

SUPERIOR COURT

CANADA
PROVINCE OF QUEBEC
DISTRICT OF MONTREAL

No.: 500-06-000816-161

DATE: November 20, 2023

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

OPTION CONSOMMATEURS
and
CHANTAL GAGNON
Plaintiffs

v.
SAMSUNG ELECTRONICS CANADA INC.
and
SAMSUNG ELECTRONICS CO., LTD
Defendants

JUDGMENT

OVERVIEW

[1] On July 3, 2023, after a full day hearing and the receipt of written representations, the Court issued a judgment (the “**July 2023 Judgment**”)¹ with regard to various motions (mostly concerning document requests, objections, and re-examinations of witnesses) presented in the context of a class action authorized more than five and a half years ago.

[2] In the course of its judgment, the Court noted:

¹ *Option Consommateurs c. Samsung Electronics Canada Inc.*, 2023 QCCS 2388.

[97] The present case illustrates rather convincingly what can happen when the parties and their counsel lose track of their duty to safeguard the principle of proportionality and the need to cooperate to ensure that proceedings proceed efficiently.

[98] The original application to be authorized to file a class action was filed in October 2016. The class action was authorized by the Superior Court more than five years ago. The class action was filed in July 2018.

[99] Nonetheless, the parties are still bogged down in numerous pre-trial procedures.

[...]

[153] Finally, the Court is conscious of its duty to ensure that the present case proceeds efficiently. It is worth repeating that five years have elapsed since the class action was authorised. In the current circumstances, Plaintiffs' request that they be first allowed to obtain additional documents and then proceed with a re-examination is not reasonable. The significant delays incurred so far are likely to seriously affect the capacity of the parties to present evidence in support of their case and more importantly will undoubtedly have an impact on the ability of individual Class Members to file a claim in the event of a favourable judgment. The phrase "justice delayed is justice denied" applies just as well to class actions as it does to other claims.

[3] The Court asked the parties to file a case protocol to ensure that the case proceeds efficiently going forward.

[4] Despite the above comments and the Court's request, the parties were unable to agree on a protocol.

[5] Moreover, less than two months after the July 2023 Judgment was issued, the Court received notice that the parties requested another full day hearing to deal with additional disputes concerning the interpretation of previous judgments on document disclosures, objections, and examinations out of court.

[6] Prior to the scheduled hearing, each of the parties filed a motion alleging abuses of procedure on the part of the other party.

CONTEXT

[7] The context was set out in July 2023 Judgment. The portions relevant to the matters at issue here are reiterated for ease of understanding.

[8] In the fall 2016, Samsung Electronics Canada Inc. ("**Samsung Canada**") and Samsung Electronics Co., Ltd ("**Samsung Electronics**") and together with Samsung Canada, ("**Samsung**") proceeded to voluntarily recall (the "**Recall**") certain models of washing machines sold in Canada (the "**Washers**") to address the risk of excessive

vibration which can cause the lid of the washers to detach.² The Recall offered consumers two choices: a free in-home repair combined with a one-year extension of the manufacturer's warranty, or a rebate that could be applied towards the purchase of a new Samsung washer. It also compensated consumers whose washers were damaged.

[9] Plaintiffs, Option Consommateurs and the Designated person, Ms. Chantal Gagnon (together "**Plaintiffs**") filed proceedings (the "**Authorization Motion**") shortly after the Recall notice on the basis that the Recall was insufficient to compensate for the damages suffered by consumers.

[10] On or about April 26, 2018, Justice Suzanne Courchesne authorized a class action (the "**Authorization Judgment**")³ against Samsung for the benefit of Quebec consumers who had purchased certain models of Washers manufactured by the defendants (the "**Class Members**").

[11] Plaintiffs filed their claim on July 6, 2018.

[12] Samsung filed its plea on December 7, 2020. It alleges that most consumers will not experience the problems which led to the decision to proceed with the Recall. For those who were susceptible to having an issue, it contends that the Recall resolved the problem and that no damages were caused.

[13] On March 30, 2021, Plaintiffs examined Mr. Anand Majithia, Vice-president Sales and Product Management for Samsung Canada.

[14] On April 1, 2021, Plaintiffs examined Mr. Sungjong Kim, of Samsung Electronics.

[15] Numerous objections were raised with regard to questions and requests for undertakings. Plaintiffs also alleged that some answers were incomplete. They requested permission to re-examine Samsung representatives on issues that the original representatives could not answer.

[16] On September 13, 2021 (rectified on October 7, 2021), Justice Moore ruled on the objections raised by Samsung during the examination of the Samsung representatives.⁴

[17] On October 28, 2021, Justice Moore authorized Plaintiffs to examine another Samsung Canada representative on certain issues surrounding the Recall. However, Justice Moore refused Plaintiffs' request to examine a Samsung Canada representative on "interactions between Samsung Canada and Class members in the context of the Recall".

² Exhibit D-1.

³ *Option Consommateurs c. Samsung Electronics Canada inc.*, 2018 QCCS 1751 (Permission to appeal denied, 2018 QCCA 1057).

⁴ *Option Consommateurs c. Samsung Electronics Canada Inc.*, 2021 QCCS 3842 (Appeal denied, 2023 QCCA 132).

