

SUPERIOR COURT

(Class Actions Chamber)

CANADA
PROVINCE OF QUEBEC
DISTRICT OF MONTREAL

No.: 500-06-000729-158
500-06-000687-141

DATE: March 4, 2024

BY THE HONOURABLE PIERRE NOLLET., J.S.C.

500-06-000729-158

MICHAEL GAGNON

Applicant

v.

GENERAL MOTORS OF CANADA COMPANY

GENERAL MOTORS LLC

Defendants

No. 500-06-000687-141

MICHAEL GAGNON

Applicant

v.

GENERAL MOTORS OF CANADA COMPANY

GENERAL MOTORS LLC

Defendants.

JUDGMENT

OVERVIEW

[1] The Court has received an APPLICATION FOR THE APPROVAL OF NOTICES TO CLASS MEMBERS, TO AMEND THE APPLICATIONS TO INSTITUTE A CLASS ACTION AND AUTHORIZE A CLASS ACTION FOR SETTLEMENT PURPOSES. (“**the Application**”).

[2] This file is an example of how not to proceed to a settlement and certification of a national class in another province without involving at the same time Quebec Courts for such part of the settlement and certification that requires Quebec Court’s approval.

[3] To illustrate the point, the Court quotes two paragraphs of the response letter from Quebec Counsel on the Court’s comments:

g) Format of the Short Form Certification Notice

To the extent that the Short-Form Certification Notice, Schedule B to the Settlement Agreement contains all the necessary and mandatory information, and given that it was approved by Justice Perell as submitted on the basis of the evidence adduced in support of the Certification motion (see notably Keough Affidavit, Exhibit R-1, par. 15, p. 126), the Parties would respectfully suggest to maintain the format of the Short-Form Notice in its current form, subject to the additional language we propose to add requiring Quebec residents to send their written opt-out requests and objections to the Court. We note that a substantial modification of the Notice may require a new agreement between parties, a validation from the Settlement Administrator and possibility additional proceedings in front of the Ontario Court of Justice to approve the modified version, which entails substantial costs and delays.

[Final paragraph]

We also stress that Justice Perell determined that the Notices were appropriate and that, in light of the agreement between the Parties, the principle of comity and cooperation between Canadian Courts should work in favour of facilitating the implementation of the Settlement in its current form.

[The Court underlines]

[4] Had the Quebec Superior Court been involved at the right time, all of this could have been avoided. To put pressure on the Quebec Superior Court to approve Notices and eventually a settlement, without the Court fully exercising the role of protecting the Class Members extended to it by the legislator is not acceptable.

[5] Said otherwise, it looks as if the Quebec Superior Court is asked not to cooperate but to surrender its jurisdiction to the Ontario Superior Court¹. More explanations will follow.

1.1 The background in Ontario and the US.

[6] On December 20, 2023, in the Ontario file, a Motion for consent certification and notice approval was filed and made returnable January 8, 2024. At the time, no courtesy copy was provided to the undersigned who is the case management judge in Quebec nor were my comments sought.

[7] In support of the Ontario Motion, a sworn declaration (Affidavit) from Ms. Jennifer Keough was entered as evidence. Ms. Keough is the Chief Executive Officer of JND Legal Administration, the Settlement Administrator to be appointed. She testified as to the Notice Program as we will see later.

[8] A second sworn declaration in support of the Motion was filed by a lawyer from Rochon Genova, co-counsels for Plaintiffs. His Affidavit explains, amongst other things, the various procedural steps of this class action since the beginning.

[9] It also adds relevant information as to the understanding of the settlement. The principal allegation of the class action is summarized in his Affidavit as being: “ ... *the subject ignition switches are prone to too-easy rotation and so can inadvertently move from the ‘run’ position to the ‘accessory’ or ‘off’ position while the vehicle is in motion, resulting in a shutdown of the vehicle’s electrical system, complete loss of engine power and steering/braking assists, and disabling of the airbags. This defect is dangerous and has been associated with serious injuries and deaths.*”²

[10] The same Affidavit also includes references to “*admissions made by the Defendants of a safety defect in which there was a low-torque ignition switch installed in many of the vehicles identified below, which, under certain circumstances, may inadvertently move out of the ‘Run’ position.*”³

[11] According to this Affidavit, personal injury or wrongful death claimants, and claimants under the *Family Law Act* (and analogous legislation in other provinces), known to the Consortium [of lawyers] and identified in the confidential settlement agreements will be eligible to participate in an aggregate settlement process set forth in the confidential settlement agreements entered into on their behalf by the Consortium with Defendants, in which an experienced and neutral third party facilitated the settlement of such claims in the United States, will examine each claimant’s individual documents and

¹ At the initiative of Counsels, obviously not of the Ontario Superior Court itself.

