

# SUPERIOR COURT

CANADA  
PROVINCE OF QUEBEC  
DISTRICT OF MONTRÉAL

No.: 500-06-001253-232

DATE: May 10, 2024

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

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**ELIAS KARRAS**

Applicant

v.

**MAPLE LEAF FOODS INC.**

and

**METRO INC.**

and

**WAL-MART CANADA CORP.**

and

**LOBLAW COMPANIES LIMITED**

and

**LOBLAWS INC.**

and

**GEORGE WESTON LIMITED**

and

**WESTON FOODS DISTRIBUTION INC.**

and

**WESTON FOODS (CANADA) INC.**

Defendants

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**JUDGMENT ON DEFENDANTS' MOTIONS TO ADDUCE RELEVANT EVIDENCE  
(ARTICLE 574 OF THE *CODE OF CIVIL PROCEDURE* ("C.C.P."))**

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## **OVERVIEW**

[1] Applicant, Mr. Elias Karras, has filed an Application to be authorized to bring a class action (the “**Authorization Application**”) on behalf of Quebec residents who purchased certain meat category items (the “**Products**”) referred to in an email allegedly sent by Mr. Michael McCain (of the Defendant Maple Leaf Foods Inc. (“**Maple Leaf**”)) on March 22, 2007, 12 p.m. (the “**Impugned Email**”). The Products were purchased from a number of retailer Defendants. The Impugned Email surfaced from the Information to obtain warrants (“**ITO**”)<sup>1</sup> issued by the Competition Bureau in the context of what is known as the “bread cartel”.

[2] Mr. Karras alleges that Defendants participated in a price-fixing conspiracy related to the Products.

[3] Two of the Defendants, Wal-Mart Canada Corp. (“**Walmart**”) and Maple Leaf have filed Applications for leave to adduce relevant evidence under article 574 C.C.P.

[4] Walmart wishes to file the sworn statement of Ms. Joanna Gallagher (born Kondrat), Vice President, People, SSC and Organizational Design at Walmart Canada (the “**Gallagher Affidavit**”).<sup>2</sup>

[5] Maple Leaf wishes to file the sworn statement of Mtre Nathalie Grand’Pierre, an attorney working at Osler, Hoskin & Harcourt L.L.P., the law firm that represents Maple Leaf in these proceedings (the “**Grand’Pierre Affidavit**”) as well as accompanying Exhibits NGP-1 to NGP-13.<sup>3</sup>

[6] Applicant consents to the filing of the Gallagher Affidavit.

[7] He opposes the filing of the Grand’Pierre Affidavit but consents to the filing of Exhibit NGP-13.

## **ANALYSIS**

### **1. Is the Evidence that Defendants Wish to File Useful and Essential to Assess whether the Authorization Criteria Are Met?**

#### **1.1 Applicable Law**

[8] A class action is a proceeding in which one person, the representative, can sue on behalf of all members of a class who have a similar claim. Since the class representative

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<sup>1</sup> Exhibit P-3.

<sup>2</sup> Exhibit RW-1.

<sup>3</sup> Exhibit RML-1.

is not specifically mandated to act on behalf of the members, prior authorization of the court is required before a class action can be commenced.<sup>4</sup>

[9] The role of the court at the authorization stage has been described as “screening”. It must weed out frivolous cases that clearly do not meet the requirements for authorization of a class action (article 575 C.C.P.). The merits of the case must be considered only after the action has been authorized.<sup>5</sup>

[10] Article 574 C.C.P. provides that an application for authorization to institute a class action must set out: (i) the facts on which it is based; (ii) the nature of the action; and (iii) the group on whose behalf the person intends to act. It adds that the application for authorization is contested orally and that “the court may allow relevant evidence to be submitted”.