[18] On March 2, 2022, Justice Moore ordered Samsung to respect their undertaking to provide the Customer service team records of interactions between Samsung and its customers in the context of the Recall (undertaking U-10 of the examination of Mr. Majithia). However, he allowed Samsung to redact all contact information for those customers.

[19] Plaintiffs appealed the three judgments but, in the meantime, Justice Moore ordered that the parties should proceed with the examination of a Samsung Canada representative, Mr. Frank Martino, on the subjects he had authorized. Mr. Martino was thus examined for the first time on October 6, 2022.

[20] On January 11, 2023, the Court of Appeal,⁵ among other things, allowed Plaintiffs to examine Mr. Martino on the subject of “interactions between Samsung Canada and Class Members in the context of the Recall” (the “**Appeal Judgment**”).

[21] On July 3, 2023, the undersigned was seized with motions to adjudicate objections raised during the examination of Mr. Martino as well as requests by Plaintiffs to proceed with additional examinations.

[22] After reviewing the principles applicable to pre-trial discovery, the Court observed that its role was to find the delicate balance between two equally important objectives:

- 22.1. 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;
- 22.2. 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.⁶

[23] Weighing these objectives, the Court ordered Samsung to:

- 23.1. provide “an extract in electronic format of the Global Customer Interaction Center (“**GCIC**”) database which contains all information that Defendants possess with regard to top detachment or excessive vibration Washer incidents involving Class Members” [underlining added];
- 23.2. provide updated versions of U-6 and U-10 “that would also include the interactions with the customers found in the GCIC”;

⁵ *Option Consommateurs c. Samsung Electronics Canada Inc.*, 2023 QCCA 19.

⁶ *Option Consommateurs c. Samsung Electronics Canada Inc.*, 2023 QCCS 2388, par. 84.

- 23.3. provide a table for the Washer models included in the Class definition, which identifies the number of Washers that experienced “Excessive vibration or top detachment incidents” (the “**Corporate Knowledge Table**”).

[24] In addition, the Court ordered that Mr. Martino could be re-examined on the subject authorized in the Appeal Judgment namely, “interactions between Samsung Canada and Class members in the context of the Recall”. It also ruled that if the GCIC extract procedure did not automatically include attachments, Mr. Martino could be examined on his sworn declaration of June 8, 2023, to the effect that providing the attachments would take an inordinate amount of time and be cost prohibitive.

[25] Mr. Martino was re-examined on August 21, 2023.

[26] Plaintiffs submit that to all intents and purposes, the examination never really took place, since the Defendants put up a barrage of 122 objections over a period of approximately 90 minutes of questioning.

[27] They also claim that Samsung unilaterally restricted the scope of the order contained in the July 2023 Judgment concerning disclosure of the GCIC extracts and the Corporate Knowledge Table and provided an updated U-10 table that still contains redactions in the form of hashtags.

[28] On their part, Samsung alleges that during the examination Plaintiffs kept ignoring the previous judgments asking questions on subjects for which permission to examine had either been refused or which had already covered during Mr. Martino’s October 2022 examination.

[29] They also submit that they complied with previous rulings regarding the GCIC, the updated U-10 and the Corporate Knowledge Table.

[30] Therefore, the case management requests basically raise two questions:

- 30.1. Has Samsung complied with the July 2023 Judgment regarding disclosure of the GCIC extracts, the updated U-10 and the Corporate Knowledge Table?
- 30.2. Did Plaintiffs’ examination of Mr. Martino in August 2023 respect the boundaries set by the Appeal Judgment of January 2023 and by the July 2023 Judgment?

[31] These questions will be dealt with in turn. If the answer to either of them, is negative, the Court must decide if sanctions should be imposed either under 54 or 342 C.p.c.

1. **Has Samsung complied with the July 2023 Judgment regarding disclosure of the GCIC extracts, the updated U-10 and the Corporate Knowledge Table?**

1.1 **The GCIC Extracts**

[32] The GCIC is a worldwide database in which Samsung records interactions with its customers (sometimes referred to as “**Tickets**”). Samsung Canada has access to the Canadian portion of the GCIC but can ask for access to relevant extracts of the Global database.

[33] In its July 2023 Judgment, the Court ordered Samsung to provide, within thirty days, the following information:

[195] With regard to objections no. 13, 14, 21, 22, 39, 40, 41, 42 and 45, **ORDERS** Defendants to provide an extract in electronic format of the [GCIC] database which contains all information that Defendants possess with regard to top detachment or excessive vibration Washer incidents involving Class Members;

[196] **PRAYS ACT** of Defendants undertaking to provide:

196.1. An updated customer service interaction log for top detachments in Canada (U-6) as of May 2023 (with the redaction authorized by the Court of Appeal) but that would also include the interactions with the customers found in the GCIC (with the redaction authorized by the Court of Appeal); and

196.2. An updated customer service interaction log for Quebec residents as of May 2023 (updated U-10).

[34] Thus, the Court not only accepted Samsung’s offer to provide updated versions of U-6 and U-10 (para. 196 of the July 2023 Judgment) but also ordered production of the relevant extracts of the GCIC database containing information “with regard to top detachment or excessive vibration Washer incidents involving Class Members” (para. 195 of the July 2023 Judgment – Underlining added).