² Affidavit of Vincent Genova sworn December 11, 2023, par. 6.

³ *Id.* par. 18.

allocates a confidential settlement amount to each claim in exchange for a release, provided other terms and conditions of the settlement are met⁴.

[12] No such Affidavit was filed or offered in Quebec. No information whatsoever was provided with respect to this confidential settlement and its impact on Quebec members if any.

[13] On January 16, 2024, Justice Perell of the Ontario Superior Court of Justice certified the Ontario Class Action, discontinued class claims for wrongful death, personal injury claims and actual physical property damages arising from a motor vehicle accident involving GM vehicles subject to relevant recalls.

1.2 The Application in Quebec

[14] The Court notes that the Application appears on the plunitif of case number 500-06-000687-141 while it does not appear on case number 500-06-00729-158. Nevertheless, the current judgment is intended to apply to both, presuming that the parties either forgot to file the Application in the appropriate file number or that the clerk's office has not noticed the dual numbers on the Application.

[15] Similarly to the Ontario proceedings, the Application seeks to amend the Application for Authorization to remove any allegation regarding certain damages associated with owning a vehicle subject to the recalls⁵. As stated in Section 11.2 of the Settlement Agreement⁶:

“[i]t is a fundamental condition of this Settlement and the intention of the Parties that any and all class or representative claims, suits, actions or proceedings for wrongful death, personal injury (and related family/dependent claims), and/or actual physical property damage arising from a motor vehicle accident involving a Subject Vehicle shall be removed, dismissed or discontinued through a Final Amendment Order or Final Discontinuance Order, and that such claims, suits, actions or proceedings be permitted to proceed as individual claims, suits, actions, or proceedings only”.

[16] The Application also seeks the approval of the Notice Program and the Short and Long Form Notices.

[17] At a case management conference, the Court sought explanations with respect to certain aspects of the Settlement and of the Notice Program. The Court then reviewed the material in English and expressed issues with respect to the Notice Program put in

⁴ *Id.* par. 25 b).

⁵ Exhibit R-2, *Amended motion to authorize the bringing of a class action and to ascribe the status of representative* in the *Québec IS Action* (500-06-000687-141) and in the *Amended motion to authorize the bringing of a class action and to ascribe the status of representative* (the *Québec EPS Action* (500-06-000729-158)).

⁶ Exhibit R-3.

place to inform the putative Class Members, and the Short and Long Form Notices. Those issues were not all resolved to the Court's satisfaction. Accordingly, this judgment deals with selected remaining issues⁷.

2. **APPLICABLE LAW**

[18] The key provisions of the Civil Code of procedure (**CCP**) with respect to Authorization, Settlement approval and Notices are as follows:

576. The judgment authorizing a class action describes the class whose members will be bound by the class action judgment, appoints the representative plaintiff and identifies the main issues to be dealt with collectively and the conclusions sought in relation to those issues. It describes any subclasses created and determines the district in which the class action is to be instituted.

The judgment orders the publication of a notice to class members; it may also order the representative plaintiff or a party to make information on the class action available to the class members, including by setting up a website.

The judgment also determines the time limit for opting out of the class. The opting-out period cannot be shorter than 30 days or longer than six months after the date of the notice to class members. The time limit for opting out is a strict time limit, although a class member, with leave of the court, may opt out after its expiry on proving that it was impossible in fact for the class member to act sooner.

579. When a class action is authorized, a notice is published or notified to the class members

- (1) describing the class and any subclass;
- (2) setting out the principal issues to be dealt with collectively and the conclusions sought in relation to those issues;
- (3) stating the representative plaintiff's name, the contact information of the representative plaintiff's lawyer and the district in which the class action is to proceed;
- (4) stating that class members have the right to seek intervenor status in the class action;

⁷ As it is common practice in these matters, the Court provided initial comments on the proposed notices and notice program. The paper process is intended to speed-up the matter and the parties must be given an opportunity to be heard prior to a decision. The parties chose how to respond and invited the Court to discuss ongoing concerns. The Court chose to not further correspond with the parties on the same subject. The law provides for the Court's approval. The Court must exercise its discretion. It is not a negotiation.

