C A N A D A

PROVINCE OF QUÉBEC
DISTRICT OF MONTRÉAL

COURT OF APPEAL

No (C.A.):

No (S.C.): 500-06-000837-175

FCA CANADA INC.
-and-
FCA US LLC

APPELLANTS - Applicants

v.

GARAGE POIRIER & POIRIER INC.
-and-
ALEX BOUFFARD

RESPONDENTS - Defendants

APPLICATION FOR LEAVE TO APPEAL DATED MARCH 1, 2018
(art. 31(2) and 357 CCP)

TO ONE OF THE JUDGES OF THE COURT OF APPEAL, APPELLANTS SUBMIT THE FOLLOWING:

1. The Appellants FCA Canada Inc. and FCA US LLC (the "**Appellants**") seek leave to appeal from a judgement rendered on January 12, 2018 (the "**Judgement**") by the Honourable Marie-Anne Paquette, of the Superior Court for the district of Montréal (the "**Judge**") in the course of class action proceeding bearing number 500-06-000837-175, as appears from a copy of the Judgment attached hereto as **Schedule 1**.

2. The Judgement dismissed the Appellants' *Application to Stay the Class Action* ("**Application to Stay**"), a copy of which is attached hereto as **Schedule 2.**

A. BACKGROUND

3. On January 13, 2017,[1] Respondents Garage Poirier & Poirier Inc. and Alex Bouffard filed an *Application to Authorize the Bringing of a Class Action and to Appoint the Petitioners as Representatives* (the "**Québec Action**"), copy of which is attached hereto as **Schedule 3**.

4. The Québec Action alleges that the Appellants engaged in the design, manufacturing, marketing, advertising, distribution, lease and sale of vehicles that were equipped with illegal software known as a "Defeat Device" and were designed to mislead consumers and regulators about their emissions.

5. The Québec Action seeks the authorization to institute a class action on behalf of all persons, entities or organizations resident in Québec who purchased and/or leased one or more of the "Subject Vehicles" equipped with a Defeat Device. The "Subject Vehicles" include model years 2014 to 2016 Dodge Ram 1500 EcoDiesel vehicles, and model years 2014 to 2016 Jeep Grand Cherokee EcoDiesel vehicles.

6. On January 19, 2017, a proceeding raising the same facts and issues and targeting the exact same vehicles was filed in British Columbia (the "**BC Action**") on behalf of all residents of Canada, as appears from a copy of the *Statement of Claim,* Exhibit R-1 of the Application to Stay (Schedule 2).

7. Moreover, still in January 2017, a series of five (5) class action proceedings raising identical facts and issues and targeting the same vehicles were also commenced in Ontario (the "**Ontario Proceedings**"), as appears from Exhibits R-2 to R-6 of the Application to Stay (Schedule 2).

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[1] We note that the Application to Stay indicates that the Québec Action was filed on January 25, 2017, however, an oral amendment was made to indicate the correct date of service of the Québec Action which was January 13, 2017.

8. The first of the Ontario class action proceedings to be filed was the *D-K Equipment Limited* v. *FCA Canada Inc. and FCA US LLC* action, which was filed on January 13, 2017, the same day as the Québec Action.

9. On April 28, 2017, Plaintiffs in the Ontario Proceedings consolidated their respective actions into one consolidated national class action and served the action on the Appellants (the "**Ontario Action**"), as appears from the *Notice of motion (certification)*, Exhibit R-7 of the Application to Stay (Schedule 2).

10. On January 10, 2018, a *Fresh Statement of Claim* was served on the Appellants, adding Robert Bosch Inc., Robert Bosch GmbH and Robert Bosch LLC as Defendants to the Ontario Action, copy of which is attached hereto as **Schedule 4**.

11. On February 14, 2018, the Appellants served their *Responding Motion Record* on the Plaintiffs, and a case management conference is expected to be scheduled imminently with a view to setting the date for the certification hearing, as appears from a copy of the *Responding Motion Record* attached hereto as **Schedule 5**.

12. Aside from the fact that the Ontario Action and the BC Action seek to represent a national class, the definition of the class proposed and the vehicles targeted in these actions is the same as the class definition proposed in the Québec Action.

