourable Court shall determine and that is in the interest of the members of the Class.

[60] **REMANDS** the file to the Chief Justice of the Superior Court for designation of the judicial district in which the class action will proceed and for the appointment of a case management judge;

[61] **DEFERS** to the case management judge, questions relating to the publication of notices to class members and the time limit for opting out of the class;

[62] With legal costs on appeal and costs to follow suit in first instance.

ROBERT M. MAINVILLE, J.A.

GENEVIÈVE COTNAM, J.A.

PETER KALICHMAN, J.A.

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Mtre Sidney Elbaz
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AUDREN ROLLAND
For Subaru Canada Inc.

Date of hearing: March 14, 2023