

SUPERIOR COURT
Class Action

CANADA
PROVINCE OF QUEBEC
DISTRICT OF MONTREAL

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

DATE: MARCH 8, 2016

BEFORE THE HONOURABLE MR. JUSTICE MARK G. PEACOCK, J.S.C.

MICHAEL GAGNON,
Petitioner

v.

GENERAL MOTORS OF CANADA,

-And-

GENERAL MOTORS COMPANY
Solidarily, the Respondents

JUDGMENT

[1] The Respondents, supported by the Petitioner, apply for an Order to Stay or Suspend these class action authorization proceedings pending the outcome in other similar Ontario and American proceedings.

[2] Firstly, the context. Mr. Gagnon seeks to be authorized as a Class Representative in two separate proceedings: one as regards certain General Motors automobiles with an alleged defective ignition switch (“Ignition Switch proceeding”)¹ and two certain General Motors automobiles with alleged defective power-steering (“Power Steering proceeding”)² and the other for automobiles. The authorization applications were commenced respectively on March 19, 2014 and on February 12, 2015.

¹ Court file no. CSM 500-06-000687-141.

² Court file no. CSM 500-06-000729-158.

- [3] Before the Ontario Superior Court, there are two main class action proceedings seeking similar relief: *Baker v. General Motors LLC et al.*³ and *Duquette et al v. General Motors of Canada Limited and General Motors Company*⁴(collectively, the Ontario Actions).
- [4] In the “Ignition Switch proceeding”, the Petitioner seeks to represent a potential class of “All persons in Quebec (including but not limited to individuals, corporations and estates) who, on the dates of February 10, 2014, February 26, 2014 and March 31, 2014 owned one of the following vehicles: 2005-2010 Chevrolet Cobalt, 2006-2011 Chevrolet HHR, 2000-2014 Chevrolet Impala, 2005-2006 Pontiac Pursuit, 2007-2010 Pontiac G5, 2006-2010 Pontiac Solstice, 2003-2007 Saturn ION and 2007-2010 Saturn Sky (“**Class Vehicles**”) ”.
- [5] In the Power-Steering proceeding, the Plaintiff seeks to represent a potential class of: “All persons in Quebec (including but not limited to individuals, corporations and estates) who, on the dates of March 31, 2014 owned one of the following vehicles: 2004-2006, 2008-2009 Chevrolet Malibu, 2004-2006 Chevrolet Malibu Maxx, 2009-2010 Chevrolet HHR, 2010 Chevrolet Cobalt, 2008-2009 Saturn Aura, 2004-2007 Saturn ION, 2005, 2006, 2008, 2009 Pontiac G6 (“Class Vehicles”) ”.
- [6] The Petitioner asserts in the “Ignition Switch proceeding” that the “Class Vehicles” experienced unwanted engine shut-down due to a defect in the ignition switch, which involuntarily disengages the “ON” position to the “OFF” position while driving. The allegation is that this alleged defect makes the Class Vehicles dangerous to operate. The Petitioner asserts that each individual Group Member is entitled to damages for: (a) loss of value of their Class Vehicles; (b) out of pocket expenses in relation to the defect; (c) compensatory damages for the loss of use and enjoyment and other moral damages; and (d) exemplary damages.
- [7] As regards the “Power Steering proceeding”, the Petitioner asserts that a defect with the electric power-steering (“EPS”) may cause the vehicle to experience a sudden loss of power-steering thus making it more dangerous to drive. The Petitioner asserts his vehicle, a new 2005 Saturn ION was subject to a safety defect recall both for the Ignition Switch and the EPS. The Petitioner claims damages for: (a) reduction in the value of the vehicle; (b) inconvenience associated with repair; (c) mental distress; (d) out of pocket expenses; (e) exemplary damages.
- [8] In Ontario, the *Baker* proceedings relate to alleged defective ignition switches as well as allegedly defective EPS. In the *Baker* proceedings, the relief sought includes: (a) a declaration that the Class Vehicles were negligently manufactured; (b) a declaration that the Defendants breached their duty to warn, breached their implied warranties and made misleading representations; (c) a declaration that the purchasers are entitled to rescind their purchase agreements “and/or to damages in lieu if such rescission and all consequent damages arising from their purchase of the Class Vehicles”; (d) a declaration that any applicable statute of limitation has been “tolled”

³ Ontario Court file no. CV-14-502023-00C.P.