[11] The role of relevant evidence is to provide the court with a necessary safety valve to filter actions bound to fail to avoid considerable costs for the parties. As Justice Crete noted: “by giving the judge hearing the authorization application the possibility of allowing the filing of appropriate evidence, the legislator’s intention was to prevent the authorization process from becoming a mere formality, with the court trapped by allegations whose only merit is that they have been set down in writing without an affidavit attesting to their veracity”.<sup>6</sup>

[12] The principles that must guide the court when considering an application to file relevant evidence at the authorization stage of a class action are well known. These principles may be summarized as follows:

- 12.1. The filing of appropriate evidence requires prior leave of the court. An agreement between the parties on this issue does not bind the court.<sup>7</sup>
- 12.2. In determining whether to allow the filing, the court must strike the right balance between rigidity and permissiveness. The summary nature of the authorization process requires such caution.<sup>8</sup>

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<sup>4</sup> *L’Oratoire Saint-Joseph du Mont-Royal v. J.J.*, 2019 SCC 35, para. 6.

<sup>5</sup> *Desjardins Cabinet de services financiers inc. v. Asselin*, 2020 SCC 30, para. 55; *L’Oratoire Saint-Joseph du Mont-Royal v. J.J.*, *supra*, note 4, para. 7; *Infineon Technologies AG v. Option consommateurs*, 2013 SCC 59, paras. 59, 61, 65 and 68.

<sup>6</sup> *Option Consommateurs c. Brick Warehouse, l.p.*, 2011 QCCS 569, para. 30, quoted with approval in *Allstate du Canada, compagnie d’assurances c. Agostino*, 2012 QCCA 678, para. 35.

<sup>7</sup> *Ibid*, paras. 25 and 27; *Ward c. Procureur général du Canada*, 2021 QCCS 109, para. 17.

<sup>8</sup> *Allstate du Canada, compagnie d’assurances c. Agostino*, *supra*, note 6, para. 35.

- 12.3. The proposed evidence must be limited and proportionate to what is essential and indispensable to assess the criteria for authorization set out in article 575 C.C.P.<sup>9</sup> The court must be mindful of the principles of proportionality and reasonable conduct of proceedings set out in articles 18 and 19 C.C.P.<sup>10</sup>
- 12.4. The court must be careful not to transform the authorization phase into a pre-trial hearing. At the authorization stage, the allegations in the motion should be presumed true without the need to testing their veracity. The court should limit itself to analyzing the proposed legal syllogism and avoid assuming the role of ultimate trier of facts.<sup>11</sup>
- 12.5. On the other hand, the court, when faced with a request to file relevant evidence, should avoid passing judgment on the quality of the arguments that the defendants may wish to make. Its role is simply to decide whether they are entitled to have the information required to present these arguments.<sup>12</sup>
- 12.6. Where evidence consists of sworn statements, these should attest to neutral and objective facts, as opposed to controversial or contentious issues that are best left for evidentiary assessment on the merits of the case. Evidence that may be challenged with regard to its truthfulness, scope or probative value should not be filed or considered at the authorization stage.<sup>13</sup>

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<sup>9</sup> *Lambert (Gestion Peggy) c. Écolait ltée*, 2016 QCCA 659, para. 38; *Allstate du Canada, compagnie d'assurances c. Agostino*, *supra*, note 6, para. 35, quoting with approval justice Clément Gascon (then at the Superior Court) in *Option Consommateurs c. Banque Amex du Canada*, 2006 QCCS 6290, para. 20.

<sup>10</sup> *Ward c. Procureur général du Canada*, *supra*, note 7, para. 17; *Option Consommateurs c. Samsung Electronics Canada inc.*, 2017 QCCS 1751, para. 11; *Kramar c. Johnson & Johnson*, 2016 QCCS 5296, paras. 22 and 25.

<sup>11</sup> *Desjardins Cabinet de services financiers inc. v. Asselin*, *supra*, note 5, paras. 9 and 74; *Infineon Technologies AG v. Option consommateurs*, *supra*, note 5, paras. 67 and 68; *Godin c. Aréna des Canadiens inc.*, 2020 QCCA 1291 (Application for approval of a settlement agreement granted, 2022 QCCS 2110); *Ward c. Procureur général du Canada*, *supra*, note 7, para. 17.