[35] Samsung responded to the undertakings on August 2, 2023.⁷

[36] The documents referred to in paragraphs 195 and 196.1 of the July 2023 Judgment were provided in the form of a single Excel document entitled “GCIC Extract and Updated U-6 (May 2023)” (the “**GCIC Extract**”). The Excel spreadsheet contains two tabs respectively entitled “SECA GPLS” (comprising 223 entries) and “Databook” (comprising 1139 entries). The GCIC Extract also includes the attachments referred to in the July 2023 Judgment with regard to the Quebec consumer files that Samsung disclosed.

[37] Plaintiffs believe that the GCIC Extract is incomplete.

⁷ Plaintiff’s Exhibit R-3.

[38] They observe that more than a thousand Tickets listed in undertakings U-10 (customers who benefited from a recall repair) and U-17 (customers who benefited from an extended warranty) contain reports by Samsung clients of excessive vibration. These excessive vibration reports are not included in the Tickets communicated in the GCIC Extract.

[39] In addition, it appears that Samsung has excluded Tickets which Samsung's own employees flagged as a "noise/vibration(s)" issue in the GCIC.

[40] Plaintiffs note for example that the Designated person is not included in the GCIC Extract. This is surprising given the allegations in the Authorization Motion about Ms. Gagnon's experience. In the Authorization Judgment, Justice Courchesne summarized these allegations as follows:

[23] Les allégations de la Demande sur le cas personnel de Mme Gagnon et les pièces à l'appui, tenues pour avérées, se résument comme suit.

[24] Le 22 avril 2014, Mme Gagnon achète chez Brault & Martineau une laveuse Samsung dont le modèle est identifié à la définition du groupe proposé.

[25] Au début de 2015, la laveuse de Mme Gagnon devient incapable de contenir les vibrations occasionnées par la cuve qui tourne au stade de l'essorage, et ce tant pour le lavage de literie que pour le lavage de simples morceaux de vêtements.

[26] Elle doit alors surveiller de près la laveuse au stade de l'essorage, afin de l'arrêter lorsque les vibrations deviennent trop violentes, parce qu'elle se déplace et se heurte aux murs et aux objets qui l'entourent.

[27] Excédée par le problème de vibration de sa laveuse et par les désagréments que celui-ci occasionne, Mme Gagnon se plaint par téléphone auprès de Samsung et de l'établissement Brault & Martineau chez qui elle a acheté sa laveuse.

[28] Le 29 juin 2015, suite à cette plainte, un technicien mandaté par Samsung se présente au domicile de Mme Gagnon afin d'inspecter sa laveuse et d'identifier les réparations à y apporter afin de régler le problème de vibrations. Au terme de son inspection, le technicien estime les coûts de réparation à 700,54 \$, soit 150 \$ de moins que le prix d'achat de la laveuse.

[29] L'estimé résume la plainte de Mme Gagnon comme suit : « essorage se débalance et recommence à laver » et identifie le travail effectué : « débalancement spin tub. En train de se défaire ».

[30] Suite à cette visite, Mme Gagnon effectue un suivi par écrit auprès de Samsung et de Brault & Martineau. En bout de piste, Samsung prend à sa charge les coûts liés à la réparation de sa laveuse.

[31] Au début de juillet 2015, un technicien effectue deux déplacements au domicile de Mme Gagnon pour y réaliser les réparations requises pour régler le problème de vibration. Plusieurs pièces sont remplacées, dont la cuve de la laveuse et certains amortisseurs.

[32] Malgré les interventions du mandataire de Samsung, la laveuse de Mme Gagnon continue encore aujourd'hui à vibrer de façon anormale et dangereuse.

[33] Le 29 septembre 2016, Mme Gagnon prend connaissance du risque d'explosion associé à l'usage normal de sa laveuse, dans les circonstances indiquées ci-après.

[41] While these remain unproven allegations which Justice Courchesne was under the obligation to take for granted at the authorization stage, one wonders how her case could not be considered an “top detachment or excessive vibration Washer incident” as per conclusion 195 of the July 2023 Judgment.

[42] A letter sent by Samsung's counsel to class counsel on October 6, 2023,⁸ may shed light on this issue:

SECA provided you with “all information that Defendants possess with regard to top detachment or excessive vibration Washer incidents” for Canada. Wording used by customers such as “excessive vibration” are allegations and complaints and do not result in an “excessive vibration incident”, the wording used by Justice Sheehan in his Order of July 3, 2023. Note that washers must vibrate in order to operate. “Excessive vibration” could also be caused by inadequate installation or misuse. However, SECA has already provided to you information where a customer allegation or complaint of “excessive vibrations” in the Washers resulted in an “incident”, thereby causing damage to the washer itself and/or other items (such as wall or dryer), to the extent that the “excessive vibration incident” involved a Washer. If the Washer experienced an “excessive vibration incident”, it would have resulted in a Product Liability (PL) finding, the results of which have already been shared with you.

[43] While the explanation is not easy to follow, it appears that Samsung interpreted the July 2023 Judgment in way that:

- 43.1. Distinguishes allegations or complaints by Class Members regarding vibration incidents from actual excessive vibration incidents;
- 43.2. Considers that vibration allegations or complaints do not consist of excessive vibration incidents if the excessive vibration is caused by the misuse or inadequate installation;

⁸ Plaintiff's Exhibit R-7.

- 43.3. Discards vibration allegations or complaints which have not resulted in damage to the washer itself or to surrounding other items (the latter being defined as a “**PL Claim**”).

