COURT OF APPEAL

CANADA
PROVINCE OF QUEBEC
REGISTRY OF MONTREAL

MINUTES OF THE HEARING

DATE: June 25, 2019

THE HONOURABLE PATRICK HEALY, J.A.

No: 500-09-028289-197
(500-06-000657-136)

PETITIONERS	COUNSEL
KAWASAKI KISEN KAISHA LTD. **"K" LINE AMERICA INC.**	Mtre ERIC VALLIÈRES *(McMillan S.E.N.C.R.L., s.r.l.)* Absent
RESPONDENTS	COUNSEL
OPTION CONSOMMATEURS	Mtre MAXIME NASR Mtre CAROLINE CASSAGNABÈRE SARAH HOLLOWAY (stagiaire) *(Belleau Lapointe, s.e.n.c.r.l.)* Absent Mtre ELISE THÉRIAULT *(Option Consommateurs)* Absent
JEAN CLAUDE CHARLET	Absent and unrepresented

IMPLEADED PARTIES	COUNSEL
NIPPON YUSEN KABUSHIKI KAISHA **NYK LINE (NORTH AMERICA) INC.** **NYK LINE (CANADA), INC.**	Mtre GUILLAUME BOUDREAU-SIMARD MtreJEAN-FRANÇOIS FORGET *(Stikeman Elliott s.e.n.c.r.l., s.r.l.)* Absent
MITSUI O.S.K. LINES, LTD. **MITSUI O.S.K. BULK SHIPPING (U.S.A.) INC.** **NISSAN MOTOR CAR CARRIER CO., LTD.** **WORLD LOGISTICS SERVICE (USA) INC.**	Mtre SIMON JUN SEIDA (*Blake, Cassels & Graydon s.e.n.c.r.l.*) Absent
EUKOR CAR CARRIERS, INC. **WILH. WILHEMSEN ASA** **WILH. WILHEMSEN HOLDING ASA** **WALLENIUS WHILHEMSEN LOGISTICS AMERICAS, LLC** **WALLENIUS WILHEMSEN LOGISTICS AS.** **WALLENIUS LINES AB**	Mtre TANIA DA SILVA (*DLA Piper (Canada) s.e.n.c.r.l.)* Absent
HÖEGH AUTOLINERS AS **HÖEGH AUTOLINERS INC.**	Mtre ERIC PRÉFONTAINE (*Osler Hoskin & Harcourt SRL*) Absent

No: 500-09-028292-191
(500-06-000657-136)

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HÖEGH AUTOLINERS AS **HÖEGH AUTOLINERS INC.**	Mtre ERIC PRÉFONTAINE (*Osler Hoskin & Harcourt SRL*) Absent

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No: 500-09-028294-197
(500-06-000657-136)

PETITIONERS	COUNSEL
NIPPON YUSEN KABUSHIKI KAISHA **NYK LINE (NORTH AMERICA) INC.** **NYK LINE (CANADA), INC.**	Mtre GUILLAUME BOUDREAU-SIMARD Mtre JEAN-FRANÇOIS FORGET *(Stikeman Elliott s.e.n.c.r.l., s.r.l.)* Absent
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HÖEGH AUTOLINERS AS **HÖEGH AUTOLINERS INC.**	Mtre ERIC PRÉFONTAINE (*Osler Hoskin & Harcourt SRL*) Absent

No: 500-09-028290-195
(500-06-000657-136)

PETITIONERS	COUNSEL
EUKOR CAR CARRIERS, INC. **WILH. WILHEMSEN ASA** **WILH. WILHEMSEN HOLDING ASA** **WALLENIUS WHILHEMSEN LOGISTICS AMERICAS, LLC** **WALLENIUS WILHEMSEN LOGISTICS AS.** **MITSUI O.S.K. LINES, LTD.** **MITSUI O.S.K. BULK SHIPPING (U.S.A.) INC.** **NISSAN MOTOR CAR CARRIER CO., LTD.** **WORLD LOGISTICS SERVICE (USA) INC.**	Mtre TANIA DA SILVA *(DLA Piper (Canada) s.e.n.c.r.l.)* Absent
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DESCRIPTION:

500-09-028289-197
Application for leave to appeal (Art. 357, 578 *CCP*).

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Application for leave to appeal (Art. 357, 578 *CCP*).

500-09-028290-195
Application for leave to appeal (352 *CCP*).

Clerk: Mélanie Camiré | Courtroom: RC-18

HEARING

Continued from June 10, 2019.

BY THE JUDGE: Judgement – see page 8.

(s) Mélanie Camiré
Clerk

BY THE JUDGE

JUDGMENT

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[1] There are before me four motions in which the petitioners seek leave to appeal against a decision of the Superior Court that authorised a class action.

