SUPERIOR COURT

CANADA
PROVINCE OF QUEBEC
DISTRICT OF MONTREAL

No: 500-06-000835-161

DATE: OCTOBER 23, 2018

PRESIDED BY: THE HONOURABLE SILVANA CONTE, J.S.C.

RIVKA MOSCOWITZ
Plaintiff

v.

ATTORNEY GENERAL OF QUEBEC
Defendant

JUDGMENT

OVERVIEW

[1] Plaintiff is seeking permission to institute a class action against the Attorney General of Quebec on behalf of the following proposed class:

> All natural and legal persons who, since the inception of the photo radar and red light camera systems in the province of Quebec on August 19th, 2009 (the "Class Period"), were issued a statement of offence involving a photo radar and/or a red light camera in the province of Quebec.

[2] Plaintiff seeks the reimbursement of the fines paid, as well as unspecified moral damages for the alleged "systemic and malicious" use of hearsay evidence to prosecute photo radar and red light offences in the province of Quebec[1].

[3] Plaintiff argues that the Director of Criminal and Penal Prosecutions ("Director"), the Bureau des infractions et amendes ("Bureau")[2] and the peace officers of the Sûreté du Québec, DSRIP Service du Contrôle automatisé de la circulation ("SQ officers") knew or should have known, since 2009, that the offence reports signed by SQ officers in support of the photo radar and red light offences contained hearsay evidence resulting in the unlawful and malicious prosecution of the members of the class.

[4] Defendant argues that the convictions are final judgments and that the proposed class action constitutes a collateral attack that should not be permitted. Defendant relies on the relative immunity of the Crown prosecutor.

[5] Plaintiff replies that the immunity defense cannot be invoked at the authorization stage, and moreover, that the Bureau and SQ officers do not benefit from any immunity for negligence or intentional fault.

[6] The Court dismisses the Application.

[7] Plaintiff has not demonstrated an arguable case for malicious prosecution. It is apparent from the admitted facts in the Application that the second requirement for malicious prosecution set out in *Nelles v. Ontario* [3] cannot be satisfied as Plaintiff was convicted of a photo radar infraction. Therefore, the proposed class action constitutes a collateral attack on the final judgment rendered against Plaintiff.

[8] Moreover, while it is arguable, given the very low threshold for authorizing a class action, that the SQ officers were negligent in attesting to facts in the offence reports without any personal knowledge, Plaintiff has not demonstrated that she incurred any damages as a direct and immediate consequence of that fault.

[9] Finally, Plaintiff has not alleged any facts to demonstrate that the Bureau was negligent or in bad faith when accepting Plaintiff's guilty plea and fine. The hearsay statement did not invalidate the statement of offence.

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1 Paragraphs 15, 15.1.3 and 26 of the Re-Amended Application for authorization to institute a class action (" Application").

2 Exhibit P-1.

3 *Nelles* v. *Ontario*, [1989] 2 SCR 170, 1989 SCC 77 (CanLII).

FACTS

Plaintiff's situation

[10] In late August or early September 2016, Plaintiff received a statement of offence and attached offence report[4]. The Plaintiff was accused of driving 125 kilometers per hour in a 100 kilometer per hour zone, on August 7, 2016, in violation of the *Highway Safety Code*[5].

[11] The offence report contains details of the date and time of the infraction as well as, a picture of the Plaintiff's vehicle taken by means of a photo radar device indicating, amongst other details, the speed limit and the speed of the vehicle. The report is dated August 23, 2016 and is signed by a peace officer of the Sûreté du Québec, DSRIP Service du Contrôle automatisé de la circulation ("SQ officer").

[12] Plaintiff claims that although she did not believe she was speeding, she decided that it would be more economical and practical to simply pay the $137.00 fine rather than engage attorneys to contest same and spend a day in court[6]. Therefore, on December 7, 2016, Plaintiff paid the fine in the amount of $137.00 to the Bureau.