[44] These caveats – which appear nowhere in the July 2023 Judgment - may very well be relevant at the trial stage to determine if an excessive vibration complaint constitutes a manufacturing defect or not, but they are certainly not appropriate at the pre-trial disclosure stage.

[45] It bears repeating that one of the main objectives of pre-trial disclosure is to allow the parties to evaluate the strength of their respective cases and encourage out of court settlements.⁹ For this goal to be achieved, relevance at the discovery stage must be interpreted broadly and any doubt as to the relevance of a response must favour disclosure. The assessment of relevancy at such a time is a function of the evidence’s usefulness rather than its necessity.¹⁰

[46] The decision of a party to unilaterally impose additional restrictions to a court order concerning document disclosure runs afoul of these principles.

[47] Such a decision is all the more surprising given the Court’s observation in the July 2023 Judgment that “[i]nformation regarding the Washers purchased by Class Members is of fundamental relevance to the questions at issue in this trial” (para. 126).

[48] Samsung submits that it complied with both the letter and the spirit of July 2023 Judgment.

[49] Unfortunately, it is not possible to determine what restrictions were actually imposed to the document disclosure as Samsung has refused to answer requests from class counsel seeking an explanation as to how they proceeded to generate the GCIC Extract.¹¹

[50] Thus, Samsung will be ordered (again) to produce a new GCIC extract (the “**New GCIC Extract**”) that includes “all information that Defendants possess with regard to top detachment or excessive vibration Washer incidents involving Class Members”.

[51] To ensure that the order is fully complied with, the Court issues the following clarifications:

⁹ *Imperial Oil v. Jacques*, 2014 SCC 66, paras. 24 to 26; *Glegg v. Smith & Nephew Inc.*, 2005 SCC 31, para. 22.

¹⁰ *Groupe TVA inc. c. Boulanger*, 2023 QCCA 687, para. 18; *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); *Siciliano c. Éditions La Presse ltée*, 2016 QCCS 3702, para. 48 (Out of court settlement (C.A., 2016-06-23) 500-09-026076-166).

¹¹ Plaintiffs’ Exhibits R-4 and R-6.

- 51.1. The New GCIC Extract must include all allegations or complaints regarding vibration regardless of whether Samsung considers these allegations or complaints to be well founded, considers that the vibration complained about is indeed “excessive”, considers the complaint to be an “incident” or considers it to be a “PL Claim”;
- 51.2. The New GCIC Extract must include (but is not limited to) all Tickets flagged by Samsung in the Category 2 description column as “Noise/Vibration” or “Noise/Vibrations” and in Category 3 description column as “Banging Noise”, “Excessive Vibration”, “Noise during spinning”, “Noise during washing”, “Shaking” or “Vibrating”.

[52] Samsung will also be ordered to communicate to Plaintiffs the selection criteria used to create the New GCIC Extract.

1.2 The Updated U-10

[53] On September 19, 2023, after receiving the updated version of U-10, class counsel notified Samsung that the text cells in this updated version included hashtag symbols in several places.¹²

[54] Samsung responded that the hashtags are automatically generated when ticket data is downloaded from the GCIC system to replace customer personal information and that it was unable to turn off this feature.¹³

[55] This appears to be incorrect as a previous version of U-10 does not include the hashtags.¹⁴

[56] Samsung will be ordered to provide a version of U-10 without the hashtags.

1.3 The Corporate Knowledge Table

[57] During the course of the hearing that led to the July 2023 Judgment, Plaintiffs had asked for a complete version of the GCIC. They alleged that the all customer interactions were relevant to establish corporate knowledge of the potential problem.

[58] The Court refused. It noted that details of worldwide incidents involving the Washers would only be marginally relevant to the Defendants’ corporate knowledge and would distract from the primary focus of the debate. It risked prolonging the trial in Quebec without a measurable benefit to the Class (paragraph 127 of the July 2023 Judgment).

[59] However, the Court ordered Samsung to provide:

¹² Plaintiffs’ Exhibit R-6.

¹³ Plaintiffs’ Exhibit R-7.

¹⁴ Plaintiffs’ Exhibits R-12 and R-13.

[197] With regard to corporate knowledge, **ORDERS** Defendants to provide a table in the same format as the one included at page 20 of Exhibit R-5 for the Washer models included in the Class definition, which instead of “Sales Quantity”, identifies the number of Washers that experienced “Excessive vibration or top detachment incidents” and **ALLOWS** Defendants, if they wish to, to separate “Excessive vibration” incidents from “Top detachment” incidents [the “**Corporate Knowledge Table**”]

[60] Samsung appears to have taken the same restrictive position with regard to this table as it did with the GCIC Extract.

[61] In their letter of August 2, 2023,¹⁵ responding to this part of the July 2023 Judgment, Samsung’s counsel writes that it is providing three tables of “PL claims – Top Detachment Incidents” for Canada, US and worldwide. The table covers only the years 2013 to 2016.

[62] Internal Samsung documents indicate that Samsung defines a PL Claim as accidents which cause harm to a customer or to his property. Samsung specifically excludes incidents in which only Samsung’s product was damaged.¹⁶

[63] While the July 2023 Judgment allowed Samsung to separate (if it wished to do so) Top detachment from excessive vibration incidents, it certainly did not allow Samsung to provide only one or the other.