⁴ Ontario Court file no. CV-14-500358-00C.P.

by the Defendants' prior knowledge; (e) general damages, special damages not limited to the loss in value and in the alternative, an accounting and an order requiring disgorgement of all gross revenue or income from the sale of the vehicles; and (f) exemplary damages in the amount of \$500,000,000.00.

A- The Parties' Positions

[9] All parties allege that it is in the interest of justice that the Quebec proceedings be suspended pending the outcome of the Ontario Actions.

[10] The Respondents succinctly state their case on the basis of *lis pendens* as follows:

- 6. Class counsel in this case, Merchant Law Group,' has filed against GMCL and GMC eleven (11) national class actions in Ontario, British Columbia, Saskatchewan, Alberta, Manitoba, New Brunswick, Nova Scotia and Newfoundland, all of which are seeking on behalf of residents in Canada damages arising from essentially the same allegations as those contained in the Amended Motion and related to more or less the same vehicle models, the whole as appears more fully from a Status Chart communicated in support hereof as Exhibit R-1 and from copies of the aforesaid eleven class actions communicated in support hereto as Exhibit R-2 "en liasse";**
- 7. Except for damages for bodily injury which are not claimed in the Amended Motion, the relief sought in all class actions, and in the Amended Motion are essentially the same;**
- 8. As a consequence, the class and the relief sought in the Quebec Amended Motion are subsumed in the aforesaid other eleven (11) class actions filed by Merchant Law Group across Canada;**
- 9. Moreover, additional national class actions (including Québec) have been filed by other law firms against GMCL and GMC as well as a number of other GM affiliate or parent companies on behalf of essentially the same class and related more or less to the same vehicles and based on the same or similar allegations as in the Amended Motion and in the eleven (11) other Merchant Law Group class actions, the whole as appears more fully from the Status Chart already communicated hereinabove as R-1 and from copies of the five (5) class actions filed in Ontario and Nova Scotia by various other law firms, communicated in support hereof as Exhibit R-3;**
- 10. Once again, the Québec class and relief sought in The Amended Motion are subsumed in the aforesaid three additional class actions filed by the other three law firm groups;**
- 11. GMCL and GMC are therefore faced with defending against seventeen (17) class actions across Canada, in which the Québec**

class action is subsumed;

12. The Ontario class action instituted by Merchant Law Group on behalf of Christina Duquette was filed on March 18, 2014, while the original Motion for Authorization in this case was filed on March 19, 2014;

13. Because of the identity of object, facts and parties in the Ontario class action filed by Merchant Law Group and the Amended Motion, as explained hereinabove, GMCL and GMC are entitled to request that this Court issue a Stay Order on the basis of *lis pendens*, until final judgment is rendered in the Christina Duquette case and the other Ontario class actions, which are being case managed by Justice Perrell of the Ontario Superior Court.

[11] This Court has already temporarily suspended the present proceedings in case management conferences dated June 20 and October 22, 2014 and February 24 and May 20, 2015 to ascertain the status of similar proceedings commenced both in the United States (the “American proceedings”) and other Canadian provinces, notably Ontario.

Present status of Ontario proceedings

[12] The present state of the Ontario proceedings is summarized in the February 23, 2016 letter to this Court of Mr. Michael C. Smith, one of the counsel to General Motors in Ontario:

“At this time, Plaintiffs’ counsel have reached an agreement with respect to the carriage of GM Ignition Switch class proceedings which contemplates that:

- i. Rochon Genova LLP and Kim Orr Barristers P.C. will be co-lead counsel for a consolidated action which will proceed in Ontario as Baker v. General Motors LLC, court file number CV-14-502023-00CP (“the Baker action) on behalf of a national class which includes Quebec residents; and**
- ii. Langevin Morris LLP, Sutts, Strosberg LLP, McKenzie Lake Lawyers LLP and Merchant Law Group LLP will be class counsel.**

Plaintiffs’ counsel have proposed a consolidated pleading in the Baker action which is currently the subject of negotiations as between the parties. While the scope of the consolidated pleading is not finalized, the proposed carriage order embedded within the proposal to proceed in Ontario with the Baker action is not in issue.