13. In the Québec Action, counsel for the Respondents recently indicated their intention to add additional defendants and to adduce as evidence an expert report in support of the alleged facts. Examinations of the Respondents have been tentatively set for April 2018, with a view to proceeding with the hearing on the authorization at the end of October 2018.

14. Since the filing of the Statement of Claim on January 19, 2017, the BC Action has been dormant. Counsel for the BC Plaintiffs has not communicated with the Appellants counsel about their intentions, if any, respecting the conduct of the BC Action.

15. By way of their Application to Stay, the Appellants asked the court to suspend the Québec Action in favour of the Ontario Action that also sought to represent a national class that included Québec consumers.

B. THE APPELLANTS' RIGHT TO SEEK PERMISSION FOR LEAVE TO APPEAL

16. The Appellants are entitled to seek leave to appeal from the Judgement as it causes them irremediable injury. The Judgement is also in contradiction with recent jurisprudence of the same Court, thus creating the risk of confusion as to the relevant criteria for stay applications in class actions.

17. As will be demonstrated in greater detail below, the Judge erred in finding that:

i. The conditions of article 3137 of the *Civil Code of Québec* ("**CCQ**") were not met because the Québec Action and Ontario Action were filed on the same day;

ii. The protection of the rights and interests of Québec residents is better served by dismissing the Application to Stay.

18. If the present *Application for Leave to Appeal* is granted, the Appellants intend to demonstrate that these errors are overriding and contradict recent decisions rendered by the same court in the context of overlapping multi-jurisdictional class actions.

1) The Judge Erred in Ruling that the Simultaneous Filing of Québec and Ontario Actions is a bar to a Stay of Proceedings

19. Despite the fact that all of the other conditions of art. 3137 CCQ were met, the Judge held that a stay of the Québec Action could not be granted because the Appellants did not establish that the Ontario action was already pending when the Québec Action was filed ("*déjà pendante devant une autorité étrangère*" according to the French version of art. 3137 CCQ).

20. Indeed, while the Judge recognized that the Ontario and Québec actions share common parties, facts and purpose, thus creating a situation of *lis pendens* and the risk of contradictory judgements on decisive issues, she dismissed the Application to Stay on the sole basis that the Appellants could not demonstrate that the Ontario Action predated the Québec Action.

21. It is important to note that, unlike in Québec where the "first-to-file" rule is applied when several applications for authorization to institute class actions are filed and are "time stamped" to avoid doubt as to which application is filed first, Ontario class action proceedings are not subject to the "first-to-file" rule and are not time stamped.

22. It follows that where Québec and Ontario class proceedings are filed on the same day, it is not possible for a party to demonstrate which of the Québec and Ontario class proceedings was filed first. What is clear in the present case, however, is that the Ontario Action was also pending on January 13, 2017, the day that the Québec Action was filed.

23. Thus, courts have held that while the "first-to-file" rule may have benefits for intra-provincial class actions in Québec, in particular to avoid carriage battles that are common elsewhere in Canada, it is not clear that a "first to file" rule makes sense or should be applied in dealing with overlapping inter-provincial class actions, and specifically in applying the conditions of art. 3137 CCQ.[2]

24. The Appellants respectfully submit that the filing on the same day of inter-provincial class actions, which share common parties, facts and purpose and which create the risk of contradictory judgements on decisive issues, is not a bar to staying a class action under art. 3137 CCQ, especially where, as is in the present case, all of the other criteria for *lis pendens* are satisfied.

25. In fact, the quasi simultaneous (or simultaneous) filing of class proceedings before different jurisdictions is commonplace in the class action context in

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2 *Chasles* c. *Bell Canada Inc.*, 2017 QCCS 5200, at paragr. 42.

Canada, and courts have held that this occurrence is not an impediment to staying a proceeding in the context of overlapping multi-jurisdictional or inter-provincial class actions.

26. Indeed, in the recent decision *Chasles* c. *Bell Canada Inc.*[3], the statement of claim in Ontario was filed two days after the application for authorization to bring a class action in Québec. In staying the Québec class action proceeding, Justice Stephen W. Hamilton, J.S.C states that the conditions of art. 3137 CCQ were designed for the typical litigation where one or more plaintiffs sue one or more defendants and do not apply readily to class actions.[4] He held that courts have thus recognized that *lis pendens* must be analysed with a view to the particular rules of class actions[5] and that the conditions of art. 3137 C.C.Q. should be applied quite liberally in the class action context.