[13] On December 9, 2016, Plaintiff learned that photo radar evidence was declared inadmissible as hearsay evidence in the case of *Directeur des poursuites criminelles et pénales* v. *Bove* rendered on November 28, 2016[7], resulting in the acquittal of the accused. She contacted her attorney to inquire as to her rights.

[14] On December 30, 2016, Plaintiff filed the present Application against Defendant for the actions of the Director who prosecuted the statement of offences, the SQ officers who signed the offence reports and the Bureau which accepted payment of the fines[8].

The *Bove* Decision

[15] In *Bove*, the Quebec Court acquitted the accused of a photo radar infraction on the basis that the Director had not proven the offence beyond a reasonable doubt.

[16] In that case, the SQ officer signing the offence report did not personally ascertain the facts therein. In particular, amongst the declarations made under oath in the offence report, the peace officer attested, in section E, that the photo radar device was compliant with the *Regulation respecting the conditions and procedures for the use of photo radar devices and red light camera systems* ("*Regulation*").[9]

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4 Exhibit P-2.
5 RSQ, c. C-24.2.
6 Paragraph 8 of the Application.
7 *Directeur des poursuites criminelles et pénales* v. *Bove,* 2016 QCCQ 13829 ("*Bove*").
8 Art. 96 CCP.
9 RRQ, c.C-24.2 r. 9.

[17] In 2016, the *Regulation* provided that a photo radar device or a red light camera system, approved by the Minister of Transport and the Minister of Public Security, was subject to validation by a peace officer who received appropriate training, allowing him to ensure, using an external device or system, that:

(1) the accuracy of the speed it records complies with the manufacturer's specifications for the device or system; and the information other than speed, and the images obtained by the device or system is accurate;

(2) an inspection, in the 75 days preceding the date of use, by the supplier, the manufacturer or any other person authorized by the manufacturer to maintain the device or system;

(3) testing by a peace officer who has received appropriate training (a) before and after each operation in the case of a mobile photo radar device; or b) in the 7 days preceding the date of use in the other cases;

[18] As the SQ officer signing the report did not personally make the above verifications, the Director could not rely on the offence report as evidence in lieu of testimony pursuant to section 62 of the *Code of Penal Procedure* which read as follows[10]:

> 62. The statement of offence or any offence report, in the form prescribed by regulation, has the same value and effect as evidence given under oath by the peace officer or the person entrusted with the enforcement of any Act who issued the statement or drew up the report, if he attests on the statement or report that he personally ascertained the facts stated therein.
>
> The same applies to a copy of the statement or report certified by a person authorized to do so by the prosecutor.
>
> [emphasis added]

[19] The Quebec Court held as follows:

> [54] Cela dit, le Tribunal déplore que la Sûreté du Québec ait mis en place un système de confectionnement de rapports d'infraction basé essentiellement sur une preuve par ouï-dire, et ce, en totale contravention des exigences édictées par l'article 62 Cpp.
>
> [55] Or, celles-ci sont claires. Les auteurs Gilles Létourneau et Guy Cournoyer rappellent d'ailleurs que c'est précisément afin d'éviter l'introduction d'une preuve par ouï-dire, que l'article 62 Cpp fixe comme condition d'admissibilité en preuve d'un rapport d'infraction, qu'il porte une attestation par l'agent d'application de la loi, qu'il a lui-même constaté les faits qui y sont mentionnés [citation omise]. Autrement dit, l'article 62 Cpp permet l'introduction en preuve d'un rapport d'infraction pour tenir lieu du témoignage d'un agent de la paix pour les faits que

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10 RSQ c. C-25.01.

