SUPERIOR COURT

CANADA
PROVINCE OF QUEBEC
DISTRICT OF MONTREAL

No: 500-06-000895-173

DATE: October 2, 2018

BY THE HONOURABLE CHANTAL TREMBLAY, J.S.C.

EMANUEL FARIAS
Applicant
v.
FEDERAL EXPRESS CANADA CORPORATION
Respondent

JUDGMENT ON LEAVE TO ADDUCE EVIDENCE IN VIEW OF THE AUTHORIZATION HEARING

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[1] Emmanuel Farias filed an Application for Authorization to Institute a Class Action and to Obtain the Status of Representative (**Authorization Application**). He alleges that Federal Express Canada Corporation (**FedEx**) unlawfully charged and collected custom duties and/or processing fees from the class members, the whole contrary to the Canada-European Union Comprehensive Economic and Trade Agreement (**CETA**) legislation, which came into effect as of September 21, 2017.

[2] CETA provides that no tariffs or custom duties are to be imposed on goods originating from an EU country or other CETA beneficiary which are imported into Canada.

[3] FedEx seeks leave to adduce evidence in view of the authorization hearing scheduled to take place on October 26, 2018. It wishes notably to demonstrate that all eligible class members, including the Applicant, have already been reimbursed by FedEx

directly, or will be by the Canadian Border Services Agency (**CBSA**), with the result that none of them will sustain a loss.

[4] Petitioner contests such request and argues that it constitutes evidence on the merits of the case that is not relevant for the authorization purposes.

[5] The parties submitted detailed written arguments in support of their respective position and it was agreed not to hold a hearing regarding this preliminary issue given the detailed written submissions.

1. CONTEXT

[6] On December 8, 2017, the Applicant filed its Authorization Application. It was served upon FedEx on February 5, 2018. He suggests the following issues of fact and law to be dealt with collectively for the purpose of the proposed class action:

> 5.1 Was/is Respondent entitled to charge and collect customs duties and/or processing fees from members of the Class who purchased goods originating in the EU or other CETA beneficiary after the coming into force of CETA?
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> 5.2 Did Respondent, in charging and collecting customs duties and/or processing fees during the class Period, breach the terms of CETA?
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> 5.3 Is Respondent a "Merchant" governed by the CPA?
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> 5.4 Are certain members of the Class consumers governed by the CPA?
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> 5.5 Did respondent fail to comply with the requirements of the CPA by charging and collecting, during the Class Period, customs duties and processing fees from members of the Class who purchased goods originating in an EU country or other CETA beneficiaries under CETA?
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> 5.6 If Respondent failed to comply with the requirements of the CPA in charging and collecting such customs duties and processing fees during the class Period, is the Petitioner entitled to recover the amounts so charged to and paid by members of the class to Respondent?
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> 5.7 How much money did Respondent collect from members of the class collectively for custom duties and processing fees during the Class Period?
>
> 5.8 Is Respondent liable to pay punitive damages to consumer members of the Class for their repeated breached of the CPA and is so, what amount of punitive damages should respondent be condemned to pay, collectively?

[7] On April 16, 2018, FedEx filed its Application to Seek Leave to Adduce Relevant Evidence in view of the authorization hearing, which was amended on July 13, 2018.

2. ANALYSIS

[8] The Court of Appeal in *Asselin* v. *Desjardins Cabinet de services financiers Inc.*[1] framed the Court's analysis of an Application to submit relevant evidence as follows:

