

SUPERIOR COURT

(Class Actions Chamber)

CANADA
PROVINCE OF QUEBEC
DISTRICT OF MONTREAL

N° : 500-06-000968-194

DATE : June 7, 2019

PRESIDING: THE HONOURABLE GARY D.D. MORRISON, J.S.C.

DAVID ZOUZOUT

Applicant

v.

CANADA DRY MOTT'S INC.
and
KEURIG DR PEPPER INC.

Respondents

JUDGMENT
(Demand to Submit Evidence)

1- OVERVIEW

[1] Respondents Canada Dry Mott's Inc. and Keurig Dr Pepper Inc. ("Canada Dry") seek leave to submit documentary evidence and to depose the Applicant prior to the Hearing on the Application to Authorize.

[2] The class action which Applicant has proposed relates primarily to alleged false statements to the effect that Canada Dry Ginger Ale is made from real ginger, thereby defrauding consumers given that there is allegedly no ginger in that drink, which the Respondents deny.

[3] The group which Applicant seeks to represent is described as follows:

All consumers who purchased, in Canada (subsidiarily in Quebec), any Canada Dry Ginger Ale product marketed as "Made from Real Ginger" or "Fait à partir de vrai gingembre".

2- THE PROOF RESPONDENTS SEEK TO SUBMIT

[4] Respondents seek to file three (3) sworn statements, as well as certain documents attached thereto.

a) Affidavit of Steven Kramer (R-1)

[5] The affiant is said to be the Senior Technical Director of Flavor Technology at Keurig Dr Pepper Inc. and its subsidiaries.

[6] The essence of his affidavit is to demonstrate that Canada Dry Ginger Ale is flavoured with a natural ginger extract made from real ginger root.

[7] He seeks to file as attachment A-1 dictionary definitions of "ginger ale".

b) Affidavit of Carol-Anne Gower (R-2)

[8] The affiant is said to be Vice-President of Marketing at Keurig Dr Pepper Inc.'s Canadian subsidiary, Canada Dry Mott's Inc.

[9] The essence of her affidavit is to deny that Canada Dry has ever made certain representations to consumers and, further, to provide details as to corporate structures pertaining to Respondents.

c) Affidavit of Ariel D. House (R-3)

[10] The affiant is said to be a lawyer located in San Francisco who is acting for Keurig Dr Pepper Inc. and Dr Pepper / Seven Up Inc. in the United States.

[11] The essence of her affidavit is to confirm the status of class actions in the United States instituted against the above-mentioned companies and involving the phrase "Made From Real Ginger".

[12] She seeks to file as attachments A-2 and A-3 the settlement agreements pertaining to those actions.

[13] Apart from the filing of those three affidavits, Respondents also seek permission to examine Mr. Zouzout out of court in relation to three subject matters, being:

- (i) the purchase of products by him;
- (ii) the composition of the class; and
- (iii) his suitability and ability to act as representative.

3- APPLICANT'S POSITION

[14] Applicant contests his proposed deposition by Canada Dry and this primarily on the basis that evidence on such subject matters is not useful, relevant or appropriate at this stage.

[15] This, he claims, is particularly so given the objective quality of any test applicable under the *Consumer Protection Act*¹, which he asserts is an essential foundation of his claim.

[16] Moreover, he argues that little useful detail will come from his deposition as to the composition of the putative class. And as regards his suitability to act as a representative, he argues that such depositions are routinely refused given the low threshold which is applied in naming representatives.

[17] Insofar as the three sworn declarations are concerned, Applicant's position during the Hearing was less clear.

[18] Prior to the Hearing, the parties had jointly submitted a draft judgment authorizing the filing of the three sworn declarations and the related attachments, and this after having informed the Court of an agreement in that regard. In fact, the parties had even agreed that Applicant would conduct certain depositions of Mr. Kramer and Madam Gower.

[19] Yet Applicant seemed to have difficulty confirming to the Court the existence of that agreement. He ultimately did, although he nonetheless also raised numerous arguments against the authorizing of such proof. Moreover, he argued that if the proof was allowed, he would likely be required to seek permission to file an expertise prior to the Hearing on the authorization of the class action.

¹ CQLR, c. P-40.1.

[20] Although the Court is not bound by agreements between the parties on the filing of proof prior to authorization, the undersigned is of the view that the existence of such an agreement is certainly a factor to be considered by the Court when analyzing the issue.