> ce dernier a lui-même constatés, non pas pour ceux dont il est informé par un témoin [citation omise]. Un rapport d'infraction n'est pas un raccourci magique permettant à son auteur de ne pas respecter les exigences élémentaires des règles de preuve.
>
> [56] Le Tribunal est également perplexe que le BIA ait autorisé ou toléré qu'un tel système soit mis en place, d'autant plus que les amendes prévues et auxquelles les justiciables se trouvent confrontés sont substantielles [citation omise]. En l'espèce, la défenderesse risquait une peine de 1 160 $. Ceci explique sûrement pourquoi certains n'hésitent pas à associer le système des photos radars à une « vache à lait » utilisée pour générer des revenus [citation omise].
>
> [57] Le BIA, un organisme gouvernemental relevant du ministère de la Justice, se devait d'être vigilant, d'autant plus qu'il est reconnu depuis longtemps que la vitesse d'un véhicule automobile captée par un cinémomètre photographique est *prima facie* du ouï-dire, à moins que la fiabilité et l'exactitude de l'appareil soient démontrées [citation omise].

[20] The *Bove* decision was not appealed. The Director's spokesman, Me Boucher, publicly declared that the practices and procedures were being reviewed in order to ensure that the evidence would be admissible in the future[11].

[21] In an article entitled "Radars photo: des failles connues depuis un an par la Couronne"[12], the author claims that the Director was fully aware a year before the decision was rendered that the evidence it was presenting was inadmissible and where there would be a contestation the practice would be to withdraw the statement of offence before a decision could be rendered. This was the case in *Bove* but the request to withdraw was denied by the Court.

[22] On August 31st, 2017, the former Minister of Transport Laurent Lessard confirmed to the public that the Defendant and its officers have reviewed their practices and that this resulted in the reduction of the number of statements of offence issued since November 28 2016[13]. The number of statements of offence issued after the *Bove* decision dropped from 41,721 in November 2016 to only 269 in June 2017[14].

[23] On March 31, 2017, the Quebec Court rendered a decision in *Directeur des poursuites criminelles et pénales* v. *Arkaifie*[15] wherein seven distinct infractions recorded from July 20 to August 5, 2016 and captured by means of a photo radar device were upheld by the Quebec Court. The evidence filed by the Director was supplemented by additional sworn declarations attesting to the compliance with the

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11 Exhibits P-5, P-9 and P-10.
12 Exhibit P-8.
13 Exhibit P-11.
14 Exhibit P-11.
15 *Directeur des poursuites criminelles et pénales* v. *Arkaifie*, 2017 QCCQ 17166.

requirements of the *Regulation*. This evidence was deemed admissible by the Court and the accused were convicted.

[24] In May 2018, section 332 of the *Highway Safety Code* [16] was modified to specify that the photograph obtained by means of a photo radar device is admissible in evidence in any penal proceeding and is proof of its accuracy in the absence of evidence to the contrary.

CRITERIA FOR AUTHORIZATION

[25] The Court authorizes a class action where, in its opinion, the application meets all of the criteria set out in article 575 of the *Code of Civil Procedure* ("CCP").

[26] The role of the Court, at this preliminary stage, is to filter frivolous claims. To paraphrase the Supreme Court of Canada, the trial judge does this by "weeding out untenable claims, sparing unnecessary procedures for the group, the representative, the defendant and the judicial system"[17]. Therefore, the threshold requirement for Plaintiff is relatively low. Plaintiff must only demonstrate that she has an arguable case[18].

[27] While the facts alleged in the application are deemed to be true for the purpose of that demonstration, opinion and argument are not[19]. Moreover, bare assertions that are not supported by some form of evidence, albeit limited, are insufficient to form an arguable case[20]:

[28] In light of these principles, the Court will now examine the requirements set out in article 575 CCP.

Article 575 (2)- the facts appear to justify the conclusions sought

[29] Plaintiff argues that the Director, Bureau and SQ officers knew or should have known that the offence reports contained false evidence and that their use of same constituted a bad faith abuse of the process justifying the reimbursement of the fines paid by the proposed class members for both photo radar and red light camera infractions.

[30] There is no allegation in the Application to support a proposed class action for red light camera infractions. Therefore, Plaintiff has not demonstrated an arguable case for malicious prosecution of red light camera infractions.