<sup>12</sup> *Option Consommateurs c. Banque Laurentienne du Canada*, 2015 QCCS 2794, para. 23; *Piro c. Novopharm Ltd.*, J.E. 2004-1251 (C.S.), paras. 35 and 51 (Motion for permission to appeal continued *sine die* (C.A., 2004-06-16) 500-09-014618-045)

<sup>13</sup> *Association pour la protection automobile (APA) c. Banque de Montréal*, 2021 QCCA 676, paras. 62 and 67; *Durand c. Subway Franchise Systems of Canada*, 2020 QCCA 1647, paras. 51 to 54 (Motion for permission to discontinue an application for authorization to institute a class action granted, 2023 QCCS 1795); *Lambert (Gestion Peggy) c. Écolait ltée*, *supra*, note 9, para. 37.

- 12.7. The burden of demonstrating the utility and necessity of the evidence rests with the party seeking leave to file this evidence.<sup>14</sup>

[13] Applying these principles, courts have generally allowed the filing of evidence consisting of:

- 13.1. Contracts relevant to the members' claim;<sup>15</sup>
- 13.2. The nature of a defendant's business and the regulatory environment in which it operates;<sup>16</sup>
- 13.3. Evidence that supplements an incomplete or incorrectly identified document;<sup>17</sup>
- 13.4. Evidence that demonstrates, on its face, the obvious falsity of certain allegations;<sup>18</sup>
- 13.5. Evidence that demonstrates the lack of jurisdiction of the Superior Court when such lack of jurisdiction is raised.<sup>19</sup>

## 1.2 Discussion

### 1.2.1 Walmart's motion to file a sworn statement of Ms. Gallagher

[14] Walmart seeks to file the Gallagher Affidavit.<sup>20</sup>

<sup>14</sup> *Allstate du Canada, compagnie d'assurances c. Agostino*, supra, note 6, para. 35, quoting with approval justice Clément Gascon (then at the Superior Court) in *Option Consommateurs c. Banque Amex du Canada*, supra, note 9, para. 20.

<sup>15</sup> *Benabou c. StockX*, 2020 QCCS 418, para. 10; *Morier c. Ouellet Canada inc.*, 2019 QCCS 5159, para. 23; *Société AGIL OBNL c. Bell Canada*, 2019 QCCS 4432, para. 9; *Charbonneau c. Location Claireview*, 2019 QCCS 4196, para. 58 (Motion for leave to appeal denied, 2019 QCCA 2056); *Gagné c. Rail World*, 2014 QCCS 32, paras. 77, 136 and 137.

<sup>16</sup> *Morier c. Ouellet Canada inc.*, supra, note 15, para. 22; *Labranche c. Énergie éolienne des Moulins, s.e.c.*, 2015 QCCS 918, paras. 48 and 52.

<sup>17</sup> *Gagnon c. Intervet Canada Corp.*, 2019 QCCS 4651, para. 36 (Motion for permission to appeal dismissed, 2020 QCCA 248); *Seigneur c. Netflix International*, 2018 QCCS 1275, para. 29.

<sup>18</sup> *Asselin v. Desjardins Cabinet de services financiers inc.*, 2017 QCCA 1673, para. 38 (Appeal to the Supreme Court allowed in part on partial dissent, 2020 SCC 30); *Desrosiers c. Groupe TDL Corporation*, 2022 QCCS 2171, para. 18; *De Auburn c. Desjardins assurances générales inc.*, 2021 QCCS 959, paras. 11 and 12; *Benabou c. StockX*, supra, note 15, para. 9; *Gagnon c. Intervet Canada Corp.*, supra, note 17, para. 35; *Charbonneau c. Location Claireview*, supra, note 15, para. 53; *Ehouzou c. Manufacturers Life Insurance Company*, 2018 QCCS 4908, paras. 24 and 25.

<sup>19</sup> *Gagnon c. Intervet Canada Corp.*, supra, note 17, para. 37; *Regroupement des cols bleus retraités et pré-retraités de Montréal c. Ville de Montréal*, 2018 QCCS 808, para. 14.