Currently, the parties anticipate submitting a Carriage Order in writing to the Ontario Superior Court for review by the end of March, 2016, regardless of whether the parties are able to achieve

consensus on a consolidated pleading. We do not anticipate any issues with the entry of the carriage order.”

[13] Counsel have advised the Court as to the status of the material actions: (a) a consolidated action will proceed in Ontario as *Baker v. General Motors LLC*⁵, this national class includes Quebec residents; (b) while the consolidated pleading in the *Baker* action is being negotiated, the proposed carriage order is agreed between counsel; and (c) the carriage order should be received by the end of March, 2015. The consolidation into one case must first be determined before any certification hearing is held. Accordingly the date as to the latter has not yet been fixed but counsel will keep this Court apprised.

Status of Proceedings in the United States

[14] The Respondents also make reference to similar proceedings taking place in the United States.

[15] The Respondents do not allege *lis pendens* for the American proceedings but rather rely on the Court's inherent jurisdiction to suspend on the grounds that there would be substantial savings⁶ to Mr. Gagnon “regarding findings of facts through the use of affidavits and cross-examinations as well as evidence at trial, as a result of the Ontario and the US proceedings, the latter of which are considerably advanced”.

[16] The Respondents succinctly summarize the status of the US proceedings as follows:

18. About 130 civil actions, some individual actions and other putative class actions against GM have been consolidated in a Multi-district Litigation (MDL) proceeding by the United States Judicial Panel on Multi-District Litigation captioned In re General Motors LLC Ignition Switch Litigation, MDL #2543. The MDL proceeding is pending before Judge Jesse M. Furman of the United States District Court for the Southern District of New York. Court documents are available on the dedicated MDL 2543 website www.gmignitionmdl.com;

19. The earliest of the individual actions consolidated into the MDL were commenced in March, 2014;

20. Judge Furman has established a case management order for the conduct of the case including discovery, motion and other pre-trial deadlines and the matter has been progressing quickly since June 20, 2014 when the first 100 or so actions were ordered consolidated into the MDL;

21. Numerous complaints, including class action Consolidated Complaints have been filed in the MDL. On June 12, 2015 plaintiffs filed a Second Amended Consolidated Complaint alleging claims of purported economic loss on behalf of a putative nationwide class;

⁵ Ontario Court file no. CV-14-502023-00CP.

⁶ The alleged substantial savings are in terms of time, energy and cost.

22. *A substantial amount of documentation has been exchanged in discovery;*
23. *Depositions began in May and are scheduled to continue throughout this year;*
24. *Bellwether trials for personal injury claims are scheduled to commence in January 2016;*
25. *The parties have already obtained the decision of Judge Robert E. Gerber of the United States Bankruptcy Court for the Southern District of New York enforcing the Court's July 5, 2009 Sale Order and barring many claims and allegations plaintiffs sought to bring against GM. Judge Gerber's Judgment in that regard has now been entered and several plaintiffs have filed appeals of that Judgment. Copies of Judge Gerber's April 15, 2015 decision to enforce the Sale Order, May 27, 2015 decision regarding the form of Judgment, and June 1, 2015 Judgment are attached to the Affidavit of Lawrence J. Lines III as Exhibits "A", "B", and "C" respectively;*

Are the Respondents Entitled to Have the Quebec Authorization Proceedings Suspended under CCQ art. 3137?

[17] The Court exercises its discretion under CCQ art. 3137 to suspend the Quebec proceedings with certain conditions. The Court determines that all the applicable criteria under this article are met.

[18] CCQ art. 3137 states:

3137. On the application of a party, a Québec authority may stay its ruling on an action brought before it if another action, between the same parties, based on the same facts and having the same object is pending before a foreign authority, provided that the latter action can result in a decision which may be recognized in Québec, or if such a decision has already been rendered by a foreign authority.