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16 *Supra* note 5.
17 *Infineon Technologies AG* v. *Option consommateurs,* [2013] 3 SCR 600 at para 11.
18 *Infineon supra* at para 134.
19 *Option Consommateurs* v. *Bell Mobilité*, 2008 QCCA 2201; *Fortier* v. *Meubles Léon Ltée*, 2014 QCCA 195.
20 *Infineon, supra* note 17 at paras 127 and 134; see also *Charles* v. *Boiron Canada Inc.*, 2016 QCCA 1716 (CanLII) at para 43.

[31] As for photo radar infractions, the Director benefits from relative immunity from liability for malicious prosecution. In *Proulx v. Québec (Attorney General),*[21] the Supreme Court affirmed that the threshold for Crown liability was set "very high, so as to deter all but the most serious claims against the prosecuting authorities, and to ensure that Crown liability is engaged in only the most exceptional circumstances"[22].

[32] Therefore, in order for Plaintiff to establish an arguable case for malicious prosecution against the Director, she must demonstrate the following conditions set out in *Nelles v. Ontario*[23]:

a) the proceedings must have been initiated by the defendant;
b) the proceedings must have terminated in favour of the plaintiff;
c) the absence of reasonable and probable cause; and
d) malice, or a primary purpose other than that of carrying the law into effect.

[33] On the face of the Application, the second requirement cannot be met as Plaintiff was convicted of speeding on the basis of either a guilty plea or as a result of the decision to pay the fine, which is deemed to be a guilty plea pursuant to article 162 of the *Code of Penal Procedure*[24]. The facts relating to the second requirement are admitted and need not be referred to a trial judge for a determination as argued by Plaintiff. To do so would defeat the Court's role at authorization which is to filter out untenable claims.

[34] The purpose for the second requirement is clear, it was meant to "preclude a collateral attack on a conviction properly rendered by a criminal court, and thus avoids conflict between civil and criminal justice"[25]. The term collateral attack is explained in *Wilson v. R.*[26] as follows:

> It has long been a fundamental rule that a court order, made by a court having jurisdiction to make it, stands and is binding and conclusive unless it is set aside on appeal or lawfully quashed. It is also well settled in the authorities that such an order may not be attacked collaterally — and a collateral attack may be described as an attack made in proceedings other than those whose specific object is the reversal, variation, or nullification of the order or judgment. Where appeals have been exhausted and other means of direct attack upon a judgment or order, such as proceedings by prerogative writs or proceedings for judicial review, have been unavailing, the only recourse open to one who seeks to set aside a court order is an action for review in the High Court where grounds for such a proceeding exist.

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21 *Proulx v. Québec (Attorney General),* [2001] 3 SCR 9, 2001 SCC 66 (CanLII).
22 *Proulx*, *supra* at 18-19.
23 *Nelles* supra note 3 at 196-197.
24 *Supra* note 10; Art. 162 CPP states: A defendant who transmits the whole amount of the fine and costs requested without entering a plea is deemed to have transmitted a plea of guilty.
25 *Miazga* v. *Kvello* (*Succession*), [2009] 3 SCR 339, 2009 SCC 51 (CanLII) at para 54.
26 *Wilson* v. *R.*, [1983] 2 SCR 594 at 599.

[35] In this case, Plaintiff is seeking the nullity of the convictions rendered by requesting the reimbursement of the fines paid by members of the proposed class convicted of speeding on the basis that the evidence relied upon by the Director was inadmissible as hearsay evidence. Therefore, the proposed class action would result in a collateral attack on the final judgments rendered against class members convicted of photo radar infractions[27]. The additional claim for moral damages does not change the nature of the proposed class action.