(5) stating that class members have the right to opt out of the class and specifying the procedure and time limit for doing so;

(6) stating that no class member other than the representative plaintiff or an intervenor may be required to pay legal costs arising from the class action; and

(7) providing any additional information the court considers useful, including the address of the website for the central registry of class actions.

The court determines the date, form and method of publication of the notice, having regard to the nature of the class action, the composition of the class and the geographical location of its members. The notice identifies, by name or a description, any class members who are to receive individual notification. If the court sees fit, it may authorize the publication of an abbreviated notice.

581. At any stage of a class action, the court may order a notice to be published or notified to the class members if it considers it necessary for the protection of their rights. The notice, which must describe the class and include the parties' names, their lawyers' contact information and the representative plaintiff's name, must be clear and concise.

590. A transaction, acceptance of a tender, or an acquiescence is valid only if approved by the court. Such approval cannot be given unless notice has been given to the class members.

In the case of a transaction, the notice must state that the transaction will be submitted to the court for approval on the date and at the place indicated. It must specify the nature of the transaction, the method of execution chosen and the procedure to be followed by class members to prove their claim. The notice must also inform class members that they may assert their contentions before the court regarding the proposed transaction and the distribution of any remaining balance. The judgment approving the transaction determines, if necessary, the mechanics of its execution.

[The Court underlines]

3. ANALYSIS

[19] This decision deals strictly with the portion of the Application seeking Court's approval of the Short Form Notice⁸, Long Form Notice⁹, and of the Notice Program¹⁰.

3.1 Short Form Notice

[20] The Short Form Notice is two pages long. The format resembles the one of a press release or of a high-school homework. It does not draw the attention of a potential reader,

⁸ Exhibit R-4.

⁹ Exhibit R-5.

¹⁰ Exhibit R-6.

is not pleasing to the eye and is not enticing putative Class Members to read it has to many words but not enough relevant information. The format requires significant improvement. It is not for the Court to hold the pen or design the notices but rather to ensure that the notices reach their audience and provide relevant information in a clear and concise way.

[21] The law provides for the possibility to have an abbreviated notice. This is in addition to the regular notice (here the Long Form Notice). It is an additional way to inform the putative Class Members. It may not include all the elements of section 579 C.p.c. but in the Court's view, its content should be determined by its intended use. This is one of the difficulties here.

[22] The Notice Program provides for the Short Form Notice to be emailed to Settlement Class Members as well as being published in the newspaper. These are two very different type of use and readers. Furthermore, no evidence was provided as to the number of putative Class Members for which the Settlement Administrator will have a valid active email address compared to the expected total number of Class Members.

[23] As well, section 2. (e) of the Notice Program, provides for a potentially modified version of the Short Form Notice. The Court was not provided with such a modified version for approval. Rather, the parties responded that "**format**"¹¹ modifications are the ones that would be required by any newspaper to permit the publication of the Notices.

[24] This is very well, but the text does not reflect that modifications are restricted to format. It rather refers to "*potentially modified version*", which basically means anything and everything. Since the Court is asked to approve the Notices, it cannot grant a *carte blanche* to modify the Short Form Notice. Typically, the Court is provided with the notices as they will be published. Otherwise, a guarantee that the actual content (as opposed to format) will not be altered would be required.

[25] The notice only refers to the settlement and not to the approval of the Class Action for settlement purposes. It is both a certification notice and a transaction notice. This should be made obvious. The parties have raised the potential confusion for Class Members between the authorization and the settlement approval if the authorization is highlighted. In the Court's view, it is possible to clearly distinguish the two but not having a reference to certification approval is not an option.

[26] While the criteria to authorize a Class Action are applied differently when the authorization is for settlement purposes, the law does not distinguish between the two types of authorization when it comes to notices. It only requires additional information.

[27] As well, the requested modification to the original Application for Authorization seeking to exclude wrongful death, personal injury (and related family/dependent claims),

¹¹ The Court highlights.

and/or actual physical property damage arising from a motor vehicle accident involving a Subject Vehicle is not mentioned in the Short Form Notice.

[28] The possibility for Class Members to object to the settlement or to exclude themselves from the Class Action is buried in the wording of the Short Form Notice and the indications as to how to proceed are insufficient. An easy way to supplement this would be to insert links to an opt-out form and an exclusion form so that the interested Class Members do not have to go through steps and hoops to opt out or to object. This should be easy to achieve as the Settlement Website is supposed to have information about both issues. It only requires the addition and a direct link to two forms, to which the parties objected to, stating that the CCP does not provide for this. Opting out or objecting are as much a right of putative Class Members than the acceptance of the transaction.