<sup>20</sup> Exhibit RW-1.

[15] While the Applicant does not oppose the filing, the Court must nonetheless determine whether the filing is appropriate.

[16] Walmart submits that the Gallagher Affidavit is necessary for the Court to assess whether the criteria for authorization are met. Walmart alleges that the Gallagher Affidavit provides the Court with facts to establish that the allegations in paragraphs 6 and 7 pertaining to an alleged Walmart employee are clearly incorrect.

[17] These paragraphs implicate Walmart in the alleged conspiracy by claiming that an individual named Ms. Michele Hardinge was a recipient of the Impugned Email and that she was a Walmart representative at the time that she allegedly received the Impugned Email.

[18] The Gallagher Affidavit is filed to confirm that she was not. The Gallagher Affidavit is succinctly limited to five paragraphs. It is objective and neutral. It is limited to confirming the employment history of an individual at Walmart. It contains no legal argument and does not address contentious issues for the merits.

[19] The Gallagher Affidavit thus falls within the narrow corridor established by the jurisprudence in that it is aimed at rectifying a plainly incorrect allegation, which will assist the Court in verifying whether the criteria for authorization have been met.

[20] The filing is allowed.

[21] The Applicant has indicated to the Court that, should the Gallagher Affidavit be admitted into evidence, it wishes to cross-examine Ms. Gallagher.

[22] While the right to cross-examine is not automatic, the Court must uphold the adversarial principle (article 17 C.C.P.)<sup>21</sup> while remaining mindful of the principles of proportionality and reasonableness (article 19 C.C.P.).

[23] Cross-examination must be limited to the allegations of the affidavit. The deposition cannot be used to conduct a discovery.

[24] Cross-examination of Ms. Gallagher will be allowed but only on the allegations of the sworn deposition. Given that the Gallagher Affidavit is very short, the deposition will be limited to one hour. Ms. Gallagher may decide if the deposition will take place by videoconference or in person. If a deposition takes place, the transcript will form part of the court record.

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<sup>21</sup> Art. 17 and 105 C.C.P.; *Innu-science Canada inc. c. Laboratoire Choisy Itée*, [2000] R.J.Q. 342 (C.A.), paras. 16 and 17; *Kalenso Inc. c. Société Coinamatic Inc.*, [1986] R.J.Q. 2017 (C.A.), para. 25; *Govan c. Loblaw Companies Limited*, 2023 QCCS 4278, para. 25; *Hand c. Denso International America Inc.*, 2021 QCCS 1671, para. 49; *Fakhri c. Dipaolo*, 2012 QCCS 6103, para. 11 (Request for permission to appeal denied, 2012 QCCA 2245); Jean-Claude ROYER and Catherine PICHE, *La preuve civile*, 6th ed., Montréal, Éditions Yvon Blais, 2020, para. 745.

1.2.2 Maple Leaf's motion to file a sworn statement of Mtre Grand'Pierre as well as Exhibits NGP-1 to NGP-13

[25] Maple Leaf submits that the allegations contained in the Authorization Application stem solely from the Impugned Email and that they are vague, unsubstantiated, and inaccurate. It refers to a recent Court of Appeal case that confirms that conspiracy or price-fixing allegations must be supported by "some evidence", such that mere assertions are insufficient without some form of factual underpinning.<sup>22</sup>

[26] It wishes to file the Grand'Pierre Affidavit to demonstrate that:

- 26.1. There is no public information regarding any ongoing regulatory investigation in respect of meat products in Canada.
- 26.2. Maple Leaf is the only meat producer named as a defendant, and none of the co-defendants are horizontal and direct competitors.
- 26.3. The ITO and the Impugned Email were made public in November 2019.

[27] Mtre Grand'Pierre is a lawyer at Osler, Hoskin & Harcourt LLP. She specializes in the review of documentation and data, evidence management and eDiscovery, for litigation matters.