[36] Plaintiff has admittedly chosen to indirectly attack the convictions before the Superior Court rather than seek redress before the Court of Quebec. In paragraphs 36.1 and 37 of the Application Plaintiff states:

> 36.1 These facts further demonstrate that individual appeals and/or judicial reviews would be inappropriate remedies in the circumstances, as they would massively clog up the legal system. As such, the award of damages equivalent to the amount of the fines collected is the appropriate and proportionate remedy;
>
> 37. In these circumstances, a class action in damages is the only appropriate procedure for all of the members of the Class to effectively pursue their respective rights and have access to justice without overburdening the court system;

[37] Contrary to Plaintiff's allegations, the rule against collateral attack remains applicable in the context of class actions. In *Drolet-Caron v. Québec (Ville)*[28], the Superior Court refused to grant a class action whereby class members sought to recover fines paid further to the issuance of statement of offences for speeding imposed illegally by the City of Quebec. The Court held that such a claim would be tantamount to a collateral attack on the final decisions rendered against the class members who were convicted of speeding and, as such, authorization was denied[29].

[38] Therefore, Plaintiff does not have an arguable case for malicious prosecution against the Defendant.

[39] At the hearing, Plaintiff argued that she is not seeking to attack the validity of the judgment convicting her of speeding but rather she is seeking damages for the bad faith and intentional fault of the SQ officers and the Bureau both of whom do not benefit from any immunity for their civil liability.

[40] The Court will examine the arguments raised regarding each entity.

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27 *Roberge* v. *Bolduc*, [1991] 1 SCR 374, 1991 CanLII 83 (SCC); art. 2848 CCQ.
28 2003 CanLII 41091 (QC CS).
29 *Drolet-Caron*, *supra* at para 42.

SQ officers

[41] It is established law that police officers do not benefit from the immunity provided to the Crown[30].

[42] Plaintiff must therefore demonstrate that the SQ officers committed a fault and that she incurred compensable damages as a direct and immediate consequence of that fault.

Fault

[43] The standard of care applicable under article 1457 of the *Civil Code of Quebec* ("CCQ") is that of a competent, prudent and diligent officer placed in the same circumstances[31].

[44] Plaintiff alleges as follows with regard to the SQ officer's fault:

> 12.2. It appears that the agent falsely attested to facts on the Offence Report and abridged police report, which, in the present case, is the equivalent of providing false testimony resulting in the conviction of an accused.
>
> 15.2.1 Moreover, the Defendant and its agents engaged in faulty conduct by instituting and persisting a systemic method by which hearsay evidence was constantly fabricated during the course of each and every penal procedure, and this in violation of section 8(3) of the *Code of ethics of Québec police officers*, chapter P-13.1, r. 1;

[45] To begin with, the Court underlines that Plaintiff is mistaken to equate hearsay evidence with false evidence. Plaintiff's use of the term fabrication of evidence appears to be a poor translation of the French term used in the *Bove* decision which refers to the drafting or preparation of the offence report.

[46] Moreover, there is also no allegation that the photo radar device was inaccurate or malfunctioning. The sole issue in dispute is whether the SQ officers committed an intentional fault or were otherwise negligent within the meaning of article 1457 CCQ when attesting to compliance with the *Regulation* without having personal knowledge.

[47] Defendant admits that the SQ officer signing Plaintiff's offence report did not personally attest to the facts contained in section E therein. Defendant has filed declarations from other SQ officers[32]attesting to the compliance with the *Regulation,* similar to those filed in *Arkaifie*.

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30 *Hill v. Hamilton-Wentworth Regional Police Services Board*, [2007] 3 SCR 129, 2007 SCC 41.
31 *Hill*, *supra* at paras 3, 72 et 73; *Lacombe* v. *André*, 2003 CanLII 47946 (QC CA) at para 41.
32 Exhibits HD-1 to HD-3.

[48] On the face of the Application, given the low threshold to be met, Plaintiff has demonstrated an arguable case that a prudent and diligent officer would not have made a solemn affirmation regarding facts that are not to his personal knowledge. However, there are no allegations to support the argument that the SQ officers acted with malice or intention to deceive. The SQ officer's good faith is presumed[33] and Plaintiff has not alleged any facts that would rebut that presumption.

[49] Finally, as Plaintiff's offence report is dated August 23, 2016, that is, before the *Bove* decision was rendered on November 28, 2016, Plaintiff has not demonstrated that the SQ officer knew the declaration under oath was inadmissible as hearsay evidence.