[29] As requested by the Court, the parties agreed to modify the recipient of the opt-out notice. It now refers to the Clerk of the Superior Court as provided for by law as opposed to the Settlement Administrator. Even if the law is silent with respect to whom should receive the objection notice, the Court suggested that it would be preferable to follow a similar process which the parties agreed to. Accordingly, those changes to the notices will be accepted but for one element discussed hereafter in the Long Form Notice review.

3.2 Long Form Notice

[30] The notice is intended to inform putative Class Members of various elements: the authorization of the Class Action for settlement purposes, the modification to the Application for Authorization and the Settlement Agreement and all putative Class Members rights and obligations arising therefrom. It must conform to sections 579, 581 and 590 CPC.

[31] Following the Court's initial comments, the parties modified the Long Form Notice to include most of the missing elements.

[32] The Long Form Notice still does not set out what the principal issues to be dealt with collectively were and what conclusions were sought in relation to those issues. This is standard for a certification notice.

[33] In the Long Form Notice there is no information about how the exclusion of wrongful death, personal injury (and related family/dependent claims), and/or actual physical property damage arising from a motor vehicle accident involving a Subject Vehicle came about. There is no indication that the Class Action sought to obtain such compensation in the first place. There is no information with respect to the prescription period resuming. The issue is not explained as plainly and clearly as it is in Mr. Genova's Affidavit.

[34] As indicated above for the Short Form Notice, the Court recognizes the potential confusion and while the parties' interpretation maybe reasonable from a business point

of view, it does not quite meet the objective set out in section 579 par. 2 CCP. It is for the parties to design the notice in such a way as to respect the law while avoiding the confusion. Such confusion is not an issue when the certification notice is published first and the settlement approval second. It should be possible to avoid it when the two notices are combined into one.

[35] The Long Form Notice now includes information with respect to the ability for a Class Member to seek intervenor status. It adds that such intervenor may be subjected to a pre-trial examination or become liable for legal costs. Further along, the notice covers the possibility to object to the Settlement.

[36] The distinction between an intervention and an objection may not be obvious to the untrained eye. While referring to the intervenor status, it should be made clear that this aspect is different from objecting to the Settlement and that objecting does not make you readily subject to a pre-trial examination nor responsible for legal costs, except your own. The Court does not want any potential objector to infer that they can be held liable for potential costs as this might deter objectors if they perceive themselves as intervenors.

[37] Finally, the parties made the sending of the opting out form to the Clerks office “optional”¹² while they made the one regarding the potential objection “obligatory”¹³. The one regarding the opting out form cannot be optional.

3.3 The Notice Program

[38] The Notice Program provides for the setting up of a Settlement Website by the Settlement Administrator with the following information:

- 38.1. English and French copies of the Settlement Agreement as well as the Certification and Approval notices on the.
- 38.2. A summary of the benefits available to Eligible Claimants;
- 38.3. The ability of Settlement Class Members to sign up to receive updates;
- 38.4. A searchable database by Vehicule Identification Number (VIN);
- 38.5. Information on key dates and procedures for Opting-Out, Objecting and the Settlement Approval Hearings;
- 38.6. A Settlement claims process;
- 38.7. A toll-free phone number;

¹² If you are a Quebec resident, your opt-out election **may** be sent to the following address:

¹³ If you are a Quebec resident, your objection **should** be sent by [date], 2024 to the following address:

[39] Notices include Long-Form Notice to be posted on the Settlement Website, a Short Form Notice to be emailed to Settlement Class Members, a press release, a potentially modified version of the Short Form Notice to be published in the print and digital replica editions of the newspapers and a reminder press release.

[40] As for the dissemination method, the Settlement Administrator will deliver the Short Form Notice by email to Settlement Class Members for whom Defendants have provided a valid e-mail address as well as those Settlement Class Members who have contacted Applicants' counsel. The Short Form Notice will be published in various print newspapers as well as their digital replica.

[41] Counsel for the Applicants will post the Long Form Notices and refer to the Settlement Website.