[2] These motions raise a recurring issue, which is the degree of rigour that must be enforced to determine whether an application for authorisation meets the conditions in article 575 C.C.P. The jurisprudence concerning this issue appears to be settled in principle but not always consistent in its practical application. While a class action is designed to promote access to justice, the process of authorisation is a mechanism that is designed to exclude actions that are not defensible within the meaning of article 575 C.C.P.[1]

[3] In the present case all of the petitioners submit that the proposed action fails to meet the standard of a defensible case stipulated in article 575(2). One of them also submits that the proposed action fails to meet the standard of commonality set out in article 575(1). In effect, each of the petitioners claims that the proposed action does not meet criteria of sufficiency and particularity that would justify its authorisation against them. The factual and legal grounds advanced in support of this conclusion are not identical among the four petitioners but, in general terms, this is the common theme that they share.

[4] The general theory of the proposed action is that the petitioners, and many others, participated in an international cartel that inflated the cost of shipping vehicles and other equipment, and that these costs were imposed upon consumers in Quebec at the time that they acquired the equipment by purchase or lease. At the authorisation hearing the petitioners contested this theory. They argued that, even assuming the truth of the allegations advanced by the applicant, there was no proof of their participation in a cartel that could sustain a class action in Quebec for a conspiracy of price-fixing and no evidentiary foundation that could support claims of fault, damage and causation in Quebec. In short, they argued that the applicant failed to meet the requirement of article 575(2) C.C.P.

[5] The petitioners also argued, and this position was shared among them at the hearing of the present motion, that the application failed to meet the requirement of article 575(1) because in the circumstances it did not permit the formulation of a common question.

[6] The judge rejected the objections of the petitioners, authorised the action and remitted it for trial. He specifically affirmed that the objections of the petitioners were

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[1] See, *e.g.*, *L'Oratoire Saint-Joseph du Mont-Royal* v. *J.J.*, 2019 SCC 35, paragraphs 6-12, 56-62 (Brown J.), 108-111 (Gascon J.), 190-202, 204-213 (Côté J., dissenting) and the authorities cited therein.

properly matters for debate on a trial of the merits.

[7] Thus the petitioners maintain that the trial judge erred in concluding that the requirements of article 575(1) and (2) C.C.P. had been satisfied. The respondents on this motion maintain that there was no error and that the matter should proceed to trial.

[8] In *L'Oratoire Saint-Joseph du Mont-Royal* v. *J.J.*[2] the Supreme Court of Canada has recently stressed that the role of the authorisation judge, and the role of the Court of Appeal, is limited.

> [10] The Court of Appeal's "power to intervene . . . is limited" when it hears an appeal from a decision on an application for authorization to institute a class action, which means that "it must show deference to the motion judge's decision": *Vivendi*, at para. 34. It is well established that the assessment of whether the conditions for authorization are met entails the exercise of a discretion: *Harmegnies*, at paras. 20-24. The Court of Appeal "will therefore intervene . . . only if the motion judge erred in law or if the judge's assessment with respect to the criteria of art. [575] C.C.P. is clearly wrong": *Vivendi*, at para. 34. Moreover, "[i]f the motion judge errs in law or if his or her assessment with respect to any criterion of art. [575] C.C.P. is clearly wrong, the Court of Appeal can substitute its own assessment, but only for that criterion and not for the others": *Vivendi*, at para. 35; see also *Sofio v. Organisme canadien de réglementation du commerce des valeurs mobilières (OCRCVM)*, 2015 QCCA 1820 (CanLII), at para. 17; *Sibiga v. Fido Solutions inc.*, 2016 QCCA 1299 (CanLII), at paras. 32-35; *Charles v. Boiron Canada inc.*, 2016 QCCA 1716 (CanLII), at para. 37; *Belmamoun v. Brossard (Ville)*, 2017 QCCA 102 (CanLII), 68 M.P.L.R. (5th) 46, at para. 70.
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> [11] It should be noted, however, that while it is true that the Court of Appeal's power to intervene in a decision on an application for authorization to institute a class action is limited, so too is the application judge's role:
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> > While the compass for appellate intervention is indeed limited, so too is the role of the motion judge. In clear terms, particularly since its decision in *Infineon*, the Supreme Court has repeatedly emphasized that the judge's function at the authorization stage is only one of filtering out untenable claims. The [Supreme] Court stressed that the law does not impose an onerous burden on the person seeking authorization. "He or she need only establish a 'prima facie case' or an 'arguable case'", wrote LeBel and Wagner JJ. in *Vivendi*, specifying that a motion judge "must not deal with the merits of the case, as they are to be considered only after the motion for authorization is granted".
> >
> > Since *Infineon*, [the] Court [of Appeal] has consistently relied upon this standard, invoking it when authorization has been wrongly denied because too high a burden was imposed.
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> > (*Sibiga*, at paras. 34-35)

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2 2019 SCC 35.