[64] Furthermore, the July 2023 Judgment does not limit the incidents to those internally referred to by Samsung as PL Claims. Finally, the order is not restricted to years 2013 to 2016.

[65] As such, Samsung will be ordered to provide a new Corporate Knowledge Table.

[66] To ensure that the order is fully complied with, the Court issues the following clarifications:

- 66.1. The new Corporate Knowledge Table must include all allegations or complaints regarding vibration regardless of whether Samsung considers these allegations or complaints to be well founded, considers that the vibration complained about is indeed “excessive”, considers the complaint to be an “incident” or considers it to qualify as a PL Claim;
- 66.2. The new Corporate Knowledge Table must include (but is not limited to) all Tickets flagged by Samsung in the Category 2 description column as “Noise/Vibration” or “Noise/Vibrations” and in Category 3 description column as “Banging Noise”, “Excessive Vibration”, “Noise during spinning”, “Noise during washing”, “Shaking” or “Vibrating”;

¹⁵ Plaintiffs’ Exhibit R-3.

¹⁶ Plaintiffs’ Exhibit R-8.

66.3. The table must cover years 2011 to 2023.

[67] Samsung will also be ordered to communicate to Plaintiffs the selection criteria used to create the new Corporate Knowledge Table.

1.4 The 25% Figure Used in Exhibit D-13

[68] The Court considers that undertaking U-39 to explain the 25% figure (re: “EST Purchase price”, Exhibit D-13), is adequately answered in Samsung’s letter of October 6, 2023.¹⁷

2. Did Plaintiffs’ Examination of Mr. Martino in August 2023 Respect the Boundaries Set by the Judgments Issued by the Court of Appeal in January 2023 and by the Undersigned in July 2023?

[69] In January 2023, the Court of Appeal ordered that the examination of Mr. Martino could cover the following additional subject: “*interactions entre SECA [Samsung Canada] et les membres du groupe dans le cadre du rappel*”;

[70] This decision was rendered in the following context.

[71] After proceeding with an examination of the first Samsung Canada representative, Mr. Majithia, Plaintiffs asked to proceed with an examination of a second Samsung Canada representative. To substantiate their request, they alleged that Mr. Majithia had been unable to answer questions on a number of subjects including the following:

- a) La séquence des événements et les démarches internes chez SECA ayant mené à la décision de procéder au rappel de sécurité des Laveuses;
- b) La détermination des modalités du rappel de sécurité des Laveuses, y compris les réparations techniques offertes, les instructions additionnelles données aux membres du groupe et les bénéfices monétaires offerts à ceux-ci dans le contexte du rappel;
- c) Les interactions et échanges entre SECA et Santé Canada dans le contexte du rappel de sécurité des Laveuses;
- d) La gestion et le suivi du rappel par SECA une fois que celui-ci fut déployé, y compris le suivi des réparations offertes et les interactions entre SECA et les membres du groupe dans le cadre de celui-ci.¹⁸

¹⁷ Plaintiffs’ Exhibit R-7.

¹⁸ Par. 20 d) of Plaintiffs’ *Demande pour poursuivre les interrogatoires au préalable des défenderesses*, dated May 27, 2021.

[72] On October 28, 2021, Justice Moore allowed Plaintiffs to proceed with the examination on the following topics:

- 72.1. The internal events and the steps taken at SECA to decide to recall the washers in dispute;
- 72.2. The recall modalities, including the technical information, financial benefits, and instructions given to class members;
- 72.3. The recall management, including the offered repairs.

[73] Justice Moore denied the request with regard to the interactions with class members in the context of the Recall. He considered that customers' reaction to the recall was not relevant:

[42] Retailers' and customers' reactions to the recall are not relevant to the issues framed in the judicial application and the defence. The class action claims that the washers had a hidden defect that Samsung chose not to disclose. The plaintiff seeks a full refund for every Quebec purchaser of a Samsung or Kenmore washer and \$200 in damages for stress and inconvenience. At this stage of the proceedings, individual customers' reactions to the recall are not relevant.¹⁹

[74] Plaintiffs appealed. In their notice to appeal, Plaintiffs allege:

13. L'Appelante en appelle du Jugement quant à la décision du Juge de tronquer le sujet d) et d'en exclure les interactions entre SECA et les membres du groupe dans le cadre du rappel.

[...]

17. La continuation de l'interrogatoire de SECA est pertinente puisque les interactions entre SECA et les membres du groupe dans le cadre du rappel sont directement liées à la résolution des questions communes identifiées au jugement d'autorisation et qui sont au cœur de la Demande introductive d'instance et de la Défense.

18. À cet égard, les communications à la suite du rappel entre les membres du groupe et le service à la clientèle de SECA (notamment par le truchement du centre d'appel (ligne 1-800) mis sur pied par SECA dans le cadre du rappel) sont essentielles à la preuve de l'Appelante.

19. Les interactions entre SECA et les membres du groupe dans le cadre du rappel sont pertinentes en ce qu'elles pourraient permettre à l'Appelante de faire la preuve, sur une base collective, de la gravité du vice de conception allégué, des difficultés techniques vécues par les membres du groupe en raison du vice, du

¹⁹ *Option Consommateurs c. Samsung Electronics Canada Inc.*, 2021 QCCS 3842, para. 42 (Appeal denied, 2023 QCCA 132).

caractère inadéquat du rappel, ainsi que des troubles et inconvénients vécus par ceux-ci.