> [37] Autre exemple de glissement : on laissera les parties produire une preuve volumineuse, qu'on examinera ensuite en profondeur comme s'il s'agissait d'évaluer le fond de l'affaire. **Or, ce n'est pas pour rien que, dans *Allstate du Canada, compagnie d'assurances c. Agostino*, réitérant un point de vue déjà exprimé dans *Pharmascience inc. c. Option Consommateurs*, la Cour met les juges autorisateurs (ou gestionnaires) en garde contre « la tentation d'user de l'article 1002 *C.p.c.* [maintenant 574 *C.p.c.*] de manière à faire du mécanisme de filtrage qu'est le processus d'autorisation du recours collectif une sorte de préenquête sur le fond »**, ce qui risque de contaminer l'analyse propre aux conditions d'autorisation en la faisant déborder du champ restreint qui doit être le sien. C'est en effet une tentation à laquelle il est souvent difficile de résister. Mieux vaut donc s'en prémunir.
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> [38] **Bien sûr, aux termes mêmes de l'art. 574 *C.p.c.* (autrefois 1002 a.*C.p.c.*), « le tribunal peut permettre la présentation d'une preuve appropriée/*the court may allow relevant evidence to be submitted* », accessoirement à la contestation de la demande d'autorisation, le demandeur étant pour sa part autorisé à déposer au soutien de sa procédure, sans permission préalable, certaines pièces qu'il estime de nature à donner du poids à ses allégations. Mais cela doit être fait avec modération et être réservé à l'essentiel et l'indispensable. Or, l'essentiel et l'indispensable, côté demandeur, devraient normalement être assez sobres vu la présomption rattachée aux allégations de fait qu'énonce sa procédure. Il devrait en aller de même du côté du défendeur, dont la preuve, vu la présomption attachée aux faits allégués, devrait être limitée à ce qui permet d'en établir sans conteste l'invraisemblance ou la fausseté.** C'est là le « couloir étroit » dont parle la Cour dans *Agostino*. Car, ainsi que l'écrit succinctement le juge Chamberland, au stade de l'autorisation, « le fardeau [du requérant] en est un de logique et non de preuve ». Il faut conséquemment éviter de laisser les parties passer de la logique à la preuve (prépondérante) et de faire ainsi un pré-procès, ce qui n'est pas, répétons-le, l'objet de la démarche d'autorisation.
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> [39] Évidemment, on peut comprendre que la partie demanderesse, désireuse de contrer par avance la contestation qu'elle prévoit, puisse être portée à déposer d'emblée une preuve abondante, le plus souvent documentaire, au soutien de ses allégations; elle peut encore chercher à produire des éléments supplémentaires au fur et à mesure qu'elle prend connaissance des moyens qu'entend lui opposer la partie défenderesse. Pour échapper à la perspective d'une action collective, cette dernière, pareillement, souhaitera présenter une preuve destinée à démontrer que l'action envisagée ne tient pas et, pour ce faire, elle pourrait bien

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[1] 2017 QCCA 1673 (Application for Leave to Appeal to the Supreme Court, S.C.C, 12-28-2017, nº 37898).

> forcer la note, sur le thème « abondance de biens ne nuit pas ». **Le juge autorisateur (ou gestionnaire) doit résister à cette propension des parties, tout comme il doit se garder d'examiner sous toutes leurs coutures les éléments produits par l'une et l'autre, au risque de transformer la nature d'un débat qui ne doit ni empiéter sur le fond, ni trancher celui-ci prématurément, ni porter sur les moyens de défense de l'intimé**.
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> [...]
>
> [91] (...) il convient de réitérer que les faits allégués par la demande d'autorisation d'intenter une action collective doivent être tenus pour avérés, à moins que leur fausseté ne se révèle de manière flagrante. Cela peut se produire, par exemple, lorsque les allégations de la demande sont irréductiblement contradictoires à leur face même ou encore quand la preuve – limitée – produite par les parties en montre l'évidence – c.-à-d. D'une manière qui s'impose à l'esprit avec une incontestable certitude - la fausseté ou la vacuité. (...)
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> (Our emphasis and references omitted)

[9] This framework respects the well-established principle that at the authorization stage the facts alleged in the applicant's motion are assumed to be true[2].