3.3.1 Comments on the Notice Program

[42] The Court enquired about the use of social media as it has now become an essential and common feature of several notice programs. The answer provided was threefold: a) an executive from the Settlement Administrator testified in the Ontario case as to the sufficiency of the Notice Program¹⁴, b) the parties wish to keep the administrative costs down to make as many funds as possible available to Class Members, c) there was no social media campaign in the corresponding U.S. settlement and d) the putative Class Members will be emailed directly.

3.3.1.1 An executive from the Settlement Administrator testified in the Ontario case as to the sufficiency of the Notice Program

[43] Ms. Keough's sworn declaration says:

15. It is my view that the Notice Program as presented serves as an effective and efficient means of bringing the Settlement Agreement to the attention of Class Members through a variety of media outlets. It is also my view that each of Short-Form Certification Notice (Schedule B), Long-Form Certification Notice (Schedule C), Approval Notice (Schedule D), Initial Press Release (Schedule F) and Reminder Press Release (Schedule G) are themselves effective in conveying information about the Settlement to the Settlement Class.

¹⁴ According to Defendants' counsel the Short Form Notice contains all the necessary and mandatory information, and given that it was approved by Justice Perell as submitted on the basis on the evidence adduced in support of the Certification motion (see notably Keough Affidavit, Exhibit R-1, par. 15, p. 126), it should be approved in Quebec. (See Annex to the Letter of February 7, 2024 at section g).

[44] For starters, a similar sworn declaration was not offered in the Quebec files. Counsels seem to assume that the evidence filed in Ontario automatically applies to the Quebec files¹⁵. This would be new law.

[45] Furthermore, Ms. Keough's declaration does not deal with social media and does not explain why not. It is not clear whether the witness testifies as an expert or otherwise. In any case, the opinion is rather thin in terms of supporting facts.

[46] Social media¹⁶ has been represented to this Court, in other files, as being more effective than newspaper notices and much less costly. Why it would be different here is not explained.

[47] In order to give her opinion, the witness and the Court should have an explanation as to what is driving the Notice Program. It will likely be a call to action, a conversion rate as opposed to creating awareness. Explain what is it? What is the breakdown of costs by media, a summary of the effectiveness of each type of recommended media together with the reach, the impressions, the targeted audience, the expected conversion rate and similar information with respect to media that were discarded.

3.3.1.2 The parties wish to keep the administrative costs down to make as many funds as possible available to Class Members

[48] The objective is noble. However, the Court does not have sufficient information which would permit to assess such statement and compare the various media intended to be used.

[49] The Court can identify a few other ways to keep the costs down.

3.3.1.3 There was no social media campaign in the corresponding U.S. settlement.

[50] Whatever happened in the Notice Program of the US settlement is somehow less relevant than what is required for the settlement to be effective in Quebec. We do not know when the Notice Program took place in the US but from Mr. Genova's Affidavit, we see that a Settlement was reached, and a final approval obtained in December 2020. More than 3 years have passed since.

¹⁵ As a matter of fact, in response to the Court's questions, Defendants' counsel referred the Court to the fact that the notices and the Notice Program had already been approved by Justice Perell of the Ontario Superior Court as if this was sufficient evidence or precedent that it should be approved the same way in Quebec.

¹⁶ This term includes but is not limited to Facebook, Instagram, TikTok, YouTube, blogs, tweets, Snapchat or Instagram reels, Google Ads.

3.3.1.4 The putative Class Members will be emailed directly.

[51] The Court tends to agree with the parties that direct email may be the most efficient way to inform putative Class Members. However, and as indicated earlier, the Court has no evidence of the effectiveness of this email program as it does not have the number of putative Class Members for which the Settlement Administrator will have active email address compared to the expected total number of Class Members.

[52] As well, the fact that the Notice Program provides for newspapers adds may be counter-intuitive if one assumes the email program to be effective.

CONCLUSION

[53] Since the only purpose of the Application is to eventually obtain the approval of a settlement, the Court cannot approve it if it is not satisfied with the Notice Program, the Short Form and Long Form Notices. The authorization of the Class Action for settlement purposes as well as the modification of the Application to Authorize the Class Action will be dealt with at a later date, when the Court is satisfied with the Notice Program and the form and content of Notices.

FOR THESE REASONS, THE COURT:

[54] **DECLARES** the evidence of the effectiveness of the Notice Program lacking and the Short and Long Form Notices requiring further modifications.

[55] **DEFERS** the approval of the Notice Program, the Short and Long Form Notices as well as the Application, to a subsequent hearing to be scheduled at the request of the parties with the agreement of the Court.

[56] **WITHOUT COSTS.**

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