1991, c. 64, a. 3137.

[19] According to article 3137 and the jurisprudence, the legal criteria to apply under CCQ art. 3137 in relation to class actions are:

- a) that the applicants in the respective jurisdictions are seeking the status of representative for a class action⁷;
- b) identical causes of action are not required so long as the basic facts in the respective proceedings are the same without requiring identical causes of action which may vary based on the

⁷ *Société canadienne des postes v. Lépine* [2009] 1 S.C.R. 549 at para. 48.

- particularity of the different legal systems, i.e., under Quebec civil law or under the common law of other Canadian provinces⁸;
- c) the comparable action must have the same object;
 - d) subject to certain nuances, the action in the other jurisdiction must have been brought earlier than the Quebec action⁹;
 - e) that a judgment from the other jurisdiction may be recognized and declared enforceable by “the Quebec authority”, pursuant to CCQ art. 3155;
 - f) assuming that the above five statutory criteria have been met, the use of the word “may” in CCQ art. 3137 still provides the Court with a judicial discretion, to be exercised, without limitation, based on the following criteria¹⁰:
 - i. the state of advancement and the activity in the foreign proceeding,
 - ii. the interest of justice and the interest of parties.

B- Applicable Law

[20] The parties do not allege that the three identities are present for *lis pendens*: this question remains open.

[21] However, on the face of the pleadings filed, the Quebec proceedings are very similar to the Ontario Actions. In a case management conference of February 26, 2016, the Court was advised that the manufacturing defects alleged in Quebec are included in the defects alleged in the Ontario actions. Also, Quebec residents are specifically included in the national class action brought in Ontario, as noted earlier.

[22] The Court has jurisdiction to suspend under art. 46 *C.C.P.* (now art. 49 *C.C.P.*).

[23] In general, the parties have, within limits, control of their case (art. 4.1 *C.C.P.* now *C.C.P.* art. 9, 10, 19)). However, deference by the Court to this control is attenuated in the case of a motion to authorize a class action because the Court must seek to protect the interests of the potential, unnamed class members. One of these interests is to have the class action proceedings be heard as soon as possible,¹¹ a second interest is to preserve evidence which may be lost through additional delay.¹² Thirdly, in cases where multiple overlapping class action proceedings have been

⁸ *Lépine*, supra note 5 at para. 52.

⁹ *Fastwing Investment Holdings Limited v. Bombardier inc.*, 2011 QCCA 432, at para. 30-33.

¹⁰ *Lebrasseur v. Hoffmann-La Roche Ltée*, 2011 QCCS 5457 at para. 14 and 15.

¹¹ *Allard v. Radio Mutuel*, EYB 1996-30169 (C.S.) at 4.

¹² *Caisse populaire de Ste-Catherine-de-Sienne v. Glassman*, J.E. 96-1823 (C.S.).

brought in the Province of Quebec, suspension of one of those proceedings has been granted to avoid "***an unnecessary triplication of time, energy and cost***".¹³

C- Analysis

[24] Using the same subparagraph numbers referred to in paragraph 19 above for each of the criteria, the Court will now apply those legal criteria to the facts of the present case:

- a) both Ms. Suzanne Baker in the Ontario proceeding and Mr. Michael Gagnon in the Quebec proceeding are seeking to act on behalf of a proposed class of consumers;
- b) in both cases, the applicants allege that they are members of a class have purchased a specified year and model of a motor vehicle produced by the Respondents, that that motor vehicle suffers from the alleged defective ignition switch and/or power steering problems and that damages have been suffered as a result;
- c) in both proceedings, the applicants are seeking authorization to proceed on behalf of a class to obtain compensation for those consumers who have unwittingly purchased one of these allegedly defective motor vehicles and suffered damages as a result of one or both of the alleged defects in manufacture;
- d) the *Baker* proceeding is dated April 11, 2014 while the Quebec "Ignition Switch proceeding" is dated March 19, 2014 and the Quebec "Power Steering proceeding" is dated January 23, 2015. In the circumstances, the Court determines that the Ontario proceeding is effectively prior to the Quebec proceedings since both alleged defects were brought before the Ontario courts prior to both alleged defaults being brought before the Quebec courts;
- e) under CCQ art. 3137, the final criterion requires that "provided that the latter action can result in a decision which may be recognized in Quebec (*"pourvu qu'elle puisse donner lieu à une décision pouvant être reconnue au Québec"*)". In the 2011 judgment of *Lebrasseur v. Hoffman-LaRoche*¹⁴, Madam Justice Manon Savard then of the Superior Court, paraphrased the statutory words of "can result" or "*puisse donner*" by the expression "*susceptible de donner lieu à une décision pouvant être reconnue au Québec*". On the basis of the *Baker* proceeding presently constituted, this Court sees no reason why a final judgment in *Baker* should not be "susceptible to homologation" here in Quebec under CCQ art. 3155. In the leading Supreme Court of Canada case of *Société canadienne des postes v. Lépine*, the two