20. De plus, les interactions entre SECA et les membres du groupe dans le cadre du rappel sont susceptibles de constituer une source pertinente de la preuve des dommages pour troubles et inconvénients réclamés par les membres du groupe. Ceux-ci sont d'ailleurs pertinents au débat puisque le jugement d'autorisation identifie précisément une question commune à ce propos à laquelle le jugement au mérite doit répondre.

21. Mais il y a plus. Ces interactions entre SECA et les membres du groupe sont une composante indissociable de l'interrogatoire pourtant autorisé par le Juge sur la gestion et le suivi du rappel effectués par SECA. En effet, SECA assure nécessairement la gestion et le suivi du rappel à la lumière de ce que les membres du groupe lui rapportent à propos des laveuses.

[75] Thus, it appears clear that the purpose of Plaintiffs' appeal was to obtain the authorization to examine on the second portion of the fourth subject which had been refused by Justice Moore namely, "*les interactions entre SECA et les membres du groupe dans le cadre de celui-ci*".

[76] Justice Moore ordered that the examination proceed on the subjects he had authorized pending the Court of Appeal's decision.

[77] The examination of Mr. Martino proceeded on October 6, 2022. Plaintiffs asked general questions about the GCIC. There were no objections in this regard. The examination, which was the third examination of a Samsung representative exceeded the statutory five-hour limit (as had the previous examination of Mr. Majithia).

[78] On January 11, 2023, the Court of Appeal allowed Plaintiffs' request to question Mr. Martino again on the topic of Samsung Canada's interaction with Class Members in the context of the Recall.

[79] On May 18, 2023, Plaintiff filed a Case management notice requesting permission to expand the scope of Mr. Martino's second examination. They sought permission to question Mr. Martino on the following topics:

- a) Les documents communiqués et à être communiqués, le cas échéant, à la suite de l'Arrêt [the Appeal Judgment];
- b) Les documents, informations et réponses donnés ou à être donnés, le cas échéant, aux engagements souscrits ou aux questions (sous objection) posées lors de l'interrogatoire;
- c) Le sujet additionnel autorisé par la Cour d'appel (paragraphe [10] de l'arrêt du 11 janvier 2023); et

d) La confection du document communiqué en réponse à l'engagement U-17, son contenu et les données à son soutien. »

[80] This request was dealt with in the July 2023 Judgment. The Court reiterated that Mr. Martino could be re-examined on the limited issue which had already been authorized in the Appeal Judgment of January 2023:

[199] **ORDERS** that Mr. Frank Martino may be re-examined on “interactions between Samsung Canada and Class members in the context of the Recall” (as well as on his sworn declaration of June 8, 2023, but only if the extract of the GCIC ordered to be produced above does not include proofs of purchases) for a maximum period of three hours and that this examination take place within thirty days of the present judgment;

[81] However, the Court specifically dismissed Plaintiffs' request to examine Mr. Martino on documents received as a result of the Appeal Judgment or the July 2023 Judgment:

[150] The Court of Appeal's decision regarding unredacted versions of undertakings U-6, U-10, U-11 and U-12 to include the names and contact information of the consumers does not require a re-examination of Mr. Martino. The same comment applies to undertaking U-17 which concerns the records of the 4,694 class members who benefitted from the extended warranty under the recall program. In fact, Plaintiffs did not ask Justice Moore or the Court of Appeal to be allowed to re-examine on this information.

[151] Similarly, there is no need to allow further questioning on documents that may be received further to the present judgment. Answers to objected questions or undertakings can be provided in writing as is the usual practice. The information ordered to be disclosed will speak for itself. Any further questions can be put to the witnesses at trial.

[...]

[155] If the extract of the GCIC regarding Class Members includes attachments, the examination of Mr. Martino will be limited to the additional subject allowed by the Court of Appeal. If not, it may also cover Mr. Martino's sworn declaration of June 8, 2023.

[...]

[159] Again, the extracts of the GCIC database as well as the table of excessive vibration global top detachment ordered to be produced by the present judgment will speak for themselves.

[160] The purpose of pre-trial disclosure is to obtain the opposing party's version and documents that support it. Impeaching witnesses or attacking their credibility is an objective best accomplished before the trial judge.

[161] Plaintiffs' requests to re-examine Mr. Martino on other issues than the subject authorized by the Court of Appeal and to examine a representative of Samsung Electronics is dismissed.

[82] In view of the fact that Plaintiff had already examined three Samsung witnesses for more than five hours each, the Court limited Mr. Martino's second examination to three hours.

[83] Mr. Martino was examined on August 21, 2023.

[84] Over 120 objections were made. The examination lasted approximately 90 minutes.

[85] Samsung alleges that Plaintiffs did not focus on interactions between Samsung Canada and Class Members in the context of the Recall. Rather, it submits that Plaintiffs predominantly questioned Mr. Martino on Samsung's internal systems and the GCIC which was an authorized topic for Mr. Martino in the October 2022 examination but not for his August 2023 examination.

[86] Furthermore, Samsung alleges that Plaintiffs attempted to question Mr. Martino on his sworn declaration of June 8, 2023, whereas such a topic had only been allowed if the GCIC Extract did not include attachments.