27. Justice Hamilton notes that, in the context of class actions, the courts have frequently stayed Québec class actions in favour of national class actions in other provinces on the basis of *lis pendens.*[6]

28. For instance, in *Parker* c. *Apotex,*[7] Justice Jean-François Michaud, J.S.C. applied art. 3137 CCQ and granted the requested stay of the Québec motion to authorize the bringing of a class action in favour of the class action proceeding brought in Alberta which was filed on the same day as the Québec proceeding.

29. In *McComber* c. *Glazosmithkline Inc.*,[8] Justice Martin Bédard, J.S.C. granted a stay of the Québec class action proceeding in favour of the Ontario class action where both actions, including a similar one in Alberta, were filed simultaneously.

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3 2017 QCCS 5200.

4 *Ibid.*, at paragr. 26.

5 *Conseil pour la protection des malades* c. *Biomet Canada Inc.*, 2016 QCCS 4574.

6 *Conseil pour la protection des malades* c. *Biomet Canada Inc.*, 2016 QCCS 4574, paragr. 19. See also *Boucher* c. *Boston Scientific Corporation*, 2014 QCCS 6395, paragr. 12 and *McComber* c. *Glazosmithkline Inc.,* 2002 CanLII 40679 (QC CS), paragr. 28.

7 2015 QCCS 1210.

8 2005 CanLII 40679 (QC CS).

30. In other cases still, albeit where the applications to stay a proceeding were not contested by the parties, the courts have not hesitated to grant a stay of class action proceedings in Québec where the foreign action was filed after the Québec proceeding.

31. For instance, in *9085-4886 Québec inc.* c. *Visa Canada corporation*,[9] a stay of the proceedings in Québec was granted by Justice Chantal Corriveau, J.S.C. where the application for authorization to bring a class action in Québec was filed on December 10, 2010, months before similar actions were brought before the Ontario and British Columbia courts on March 28, 2011 and May 13, 2011 respectively.

32. It follows that the courts have recognized on multiple occasions that the question of *lis pendens* should be analyzed according to the particular rules of class actions and that the conditions of art. 3137 CCQ can and should be applied liberally. The mere fact that a foreign action is brought simultaneously, and even if it is brought after the Québec proceeding, is not a bar to staying an application for authorization to institute a class action in Québec.

33. This reasoning and jurisprudence stand in stark contrast to the present Judgement where the Judge held that even in the context of overlapping multi-jurisdictional class actions which create a situation of *lis pendens* and entail the risk of contradictory judgements on decisive issues, the Court's discretionary power does not allow it to waive what the Judge held to be non-compliance with the conditions of art. 3137 CCQ.

34. It is thus in the interest of justice that the Court of Appeal be seized with this controversial issue and dispel the confusion created by differing reasons of the Québec Superior Court with regards to the application of art. 3137 CCQ in the context of overlapping multi-jurisdiction or inter-provincial class actions.

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[9] 2012 QCCS 2572.

35. Furthermore, as the Judge herself recognizes,[10] the Judgement with respect to which the Appellants seek this Honourable Court's permission to appeal, creates the real risk of contradictory judgments on decisive issues, which the Appellants contend could bring the administration of justice in disrepute and undermine the public's confidence in the justice system as whole.

36. Moreover, in this day and age of scarce judicial resources, it is clearly counter-productive to allow proceedings to move forward in parallel when they cover the same potential class members and raise the same issues of fact and law.

37. Finally, and importantly, the Judgement causes irremediable prejudice to the Appellants by creating a situation where they are forced to defend themselves against the very same action in multiple jurisdictions, to incur significant costs in doing so and to unnecessarily multiply their use of judicial resources, which is inconsistent with the principles of proportionality and the good administration of justice enshrined in the *Code of Civil Procedure* ("**CCP**").

38. The Judge's assertion that the fact that the Appellants have to face proceedings relating to the same facts in different jurisdictions has no impact on the court's decision to stay a class action proceeding,[11] is contrary to the overarching principles of proportionality and good administration of justice provided for in the CCP.