> [12] Thus, a judge who oversteps the bounds of his or her screening role at the authorization stage, and in so doing imposes an excessive evidentiary threshold requirement on the applicant or considers the merits of the case, makes an error of law warranting the Court of Appeal's intervention: *Vivendi*, at paras. 4 and 37; *Infineon*, at paras. 40 and 68; *Marcotte v. Longueuil (City)*, at para. 22; see also *Sibiga*, at paras. 71 and 80; *Masella v. TD Bank Financial Group*, 2016 QCCA 24 (CanLII), at para. 9.

[9] The last paragraph in this quotation clearly counsels caution and deference but it does not state a standard that can be applied with mathematical precision or predictability. It refers to a spectrum of variables and the division between the majority and minority views demonstrates that opposing conclusions may be reached in the application of agreed principles. Just as it would be an error to impose too onerous an evidentiary burden on an applicant for authorisation, or at this stage to enter upon the merits of the action, it is an error to fail to ensure that a proposed action adequately meets the conditions set in article 575 C.C.P.

[10] Those conditions seek to impose a standard of substantive coherence and evidentiary sufficiency for the authorisation of a class action that provides an alternative to a multiplicity of individual actions. The requirement of commonality in article 575(1) is intended to achieve a measure of substantive coherence by defining a working core of questions in dispute. Article 575(2) requires the applicant to show a degree of probative value to the claim that excludes speculation or conjecture and affirms the elements of an arguable case.

[11] The elements of article 575 impose upon the authorisation judge a gate-keeping function, which is obviously distinguishable in principle from an open-door policy for the authorisation of a class action. Both articles 575(1) and (2) seek to avoid sprawling shapeless claims that are untenable. Although the jurisprudence has affirmed that standards in this article are not exacting, it remains that they must be given tangible effects. Article 575(2), in particular, seeks to exclude claims of hypothetical possibility and for these reasons imposes a threshold of probability with respect to the conclusions sought in a claim that satisfies the test of commonality in article 575(1).

[12] The issues raised by the present motions are substantive and are not obviously bound to fail. They merit the attention of the Court. In reaching this conclusion I bear in mind the caution expressed by this court and others that appellate intervention with respect to a decision concerning the authorisation of a class action, in the decision to grant leave to appeal, should be approached circumspectly.[3] I am particularly mindful of the caution expressed in *Centrale des syndicats du Québec* v. *Allen*:[4]

> [59] Le juge accordera la permission de faire appel lorsque le jugement lui paraîtra comporter *à sa face même* une erreur déterminante concernant l'interprétation des conditions d'exercice de l'action collective ou l'appréciation des faits relatifs à ces

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3 See *Centrale des syndicats du Québec* v. *Allen*, 2016 QCCA 1878 paragraph 59.
4 2016 QCCA 1878.

> conditions, ou encore, lorsqu'il s'agira d'un cas flagrant d'incompétence de la Cour supérieure.

[13] Thus the jurisprudence is clear that the test of sufficiency for authorisation in the Superior Court is relatively low and the test for appellate intervention, including an application for leave to appeal, is high.

[14] An important limitation on the role of the authorisation court and the court of appeal is that the facts alleged must be taken as true. This reinforces the principles that the applicant for authorisation is not required to prove the facts alleged. At the same time, however, those facts must have an evidentiary foundation that is not unsubstantiated, vague or imprecise.[5] They must demonstrate a measure probability that supports the claim. It would otherwise be difficult to conclude, as required by article 575(2) C.C.P., that "the facts alleged appear to justify the conclusions sought."

[15] The respondent has established that the authorisation granted in the Superior Court applied a standard that was sufficient in law and fact, and accordingly that the proposed action meets the requirements of a defensible case. While an application for authorisation is not a trial of the action itself, this procedure also has an important function to filter cases that are untenable and an unjustifiable burden on judicial resources. Nevertheless, the caution expressed in *Centrale des syndicats du Québec* v. *Allen* remains the considered position of the Court and it must be followed unless the Court determines clearly to revise it. In the Superior Court the judge justifiably concluded that the strength of the respondent's case will be tested at trial.

[16] **FOR THESE REASONS** the motions are dismissed, costs to follow the outcome of the trial.

PATRICK HEALY, J.A.

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5 *Infineon Technologies AG* v. *Option consommateurs*, 2013 SCC 59.