[28] The undersigned has already commented that sworn statements are akin to written testimony. They must therefore respect the rules of evidence that apply to oral testimony. The testimony must be relevant and emanate from someone who has personal knowledge of the stated facts. A written statement is also subject to the ordinary rules regarding opinion and hearsay evidence.<sup>23</sup>

[29] While many common law jurisdictions accept affidavit evidence attaching third party documents based on "information and belief", such a practice is not recognized in Quebec. Thus, in Quebec, documents attached to a sworn statement are not admissible unless they could have been filed by the same witness in open court.

[30] Applicant objects to the filing of the Grand'Pierre Affidavit on the basis that it is useless, irrelevant or, at best, argumentative and unnecessary.

[31] The Court finds that the Grand'Pierre Affidavit falls outside the "narrow corridor" established by the case law. However, some of the exhibits attached to it can be filed.

[32] The Grand'Pierre Affidavit comprises five pages.

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<sup>22</sup> *Hazan c. Micron Technology Inc.*, 2023 QCCA 132, paras. 10 to 12.

<sup>23</sup> *Govan c. Loblaw Companies Limited*, *supra*, note 21, para. 23; J.-C. ROYER and C. PICHÉ, *supra*, note 21, para. 745.

[33] Paragraphs 2 to 8 related to internet searches conducted by Mtre Grand’Pierre to identify any publicly reported information relating to allegations of anti-competitive practices in the meat industry in Canada.

[34] Such evidence may be relevant to the merits of the application if authorized but it is not part of the generally accepted categories where evidence is allowed on an authorization application.

[35] Paragraphs 9 to 13 relate to proceedings and judgments (NGP-3 to NGP-5) rendered in the context of the alleged bread cartel in Quebec and in Ontario. Mtre Grand’Pierre does not indicate that she has a personal knowledge of these proceedings. These documents are public and they can be filed without a sworn statement.<sup>24</sup> Interpretation of these documents constitutes legal argument best left to counsel.

[36] With regard to paragraph 14, it relates to public documents (annual reports or website extracts) emanating from the various defendants. Again, Mtre Grand’Pierre has no personal knowledge of these documents. Aside from stating that she found these documents on the internet, she could not be validly cross-examined as to their contents.

[37] Nonetheless, while the documents cannot be filed to establish the veracity of their contents, the Court will allow the filing of the documents merely to establish that they exist and are publicly available in this format.

[38] Paragraph 15 and Exhibit NGP-12 are inadmissible. Mtre Grand’Pierre has no personal knowledge of the information. No element is provided to establish the credibility of the source (Essential Food Commodity Trading News).

[39] Paragraphs 16 to 20 consist of legal argument surrounding Exhibit NGP-13 (which is a native format version of Exhibit P-8.1).

[40] The applicant does not object to the filing of Exhibit NGP-13.

[41] The filing of the Exhibit is allowed but without Mtre Grand’Pierre’s comments.

**FOR THESE REASONS, THE COURT:**

[42] **AUTHORIZES** the Defendant Wal-Mart Canada Corp. to file the Sworn Statement of Ms. Joanna Gallagher (born Kondrat) dated January 16, 2024 (filed as Exhibit RW-1) for the purposes of the hearing of the Applicant’s Amended Application to Authorize the Bringing of a Class Action and to Appoint the Status of Representative Plaintiff dated July 26, 2023.

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<sup>24</sup> *Govan c. Loblaw Companies Limited*, supra, note 21, para. 42.



[43] **ALLOWS** Applicant to cross-examine Ms. Gallagher but only on the allegations of her sworn deposition. **ORDERS** that the deposition be limited to one hour and that Ms. Gallagher may decide if the deposition should take place by videoconference or in person. **ORDERS** that, if a deposition takes place, the transcript will form part of the court record.

[44] **REFUSES** permission to file the sworn statement of Mtre Nathalie Grand’Pierre, dated January 31, 2024;

[45] **AUTHORIZES** the Defendant Maple Leaf Foods Inc. to file Exhibits NGP-1 to NGP-11 as well as NGP-13 for production purposes only;

[46] **WITH COSTS** to follow suit.

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MARTIN F. SHEEHAN, J.S.C.

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