39. Indeed, the courts have consistently recognized that staying a Québec class action when there is a national class action in another province prevents a multiplicity of proceedings and thereby saves precious time, energy and judicial resources, while avoiding the risk of conflicting judgments on decisive issues, and is therefore consistent with the principle of proportionality enshrined in the CCP.[12]

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10 Judgement, at paragr. 33 and 100.

11 Judgement, at paragr. 101.

12 *Canada Post Corp.* v. *Lépine*, 2009 SCC 16, at paragr. 57; *Chasles* c. *Bell Canada Inc.*, 2017 QCCS 5200, at paragr. 27.

2) The Judge Erred in Finding that the Rights and Interests of Québec Residents is Better Served by Dismissing the Application to Stay

40. While the Judge dismissed the Application to Stay on the sole basis that the Appellants could not demonstrate that the Ontario Action predated the Québec Action, the Judgement nonetheless addresses the requirements of art. 577 CCP.

41. Article 577 CCP provides for the right of a party to request the stay of an application for the authorization of a class action. In analyzing such a request, the Court is required to have regard for the protection of the rights and interests of Québec residents.

42. In analyzing these requirements, the Judge held that the Québec residents' rights would be equally respected in the Québec Action or the Ontario Action with respect to the communication with class members and compliance with the principles of Québec procedure,[13] and that the differences between applicable laws in Québec and Ontario did not justify the continuation of the Québec Action.[14]

43. Despite these findings, the Judge found that the continuation of the Québec Action offers a "slight advantage" so long as the Respondent's counsel do everything necessary to move the case forward diligently and ensure a useful and efficient communication with Québec residents.[15]

44. In this regard, the Judge assumes that the necessary adjustments will be made to the Québec Action, which was never translated into French despite being filed more than one year ago.

45. Since the Judgement and to date, no actions or adjustments have been taken by the Respondents in this regard.

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[13] Judgement, at paragr. 88.
[14] Judgement, at paragr. 82.
[15] Judgement, at paragr. 97.

46. Moreover, the Judge's finding that the proceedings in the Québec Action could be conducted in a "slightly easier" fashion since a consortium requires more coordination efforts[16], is not supported by the evidence before the Judge, and is further contradicted by the fact that the Respondent's counsel has only recently indicated that it too will seek to add new defendants to the action and will adduce additional evidence in the form of an expert report; steps already taken in the Ontario Action.

47. Indeed, as explained in the *Déclaration sous serment de Me David Stern* submitted to the Judge, copy of which is attached hereto as **Schedule 6**, the consortium is composed of highly experienced law firms that are familiar with major class actions and ready to take this action forward with diligence and with respect for and protection of the rights and interested of the Québec class members.

48. There is no factual or legal basis to support the Judge's conclusion that the continuation of the Québec Action offers a "slight advantage" over the Ontario Action, justifying the dismissal of the Application to Stay. In fact, all of the evidence before the Court indicates that the protection of the rights and interests of Québec residents will be duly protected in the Ontario Action.

49. In the present case, the Appellants clearly mentioned to the Court that they were willing to accept any accommodation that the Judge deemed necessary to protect the interests of Québec residents including those measures often imposed by judgements that have approved stay applications in the past.

50. The Appellants respectfully reiterate that they are seeking the stay of the Québec Action, not its dismissal. In the event the Ontario Action does not move forward as planned or if certification of the Ontario Action is not successful, the Respondents will be able to seek a lift of the stay of the Québec Action.

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[16] Judgement, at paragr. 81.

51. Finally, the Appellants submit that an immediate stay of the Québec Action should be granted by this Honourable Court so as to avoid irremediable prejudice to the Appellants as described hereinabove.