[10] In *Lambert (Gestion Peggy)* v. *Écolait Ltée*[3], the Court of Appeal also stated:

> [37] **La production de déclarations sous serment, autorisée en vertu de l'article 574 *C.p.c.*, doit généralement porter sur des questions neutres et objectives par opposition à des questions controversées ou litigieuses qui relèvent de l'appréciation de la preuve à être évaluée sur le fond de l'affaire**. Comme le rappelle la juge Bich dans *Allstate du Canada* c. *Agostino*, le juge de l'autorisation doit éviter de permettre la production d'une preuve qui viserait à transformer le mécanisme de filtrage en préenquête sur le fond. Il doit plutôt choisir « une voie mitoyenne qui, entre la rigidité et la permissivité, est celle de la prudence, une prudence qui s'accorde avec le caractère sommaire de la procédure d'autorisation du recours collectif ».
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> (Our emphasis)

[11] More recently in *Baratto* c. *Merck Canada inc.*[4], the Court of Appeal reiterates such framework in these words:

> [48] À cet égard, il est utile de rappeler qu'il ne doit pas, à ce stade, se pencher sur le fond du litige et qu'il soit prendre les faits pour avérés, sauf s'ils apparaissent invraisemblables ou manifestement inexacts.

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2 Infineon Technologies AG c. Option consommateurs, 2013 C.S.C. 59, par. 67.
3 2016 QCCA 659.
4 2018 QCCA 1240.

[...]

> [51] Un requérant, à ce stade, doit présenter une cause soutenable, c'est-à-dire ayant une chance de réussite. Il n'a pas à établir une possibilité raisonnable ou réaliste de succès ». Cette condition est satisfaite dès lors que les faits allégués dans sa requête justifient, *prima facie*, les conclusions recherchées et qu'ainsi, il démontre avoir une cause défendable. Il n'a pas à faire la preuve complète de ce qu'il allègue et peut se limiter à présente en preuve « l'essentiel et l'indispensable ». Un intimé, par ailleurs, n'est autorisé à présenter que ce qui permet « d'[...] **établir sans conteste l'invraisemblance ou la fausseté** » de faits qu'énonce la procédure. **Ainsi, le débat qui doit avoir lieu au stade de l'autorisation n'est pas un débat sur le fond de l'affaire**.
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> (References omitted)

[12] FedEx seeks leave to submit Renate Jalbert's amended sworn declaration, as Managing Director, Regulatory Affairs, at FedEx and 16 exhibits referred to therein, the contents of which are summarized as follows:

a) All custom duties collected by FedEx are collected on behalf of the CBSA and are remitted to the CBSA;

b) The CBSA has broad powers to which FedEx is subject, including the CBSA's rights to audit, to suspend a broker license, of compliance verification and to administer penalties for non-compliance;

c) FedEx was well prepared for the entry into force of the *CETA* and information was released both internally and on the FedEx.ca website to ensure its own employees as well as its customers were aware of what the *CETA* entails;

d) Through an internal review of the *CETA* clearing process in October 2017, prior to the Petitioner's filing of the Application, errors were discovered by FedEx with *CETA* clearance processing;

e) These errors affected about 8% of the shipments qualifying for TT31, including both shipments where custom duties were not collected (or duties under-charged) and shipments where custom duties should not have been collected (or duties over-charged);

f) By the end of November 2017, prior to the filing of the Petitioner's Application, there were already at least 70 *CETA* related disputes filed by customers and under review by FedEx;

g) FedEx acted diligently to correct all *CETA* processing errors, which were identified and corrected in accordance with usual FedEx processes, quality control and CBSA requirements and in conformity with *Custom Act* and its regulations;

h) The custom clearance entry issues identified by FedEx resulting in the *CETA* processing errors were rectified preventing any further overcharging. This is confirmed by regular routine quality control audits;

i) In total, $504,197 in duties were collected in error by FedEx for *CETA* qualifying shipments. Of this amount, 60% ($301,269) were collected on commercial goods shipments and 40% ($202, 928) were collected on casual goods shipments;

j) FedEx took all corrective actions to overcharging resulting from *CETA* processing errors;

k) All qualifying customers were either reimbursed directly by Fedex, or will be reimbursed by the CBSA;

l) The actions taken by Fedex were in conformity with the CBSA's policies and with FedEx general business practices;

m) Ancillary clearance fees are not related to the application of *CETA*;

n) FedEx shipments are subject to an arbitration provision.