Damages

[50] As Plaintiff has met the low threshold of establishing an arguable case for fault, the Court must now determine whether Plaintiff has demonstrated that she has incurred a compensable damage as a direct and immediate consequence of the SQ officer's hearsay statement in section E of the offence report.

[51] On the face of the proceedings, Plaintiff did not incur any damage as a direct and immediate consequence of the SQ officer's hearsay statement. The fine was paid as a result of the conviction for speeding.

[52] The allegations contained in the Application regarding her damages are as follows:

> 15.2.7 For the abovementioned reasons, Applicant's damages are a direct and proximate result of the Defendant's misconduct;
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> 15.3 There are precedents in other Canadian jurisdictions where governments have compensated its citizens after public confidence was affected as a result of issues with the use of photo radars:
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> a) In 2011, the Alberta government cancelled approximately 140,000 tickets issued by photo radars during a 15-month period and compensated Albertans close to $13 million in fines, Applicant disclosing of a copy of the January 24th, 2011, Globe and Mail article titled Alberta to refund $13M in speeding fines; photo radar network in doubt as Exhibit P-6;
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> b) In 2014, the City of Winnipeg cancelled more than 2,500 photo radar tickets and issued refunds to its citizens totaling approximately $1 million because of errors on tickets issued by photo radar, Applicant disclosing a copy of the July 30th, 2014, CBC News article titled $1M in photo radar fines in Winnipeg refunded due to error as Exhibit P-7;

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[33] Article 2805 CCQ.

> 16. In these circumstances, Applicant's claim for compensatory damages against the Defendant for her pecuniary and moral damages is justified and practicable;
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> 26. All of the damages to the Class members are a direct and proximate result of the Defendant's and its agents' misconduct, maliciousness and bad faith with respect to the use of hearsay evidence, which they ought to have known was inadmissible in court;

[53] These allegations are conclusions and not statements of fact that are deemed to be true.

[54] Moreover, the fact that other provinces chose to voluntarily cancel speeding infraction and refund fines does not demonstrate an arguable case. On the face of the articles submitted, the refunds were offered by the government due to errors or deficiencies in the photo radar measurements, which is not the case here, as was demonstrated by the *Arkaifie* decision.

[55] In addition, it cannot be said that Plaintiff was misled by the SQ officer's declaration. In paragraph 8 of the Application, Plaintiff states as follows:

> 8. Although the Applicant was not driving at the speed indicated on the Offence Report, Exhibit P-2, she and her husband decided that it would be more economical and practical to simply pay the fine of $137.00, instead of wasting money on a lawyer (which would cost more than the $137.00 fine) to defend herself and spending a day at court;

[56] Therefore, Plaintiff was not misled to believe that she was speeding. Rather, Plaintiff paid the fine out of convenience in order to avoid the time and expense related to contesting the infraction.

[57] This case differs from the *Bove* case relied upon by Plaintiff to justify her request for damages. In that case, the accused was acquitted but had incurred costs in contesting the offence. In addition, the court denied the request to condemn the Director for malicious prosecution but stated that the reliance on hearsay evidence could give rise to an order to pay costs in the future as follows[34]:

> [59] Cependant, à la suite du présent jugement, le poursuivant est maintenant formellement informé que la preuve dont il dispose pour les poursuites concernant les cinémomètres photographiques fixes repose sur une preuve déficiente.
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> [60] À l'avenir, les défendeurs pourront, en toute légitimité, s'adresser au Tribunal pour demander que le poursuivant soit condamné aux frais si ce dernier persiste à déposer une preuve qu'il sait illégale.

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34 *Bove*, *supra* note 7.

> [61] D'autant plus que les défendeurs auront dû perdre des heures de travail, retenir les services d'un avocat ou dû exiger la présence de l'agent ayant signé le rapport d'infraction, pour se défendre.

[58] As mentioned previously, Plaintiff was convicted of the offence and cannot claim damages for malicious prosecution.