[21] In the present circumstances, however, the Court considers that it would be less than prudent to adopt the draft judgment, and it will conduct an analysis of Respondents' demand as if there was no agreement between the parties.

4- APPLICABLE LAW

[22] The filing of evidence which the Court may allow prior the authorization is to be limited to "relevant evidence" ("*une preuve appropriée*"), and this pursuant to Article 574 C.C.P.

[23] In this regard, it is not sufficient that such proof may eventually be relevant for the merits of the case per se, but it must, even more importantly, be relevant specifically for the authorization analysis to be conducted in accordance with Article 575 C.C.P.²

[24] Clearly, and as is often stated, the Court is not to conclude during the authorization phase as to the merits of the claim. It is exactly in this regard that allegations of fact by applicants are taken as being true and, further, that the burden of the applicant at authorization is one of logical demonstration and not of proof.

[25] Accordingly, there is a very limited purpose for a judge to allow contradictory evidence to be adduced at the authorization stage since, when faced with such proof, the general rule is to take the applicant's allegations of fact as true, unless of course they appear improbable or manifestly inexact, thereby rendering the case frivolous, untenable or clearly unfounded.

[26] And given that only allegations of fact are to be taken as true, not inferences, conclusions, unverified hypothesis, legal arguments or opinions³, it is only logical to conclude that the Court should be extremely reticent to authorize parties to adduce as so-called evidence, elements which are tantamount to such inferences, conclusions, hypothesis, arguments or opinions.

² *Lambert (Gestion Peggy) v. Écolait Ltée*, 2016 QCCA 659, at paras. 37-38.

³ *Option Consommateurs v. Bell Mobilité*, 2008 QCCA 2201; *Harmegnies c. Toyota Canada inc.*, 2008 QCCA 380, at para. 44.

[27] It is also in keeping with the objective of authorization being a filtering system that relevant proof be limited to what is essential and indispensable⁴, as well as proportional, to the authorization analysis.

[28] Accordingly, and to use expression of the Court of Appeal in *Allstate du Canada, compagnie d'assurances v. Agostino*, the judge in deciding on relevant proof should use moderation and prudence, applying a "*couloir étroit*"⁵, a narrow corridor that runs between the rigidity of enforcing the filtering process and a generous permissiveness that can mistakenly lead the judge to conduct an analysis of the merits of the claim.

[29] The Court understands from the case law that proof which is not simply contradictory in nature as regards the case on the merits, but which might possibly demonstrate on summary analysis that allegations of fact relating to essential and indispensable matters are improbable, manifestly inexact or simply false in the context of the authorization analysis, may be allowed by the judge exercising, with prudence and moderation, his or her discretion.

[30] In other words, the narrow corridor as described by the Court of Appeal in *Asselin* may indeed be narrow, but it is definitely not inexistent.

5- ANALYSIS

A) The sworn statements (R-1 to R-3)

(i) Affidavit of Steven Kramer

[31] There can be little doubt at this stage that the marketing of Canada Dry Ginger Ale as "*Made From Real Ginger*" is at the heart of the proposed class action. It is an integral part of the class definition proposed by Applicant.

[32] What "facts" does Applicant allege and rely upon in order to allege that it is "false" to claim that the product is made from real ginger, that there is no ginger in it and that Canada Dry has defrauded consumers by selling it as such?

[33] Applicant refers to a judgment dated June 26, 2018 rendered by the United States District Court, Northern District of California.⁶ He cites the said judgment⁷, but that citation does not contain a conclusion by that court as to false statements or defrauding consumers.

⁴ *Asselin c. Desjardins Cabinet de services financiers inc.*, 2017 QCCA 1673, at para. 38.

⁵ 2012 QCCA 678, at para. 36.

⁶ Exhibit P-2.

⁷ Application to Authorize, at para. 4.

[34] Essentially, Applicant's so-called allegations of fact do not appear to refer to specific sources of proof demonstrating that there is no ginger in Canada Dry Ginger Ale. They appear to be more like conclusions drawn by Applicant than facts, which may or may not be correct. Hence, it is arguable that Respondents are not simply seeking to adduce contradictory proof.

[35] In the Court's view, the affidavit of Steven Kramer, except for paragraph 4 regarding dictionary definitions, may possibly demonstrate for authorization purposes that Applicant's allegations as regards the absence of ginger in the product, being essential and indispensable to his legal syllogism, is improbable, manifestly exact or simply false.