[13] FedEx submits that the facts alleged in the Authorization Application and the exhibits submitted are incomplete and misleading and that the Court would benefit from a complete portrait of the role played by FedEx and its obligations under the law, the regulatory framework it is subject to, the role assumed by the CBSA as well as an explanation of the assessment of duties. It further submits that the above stated evidence is essential to a proper determination of whether Petitioner has exposed an arguable case and whether there is an identifiable class of FedEx customers who have actually sustained a prejudice.

[14] For the following reasons, the Court is of the view that the facts alleged in the paragraphs of the amended sworn declaration mentioned below and the exhibits in support thereof are not necessary and indispensable for the purpose of the authorization hearing:.

a) Paragraphs 1 to 5 refer to general information regarding the role and activities of FedEx. The allegations found in the Authorization Application are more than sufficient in this regard.

b) Paragraphs 6 to 8.10 and exhibits RJ-5 and RJ-11 to RJ-16 concern the role and powers of the CBSA regarding the admissibility of goods into Canada.

These paragraphs explain that in the normal course of business, adjustments to duties are routinely required and processes have been established in doing so. Any errors in the collection of duties do not benefit FedEx as they are remitted to

CBSA. Also, the latter has a right to suspend or cancel a custom broker's licence and to administer penalties for non-compliance. These paragraphs also refer to the fact that Petitioner disputed duties and taxes directly with the CBSA in the past.

These facts are not indispensable in view of the authorization hearing as they rather constitute a pre-enquiry on the merits of the case and they do not preclude Petitioner from requesting the authorization to institute a class action against FedEx based on a violation of the *Consumer Protection Act*[5].

c) Paragraphs 9 to 34 and the exhibits RJ-1 to RJ-4 provide a factual background of how FedEx prepared for and what has been FedEx's conduct in relation to the CETA clearance process.

These facts are not essential for the determination as to whether or not Petitioner has an arguable case namely with regards to punitive damages and rather constitute a pre-enquiry on the merits of the case.

[15] On the other hand and for the following reasons, the Court views the following paragraphs of the amended sworn declaration and exhibits in support thereof as relevant, necessary and indispensable in view of the authorization hearing:

a) Paragraphs 35 to 45.2 and the exhibits RJ-6 to RJ-8 concern the corrective actions to overcharging and the situation of the Petitioner. These additional facts and documents are necessary and indispensable as they are directly related to the issues as to whether or not there is a class and whether or not Petitioner has a personal cause of action. They also distinguish the unlikelihood and falseness of the allegations contained in the Authorization Application and thus, without constituting a pre-enquiry on the merits of the case.

b) Paragraphs 46 to 49 and exhibit RJ-10 concern ancillary fees charged by FedEx. These fees are unrelated to *CETA*, as contrary to what is alleged by Petitioner. Therefore, such evidence is essential and indispensable.

c) Paragraphs 50 and 51 and exhibit RJ-9 refer to the existence of an arbitration provision that may affect the conclusions sought by Petitioner. Once again, this evidence is relevant and indispensable in view of the authorization hearing.

[16] Finally, paragraph 52 of the amended sworn declaration is not essential and indispensable as it constitutes a summary of the most important aspects of the amended sworn declaration which have already been dealt with above.

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5 CQLR c P-40.1.

WHEREFORE, THE COURT:

[17] **ALLOWS** the filling of paragraphs 35 to 51 of Renate Jalbert's amended sworn declaration dated July 12, 2018, and the exhibits RJ-6 to RJ-10 in support thereof;

[18] **REFUSES** the filing of paragraphs 1 to 34 and 52 of Renate Jalbert's amended sworn declaration dated July 12, 2018, and the exhibits RJ-1 to RJ-5 and RJ-11 to RJ-16 in support thereof;

[19] **THE WHOLE,** with legal costs.

Chantal Tremblay J.S.C.

CHANTAL TREMBLAY, J.S.C.

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