52. If the present leave to appeal is granted, the Appellants will respectfully request that the Court of Appeal:

I. **GRANT** the appeal;

II. **QUASH** the judgement of the Superior Court rendered on January 12, 2018 by the Honourable Justice Marie-Anne Paquette, J.S.C. sitting in the district of Montréal, in the case bearing number 500-06-000837-175;

III. **ORDER** the stay of the proceeding in the case number 500-06-000837-175;

IV. **ORDER** Respondents to bear the legal costs of the first instance and the appeal.

FOR THESE REASONS, MAY IT PLEASE THE JUDGE OF THE COURT OF APPEAL TO:

GRANT the present Application for Leave to Appeal;

AUTHORIZE FCA Canada Inc. and FCA US LLC to appeal the judgment rendered January 12, 2018, by the Honourable Marie-Anne Paquette, J.S.C. of the Superior Court from the district of Montréal in case number 500-06-000837-175;

ORDER the stay of proceeding in the case number 500-06-000837-175 until the judgement on the merit is rendered in the present appeal;

THE WHOLE, with legal costs to follow depending on the outcome of the appeal.

Montréal, this March 1, 2018

Fasken Martineau DuMoulin

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NOTICE OF PRESENTATION

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TAKE NOTICE that the present Application for Leave to Appeal will be presented for adjudication before one of the honourable judges of the Court of appeal for the district of Montréal, sitting at the Édifice Ernest-Cormier, located at 100 Notre-Dame Street East, Montréal, Québec, H2Y 4B6, on March 26, 2018 at 9:30 a.m. or so soon thereafter as counsel may be heard, in Room RC-18.

DO GOVERN YOURSELVES ACCORDINGLY.

Montréal, this March 1, 2018

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SWORN STATEMENT

I, the undersigned, Noah Boudreau, lawyer, having my professional address at 800 Victoria Square, Suite 3700, P.O. Box 242, in the city and district of Montréal, Province of Québec, H4Z 1E9, do solemnly declare:

1. I am a duly authorized representative of FCA Canada Inc. and FCA US LLC in the present case;

2. All the facts alleged in the present application are true.

AND I HAVE SIGNED :

Noah Boudreau

Solemnly affirmed before me,
in Montréal, on March 1, 2018

Commissioner for Oaths for Québec

COMMISSAIRE À L'ASSERMENTATION
LUCIE BRUNET
#86 084
POUR LE QUÉBEC

C A N A D A

PROVINCE OF QUÉBEC
DISTRICT OF MONTRÉAL

COURT OF APPEAL

No (C.A.):

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APPELLANTS- Applicants

v.

GARAGE POIRIER & POIRIER INC.
ALEX BOUFFARD

RESPONDENTS - Defendants

LIST OF SCHEDULES IN SUPPORT OF THE APPLICATION FOR LEAVE TO APPEAL

SCHEDULE 1: Judgment rendered January 12, 2018, by the Honourable Marie-Anne Paquette, S.C.J. in case number 500-06-000837-175.

SCHEDULE 2: *Application by the Defendants to Stay the Class Action*, dated May 31st, 2017.

SCHEDULE 3: *Application to Authorize the Bringing of a Class Action and to Appoint the Petitioners as Representatives,* dated January 13, 2017.

SCHEDULE 4: *Fresh Statement of Claim* served on January 10, 2018.

SCHEDULE 5: *Responding Motion Record* dated February 14, 2018.

SCHEDULE 6: *Déclaration sous serment de Me David Stern,* dated November 10, 2017, filed at the hearing on November 20, 2017.

Montréal, this March 1, 2018

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APPLICATION FOR LEAVE TO APPEAL DATED MARCH 1, 2018 (art. 31(2) and 367 CCP), NOTICE OF PRESENTATION, SWORN STATEMENT, LIST OF SCHEDULES AND SCHEDULES 1 TO 6

ORIGINAL

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358 C.C.P.: Within 10 days after notification, the respondent, the intervenors and the impleaded parties must file a representation statement giving the name and contact information of the lawyer representing them or, if they are not represented, a statement indicating as much. If an application for leave to appeal is attached to the notice of appeal, the intervenors and the impleaded parties are only required to file such a statement within 10 days after the judgment granting leave or after the date the judge takes note of the filing of the notice of appeal.

25 C.P.R.C.A. : The parties shall notify their proceedings to the appellant and to the other parties who have filed a representation statement by counsel.

30 C.P.R.C.A.: If a party fails to file a representation statement by counsel (or non-representation statement), it shall be precluded from filing any other pleading in the file.