[36] Accordingly, the Court concludes that Canada Dry should be entitled to submit as evidence the Kramer sworn statement except as regards both paragraph 4 thereof and attachment A-1 thereto.

(ii) Affidavit of Carol-Anne Gower

[37] There are, as mentioned above, two separate subjects addressed in the Gower affidavit.

[38] Firstly, there is a denial as to what Canada Dry has stated to Canadian consumers regarding either the natural quality of the product or its health and medicinal benefits.

[39] In this regard, Applicant does not specifically allege that Respondents actually made such statements to Canadian consumers. He does cite the United States District Court judgment⁸ which mentions that there was an intention to encourage people to believe that Canada Dry Ginger Ale fits into a healthy lifestyle because it is made from real ginger. However, that too does not confirm any positive statements by Respondents.

[40] Accordingly, in the Court's view, paragraph 3 of the Gower affidavit will not likely be useful for the authorization determination. Applicant has not alleged that Respondents specifically did what they now seek to deny. Those assertions may be something that would interest a judge on the merits, should it reach that stage, but it is of no real value at the authorization phase.

[41] As regards paragraphs 4 to 8 of the said affidavit relating to matters of corporate structure, the Court is of the view that such factual elements may be relevant to the authorization stage and will, accordingly, allow same.

⁸ Exhibit P-2.

(iii) Affidavit of Ariel D. House

[42] Essentially, what the House affidavit seeks to do is to clarify the out of court settlements in the class actions instituted in the United States, in both Missouri and California, and this by way of filing the settlement agreements as Exhibits A-2 and A-3.

[43] This is likely relevant since Applicant himself refers to those settlements in support of his claim.⁹

[44] Should the settlement of the class actions in the United States be relevant to Applicant's demand for authorization of a class action, the House affidavit and exhibits may also be relevant and essential to the Court's authorization determination.

[45] Accordingly, the House affidavit and attachments A-2 and A-3 will be authorized for evidence purposes.

(iv) Applicant's stated desire to examine the affiants

[46] According to the draft judgment of the parties mentioned above, Applicant intends to examine the affiants as follows:

- Steven Kramer: as regards paragraphs 3 to 8 of his affidavit; and this for a maximum of one (1) hour but without any other subject constraints;
- Carol-Anne Gower: as regards paragraphs 3 to 7 of her affidavit, without any further specifics or time constraints.

[47] Obviously, the Court will not authorize the deposition of an affiant in relation to a paragraph which is not itself authorized to be filed as evidence. In other words, a deposition by Applicant as regards paragraph 4 of the Kramer affidavit and paragraph 3 of the Gower affidavit, would not be appropriate.

[48] That said, the Court considers that it is appropriate to authorize Applicant to depose the affiants in relation to the subjects stated in those paragraphs of their affidavits which are going to be submitted as evidence, but exclusive of any other subjects or matters.

[49] As regards the length of such depositions, given the absence of any explanation or justification by Applicants, the Court in exercising its discretion fixes the length of said deposition to a maximum 45 minutes each.

⁹ Application to Authorize, at paras. 8 and 11 b).

B) Deposition of David Zouzout

[50] As mentioned, Canada Dry seeks to depose Applicant as regards three subjects and this for a total duration of not more than one hour.

[51] The Court will address each subject separately.

(i) The purchase of the products by Applicant

[52] Canada Dry contends that Applicant's allegations as regards his purchase of relevant products are incomplete in that they lack detail and context.

[53] However, at paragraph 12 and 13 of the Application to Authorize, he alleges as follows:

12. *Applicant would often drink Canada Dry Ginger Ale and has spent hundreds of dollars (if not more) purchasing the beverage both individually and in packs from grocery stores in Montreal in the last few years alone;*
13. *He would especially purchase and ingest Canada Dry Ginger Ale when he had a gastro or stomach ache (...);*

[54] So it is definitely not necessary to depose Applicant in order to determine whether he purchased the product in a pharmacy "*next to the Pepto Bismol*", as argued by Respondents at the Hearing.

[55] Essentially, Canada Dry is looking to test the allegations, to try and establish contradictory proof. Respondents seek details relating to the context, quantity and frequency of purchases, the promotional material and other advertising known to Applicant and the time of his purchases and the specific representations upon which he relied.