[87] Thirdly, Samsung submits that Plaintiffs attempted to circumvent this Court's refusal to grant them access to the full worldwide GCIC by insisting that Mr. Martino be able to access the GCIC during his examination.

[88] Finally, Samsung alleges that Plaintiffs asked questions about customer complaints which occurred prior to the Recall.

[89] A review of the questions objected to leads to the conclusion that Samsung is partially correct.

[90] Plaintiffs asked general questions about the GCIC rather than on interactions between Samsung Canada and the Class Members in the context of the Recall. Plaintiffs entered into a debate regarding access to the full GCIC (which had been refused by this Court).

[91] Furthermore, they attempted to ask questions about Mr. Martino's sworn declaration.

[92] Finally, questions were asked on facts that had occurred prior to the Recall while the authorized subject was clearly limited to discussions "in the context of the Recall".

[93] However, Samsung does appear again to have taken a very restrictive view of the July 2023 Judgment. For example:

- 93.1. They objected to any reference to the GCIC Extract or undertakings U-6 and U-10; and
- 93.2. They objected to subjects which had been covered by Mr. Konrad Baranowski in his sworn declaration of March 29, 2019 (the “**Baranowski Affidavit**”);
- 93.3. They objected to discussions with Class Members which took place through Samsung Canada’s Authorized Service Centers (“**ASC**”).

[94] While Plaintiffs were not authorized to question Mr. Martino without restrictions on documents disclosed as a result of the Appeal Judgment or the July 2023 Judgment that does not mean that they could not refer to documents in the file for the purpose of questioning him on the subject that had been authorized.

[95] In fact, as the GCIC constitutes Samsung’s main record of interactions between the corporation and its customers (as the name Global Customer Interaction Center implies) it would be difficult - if not impossible - to ask questions on the subject authorized by the Appeal Judgment without referring to the various GCIC extracts in the file.

[96] In the same vein, the mere fact that Mr. Baranowski covers a subject in his sworn declaration does not render this subject off limits if it otherwise falls within the confines of the Appeal Judgment.

[97] The exclusion of communications which went through Samsung Canada’s ASCs does not respect the spirit of the Appeal Judgment or the July 2023 Judgment.

[98] Finally, with regard to the attachments, because Samsung has not answered class counsel’s questions on the way the GCIC Extract was created, it is not possible to determine if the condition indicated in the 2023 Judgment to examine Mr. Martino on his sworn declaration was satisfied.

[99] The reasoning of the July 2023 Judgment was meant to be straightforward.

[100] The issue of the difficulty or costs involved in providing the attachments becomes moot (and thus, there is no need to examine Mr. Martino on this issue) if the electronic process to create GCIC extract includes the attachments.

[101] If, on the other hand, the automatic extraction process does not extract attachments, then the “undue burden” involved in providing these documents becomes relevant and Plaintiffs should be allowed to examine Mr. Martino on this issue.

[102] Thus, Plaintiffs will be allowed to examine Mr. Martino on the subject of interactions between Samsung Canada and Class members in the context of the Recall. It follows that questions on interactions prior to the Recall are not allowed.

[103] For further clarification, as long as the question concerns discussions between Samsung Canada and Class Members in the context of the Recall:

- 103.1. Plaintiffs will be allowed to refer the witness to documents in the file (including without limitation U-6, U-10, U-17 and the New GCIC Extract) for the purpose of their questions;
- 103.2. Defendants may not object to an otherwise valid question simply because the subject was covered in the Baranowski affidavit;
- 103.3. The examination may cover communications with Class Members documented in the New GCIC Extract which went through Defendants' ASCs.

[104] With regard to Mr. Martino's sworn declaration, Samsung will be ordered to explain the process it has followed to create the New GCIC Extract.

[105] If the process does not automatically extract all attachments, Mr. Martino may be examined on his sworn declaration with regard to the undue burden or costs that would be involved in providing the attachments to all the Tickets included in the New GCIC Extract.

[106] With regard to the length of the new examination, Mr. Martino was examined for 90 minutes while the Court had authorized three hours.

[107] However, the Court must take into consideration that the numerous objections have interfered with proper questioning.

[108] The additional examination of Mr. Martino will be limited to two hours.

[109] Mr. Martino may decide that the examination take place via videoconference.

[110] In order to avoid any further examinations, the Court strongly recommends that any objections (except those involving a privilege) be taken under advisement.

3. Other Issues and Case Protocol

[111] Plaintiffs' case management notice asks for the complete disclosure of certain client files. It left open the possibility of asking for additional files after analysis of the information ordered to be communicated in the present judgment.

[112] Plaintiffs have also indicated that they intend to have certain Class Members testify at trial and that they intend to file sworn declarations of other clients.

[113] Defendants ask that a deadline should be set for Plaintiffs to identify the Class Member witnesses and to file their sworn declarations. Indeed, they have advised the Court that they may wish to proceed with an expert analysis of the Washers belonging to such Class Members. They have also expressed the wish to examine certain of these Class Members out of court.

[114] Plaintiffs oppose the request alleging that pre-trial depositions of Class Members are usually not allowed. They add that the usual practice is to announce witnesses in the declaration of readiness.