[59] As for the claim for moral damages, Plaintiff alleges:

> 7. Applicant was unpleasantly surprised and stressed when she received the Offence Report, Exhibit P-2;

[60] However, her alleged stress arises from the receipt of the offence report for speeding and not the hearsay statement in section E therein.

[61] As a result, in the absence of compensable damages arising from the alleged fault, Plaintiff has not demonstrated that she has an arguable case against the SQ officers.

The Bureau

[62] There are no allegations of fact which would demonstrate an arguable case that the Bureau acted negligently or in bad faith.

[63] Plaintiff argues that the Bureau should not have accepted the payment of the fine paid on December 7, 2016, in light of the *Bove* decision which held on November 28, 2016 that the offence report contained hearsay evidence. However the *Bove* decision did not render the statement of offence invalid, it simply held that the Director could not file the offence report in lieu of testimony as it contained hearsay evidence. Therefore, once the accused chose to plead guilty to the infraction and sent the payment to the Bureau, the Bureau's duty is to accept the payment of the fine.

[64] For all of these reasons, Plaintiff has not demonstrated and arguable case for civil liability as against the Director, the SQ officer or the Bureau.

Article 575 (1)- common questions of fact and law

[65] As stated in *Western Canadian Shopping Centres Inc. v. Dutton*[35], when examining the commonality requirement, "the underlying question is whether allowing the suit to proceed as a representative one will avoid duplication of fact-finding or legal analyses." Therefore, there need only be one common question of fact or law as long as that question significantly advances the outcome of the class action for all of its members[36].

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35 *Western Canadian Shopping Centres Inc. v. Dutton*, [2001] 2 SCR 534 at para 39.
36 *Vivendi Canada Inc.* v. *Dell'Aniello,* 2014 SCC 1, [2014] 1 SCR 3 at para 58.

[66] The Plaintiff's proposed common questions are not contested by Defendant and read as follows:

> a) Did the Defendant and its agents commit an intentional fault and, if so, are Class members entitled to damages?
>
> b) Was Defendant and its agents malicious, willfully blind and/or negligent with respect to its legal obligations, notably under article 1457 of the *Civil Code of Quebec*?
>
> c) Did Defendant and its agents act in bad faith?
>
> d) When does prescription start for Class members and what are the factors common to the Class members regarding the impossibility in fact to act?

[67] The Court finds that while the first three questions are variations on the same theme and can be simplified, the answers to the questions are common to the proposed class and would advance each class members claim.

[68] This criterion is therefore met by Plaintiff.

Article 575(3) CCP-The rules of mandate or joinder are difficult or impracticable

[69] The Court finds that the composition of the class, both in number and geographic locations, would make it difficult or impracticable to proceed by way of a mandate or joinder of actions.

[70] Defendant's argument that there are no other class members convicted on the basis of hearsay evidence after the *Bove* decision as a result of the changes made in the Director's practices, requires evidence and is an issue that can only be determined by the trial judge hearing the merits of the case.

Article 575 (4) CCP- Adequateness of the Representative of the Proposed Class

[71] In the *Infineon* case, the Supreme Court of Canada confirmed that an adequate representation requires the consideration of three factors: interest in the suit; competence; and absence of conflict with the group members[37]. These factors must be interpreted liberally as no proposed representative should be excluded unless his or her interest or competence is such that the case could not possibly proceed fairly.

[72] Plaintiff meets this low threshold. The allegations in Application concerning her interest, knowledge of the facts and absence of conflict are deemed to be true[38].

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37 *Infineon, supra* note 17 at 419.

38 Paragraphs 38-54 of the Application.

[73] Therefore, as one of the criteria for authorization has not been met, the Court will not authorize the proposed class action.

FOR THESE REASONS, THE COURT:

[74] **DISMISSES** Plaintiff's Re-amended application to authorize the bringing of a class action and to appoint the status of representative Plaintiff;

[75] **THE WHOLE** with costs.

Silvana Conte

SILVANA CONTE, J.S.C.

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Dates of hearing: May 10 and 11, 2018