[56] All those issues may be relevant to the merits of the case, but they have not been shown to be relevant at this stage. In the Court's view, it is not appropriate proof at the authorization stage.

(ii) The composition of the class

[57] Canada Dry contends that it has not been provided with even a minimal amount of information as regards the actual composition of the class, its size and essential characteristics.

[58] As regards the size of the putative class, during the Hearing Applicant's counsel informed the Court it would really only be a Quebec class, not a pan-Canadian one, unless the parties were to agree otherwise.

[59] Whatever be the geographic basis for the class, clearly Respondents are in a much better position than Applicant to determine its potential size having knowledge as to the quantity and dollar-value of sales.

[60] Moreover, in the affidavit of Steven Kramer¹⁰, it is stated that:

3. (...).

Canada Dry Ginger Ale is the oldest and best-known of such flavours and has been purchased and enjoyed by consumers for nearly 115 years. (...).

[61] Clearly the case involves what appears at this stage to be a popular product sold to consumers throughout, at least, North America.

[62] The Court would be entitled to infer from such factual allegations, for the purposes of authorization, that there is likely a sufficient number of consumers to satisfy the requirements of Article 575 (3) C.C.P.¹¹. The proposed deposition of Mr. Zouzout will unlikely provide any additional information of value in this regard, for as he states in his proceeding¹², he is only estimating the numbers and does not know the names and addresses of all the persons that would comprise the class if it were to be authorized.

(iii) Applicant's suitability and ability to act as Representative

[63] Respondents argue that there is little or no evidence as to the steps taken, the inquiries made, the research conducted by Applicant, the nature and extent of his personal involvement in the preparation of the proceedings or as to the existence of any conflict of interest with other potential group members.

[64] Firstly, it has been determined both by the Supreme Court of Canada¹³ and the Quebec Court of Appeal¹⁴ that the criteria regarding the suitability and ability to act as a class action representative is minimal.

[65] Secondly, although there may be cases where concerns regarding those criteria might justify the deposition of an applicant, nothing has been argued that would lead the Court to believe that there is anything exceptional in the present case justifying the proposed deposition.

¹⁰ Exhibit R-1, at paras. 3 and 6.

¹¹ *Lévesque v. Vidéotron*, 2015 QCCA 205, at para. 27.

¹² Application to Authorize, at paras. 45 and 46.

¹³ *Infineon Technologies AG v. Option consommateurs*, [2013] 3 S.C.R. 600.

¹⁴ *Lévesque v. Vidéotron, s.e.n.c.*, 2015 QCCA 205.

[66] Essentially, if one were to follow Respondents' reasoning, depositions of applicants would become the rule, which is contrary not only to the recognized case law on the subject but also to the principles which speak against the use of depositions as proverbial "fishing expeditions".

[67] In view of all the foregoing, the deposition of Applicant will not be authorized at this stage.

FOR THESE REASONS, THE COURT:

GRANTS in part the Application for leave to adduce evidence and to examine the Applicant;

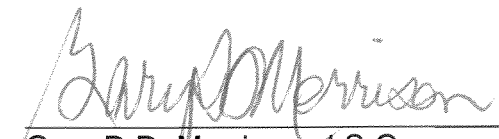
AUTHORIZES Respondents Canada Dry Mott's Inc. and Keurig Dr Pepper Inc. to presently submit the following evidence;

- (i) Affidavit of Steven Kramer (Exhibit R-1), except for both paragraph 4 thereof and the attachment A-1 thereto;
- (ii) Affidavit of Carol-Anne Gower (Exhibit R-2), except paragraph 3 thereof;
- (iii) Affidavit of Ariel D. House (Exhibit R-3), as well as attachments A-2 and A-3 thereto.

AUTHORIZES Applicant to depose affiants Steven Kramer and Carol-Anne Gower in relation only to their own individual affidavit and the portion thereof authorized as evidence, and as to no other matters, the duration of each of such depositions to be no longer than 45 minutes;

DISMISSES Respondents' demand to depose Applicant;

THE WHOLE with costs to follow suit.



Gary D.D. Morrison, J.S.C.

Mtre. Joey Zukran
LPC Avocat Inc.
Attorneys for the Applicant

Mtre. Marie-Louise Delisle
Mtre. Bogdan Catanu
Woods
Attorneys for the Defendants

Date of Hearing : May 27, 2019