¹³ *Marandola v. General Motors du Canada Ltd.*, EYB 2004-69313 (C.S.).

¹⁴ 2011 QCCS 5457.

reasons given for not allowing the Ontario decision to be homologated into Quebec were:

- a. because the newspaper notice permitting members to opt out was too ambiguous; and
- b. because there was still a pending Quebec proceeding thus preventing any homologation due to CCQ art. 3155 (4).

In the present case, there is no reason why, based on the *Lépine* judgment, an unambiguous newspaper notice could not be given nor the present proceedings could not be withdrawn in Quebec to permit the homologation of an eventual *Baker* judgment; and

- f) unlike in the *Lebrasseur* decision where the Ontario proceedings had been stalled for years, the proceedings in *Baker* are moving forward, particularly but without limitation, through regular case management conferences before Mr. Justice Paul Perell in the Ontario Superior Court of Justice.

[25] The Court is mindful to ensure the efficient use of legal resources in Quebec. This Court, at present, is prepared to consider that there may be substantial savings accrued in the Quebec proceedings by virtue of fact finding both in the Ontario proceedings and, potentially in the United States proceedings. The Respondents have admitted that the **"... the Plaintiff in Quebec could make use of affidavits served in the Ontario Action and any transcripts of cross examinations on those affidavits ..."** This will also go some way to alleviating any concern about losing evidence through delay.

[26] Secondly, the Court is mindful to ensure the efficient use of legal resources in Quebec. There may indeed be savings in time, energy and costs – should any proceedings be required in Quebec – where similar matters have already been heard by the Ontario courts.

[27] At the same time, this Court is mandated to carry out case management in class action proceedings which is both **"vigilant and active"**¹⁵ to protect the rights of all parties, which includes potential unnamed class members.

[28] Accordingly, on the basis of the Ontario actions and the American proceedings, the Court is prepared to suspend the Quebec proceedings but to require the parties to re-present themselves before it at regular intervals to keep the Court appraised of the progress in the Ontario proceedings. Any undue delays or difficulties in the Ontario actions which may prejudice the right of the Petitioner and/or potential unnamed Quebec class members may require the Court to revisit its decision on suspension¹⁶.

¹⁵ *Option Consommateurs v. Banque Amex du Canada*, EYB 2006-109880 (C.S.) at para. 76.

¹⁶ For authority to do so see: *McComber et al v. GlaxoSmithKline inc. et al*, EYB 205-97250 at para. 32 and 35 (QCCS) and also by analogy: *Hotte v. Servier*, [1999] R.J. Q. 2598.

D- CONCLUSIONS

FOR THESE REASONS, THE COURT:

[29] **SUSPENDS** the present proceedings in C.S.M.: 500-06-000687-141 and 500-06-00729-158, and **REQUIRES** counsel for the Parties to: (a) re-present themselves at a date to be fixed by the Court after four months from the present judgment and (i) to apprise the Court of the status of the Ontario actions and the American proceedings and thereafter at 4 month intervals; and (ii) whenever they need to advise the Court of any important development in the Ontario actions or American proceedings;

[30] **ALL WITH COSTS TO FOLLOW.**

MARK G. PEACOCK, J.S.C.

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Date of hearing: February 26, 2016