[115] With regard to the communication of Class Member files, the Court indicated that Plaintiffs could not proceed in stages and should – in the event that the parties can't agree on same - present a single motion asking for all files they wish to be communicated.

[116] With regard to the other issues, while the parties' respective positions have merit, the Court believes that in the present context, it makes sense for a deadline to be scheduled for the filing of sworn declarations and the identification of Class Members who will testify at trial. This deadline should precede the filing of the declaration of readiness. This could avoid the presentation of motions after the declaration of readiness.

[117] However, the Court asked the parties to explore the possibility that the examinations of Class Members form part of the record. This could reduce the time requested for trial and allow an earlier trial date.

[118] In all cases, firm deadlines should be indicated in the case protocol. If the parties can't agree on the process for the identification and examination of witnesses, deadlines should be indicated in the case protocol for the filing of motions on these issues.

CONCLUSION

[119] The conclusions of the July 2023 Judgment remain with the clarifications issued in the present judgment.

[120] Given that both parties were partially successful, no damages or costs will be awarded.

[121] However, the court can only reiterate that it is up to the parties and their counsel to safeguard the principle of proportionality and ensure that proceedings proceed efficiently.

[122] If either party continues to refuse to heed this warning, the Court will not hesitate to use the powers at its disposal to sanction further breaches in the conduct of proceedings.

FOR THESE REASONS, THE COURT:

[123] **ORDERS** Samsung Electronics Canada Inc. (“**Samsung Canada**”) and Samsung Electronics Co., Ltd (“**Samsung Electronics**” and together with Samsung Canada, “**Samsung**”) to produce a new GCIC extract (the “**New GCIC Extract**”) that includes “all information that Defendants possess with regard to top detachment or excessive vibration Washer incidents involving Class Members”.

[124]**ISSUES** the following clarifications to ensure compliance with this order:

- 124.1. The New GCIC Extract must include all allegations or complaints regarding vibration regardless of whether Samsung considers these allegations or complaints to be well founded, considers that the vibration complained about is indeed “excessive”, considers the complaint to be an “incident” or considers it to be a “PL Claim”;
- 124.2. The New GCIC Extract must include (but is not limited to) all Tickets flagged by Samsung in the Category 2 description column as “Noise/Vibration” or “Noise/Vibrations” and in the Category 3 description column as “Banging Noise”, “Excessive Vibration”, “Noise during spinning”, “Noise during washing”, “Shaking” or “Vibrating”.

[125]**ORDERS** Samsung to communicate to Plaintiffs the process followed to create the New GCIC Extract.

[126]**ORDERS** Samsung to provide a version of the Updated U-10 without the hashtag symbols;

[127]With regard to corporate knowledge, **ORDERS** Defendants to provide a table in the same format as the one included at page 20 of Exhibit R-5 [the R-5 filed for the purpose of the July 2023 Judgment] for the Washer models included in the Class definition, which instead of “Sales Quantity”, identifies the number of Washers that experienced “Excessive vibration or top detachment incidents” (the “**New Corporate Knowledge Table**”) and **ALLOWS** Defendants, if they wish to, to separate “Excessive vibration” incidents from “Top detachment” incidents;

[128]**ISSUES** the following clarifications to ensure that the above order is fully complied with:

- 128.1. The New Corporate Knowledge Table must include all allegations or complaints regarding vibration regardless of whether Samsung considers these allegations or complaints to be well founded, considers that the vibration complained about is indeed “excessive”, considers the complaint to be an “incident” or considers it to qualify as a PL Claim;
- 128.2. The new Corporate Knowledge Table must include (but is not limited to) all

Tickets flagged by Samsung in the Category 2 description column as “Noise/Vibration” or “Noise/Vibrations” and in the Category 3 description column as “Banging Noise”, “Excessive Vibration”, “Noise during spinning”, “Noise during washing”, “Shaking” or “Vibrating”;

128.3. The table must cover years 2011 to 2023;

[129] **ORDERS** Samsung to communicate to Plaintiffs the process used to create the New Corporate Knowledge Table;

[130] **ORDERS** that all the above information be provided within the next fifteen days;

[131] **ORDERS** that Mr. Frank Martino may be re-examined on “interactions between Samsung Canada and Class members in the context of the Recall” (as well as on his sworn declaration of June 8, 2023, but only if the process used to generate the New GCIC Extract does not automatically include attachments);

[132] **ISSUES** the following clarification to ensure that the above order is fully complied with. As long as the question concerns discussions between Samsung Canada and Class Members in the context of the Recall:

132.1. Plaintiffs will be allowed to refer the witness to documents in the file (including without limitation U-6, U-10, U-17 and the New GCIC Extract) for the purpose of their questions;

132.2. Defendants may not object to an otherwise valid question simply because the subject was covered in the Baranowski affidavit;

132.3. The examination may cover communications with Class Members documented in the New GCIC Extract even though they took place with Defendants’ ASCs;

132.4. Questions on interactions prior to the Recall are not allowed.

[133] **ORDERS** that Mr. Martino’s examination not exceed a maximum period of two hours, that this examination take place within forty-five days of the present judgment and that it may proceed via videoconference if Mr. Martino so wishes;

[134] **ORDERS** the parties to file into Court a new case protocol that complies with the present judgment prior to December 21, 2023;

[135] **THE WHOLE** without costs.

MARTIN F. SHEEHAN, J.S.C.

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