SUPERIOR COURT

CANADA
PROVINCE OF QUEBEC
DISTRICT OF MONTREAL

N° : 500-06-000946-182

DATE : February 4, 2020

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

PANAGIOTIS LEVENTAKIS
Petitioner

v.

AMAZON.COM INC.
and
AMAZON SERVICES INTERNATIONAL, INC.
and
AMAZON.COM.CA, INC.
Respondents

JUDGMENT
(Application to adduce evidence)

1- OVERVIEW

[1] Respondents ("Amazon") seek permission to adduce evidence by means of a Sworn Statement, certain documents and a discovery of Petitioner Panagiotis Leventakis ("Leventakis") during the authorization phase of the latter's application for authorization to institute a class action concerning alleged anti-competitive behaviour and overcharges relating to certain specified products sold on the internet.

2- CONTEXT

[2] The proposed class on behalf of which Leventakis seeks to institute a class action is defined as follows, having been modified orally during the Hearing:

> *All persons, entities, partnerships or organizations in Quebec who purchased new books, video, music or DVDs through www.amazon.ca, or any other group to be determined by the Court, between November 5, 2003 and the date this action is authorized as a class action.*

[3] Amazon pleads that the proof it seeks to adduce is relevant and appropriate in relation to the following "*false and inaccurate allegations*", presented without "*any sustainable evidence*", contained in Leventakis's Application:

> *(a) That Third Party Sellers have entered into an alleged Unlawful Agreement with the Respondents whereby they have agreed that they would not be eligible to qualify as Featured Offers in the new books, videos, music or DVDs category;*
>
> *(b) That, as a result of the alleged Unlawful Agreement, the Respondents do not face any competition from Third-Party Sellers in the new books, videos, music or DVD category;*
>
> *(c) That the Unlawful Agreement therefore permits the Respondents to charge "supra-competitive prices" or an "unlawful premium" for all new books, videos, music and DVDs that are sold through Featured Offers;*
>
> *(d) That the Unlawful agreement results in an anti-competitive overcharge to consumers and/or restricts the supply of new books, videos, music or DVDs to consumers;*
>
> *(e) That the Respondents' actions were camouflaged and not brought to the attention of the Petitioner and, accordingly, that the Petitioner did not and could not have been aware of the Respondents' allegedly anti-competitive practices.*

3- APPLICABLE LAW

[4] Pursuant to Article 574 C.C.P., only relevant evidence ("*preuve appropriée*") can be allowed during the authorization phase. In this regard, it is not sufficient that such proof 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.[1].

[5] 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.

[6] Given that only allegations of fact are to be taken as true, not inferences, conclusions, unverified hypothesis, legal arguments or opinions[2], it is only logical to conclude that the Court should be extremely reticent to authorize parties to adduce as so-called proof elements which are tantamount to such inferences, conclusions, hypothesis, arguments or opinions.

[7] It is also in keeping with the objective of authorization being a filtering system that relevant proof be limited to what is essential and indispensable[3], as well as proportional, to the authorization analysis.

[8] 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.

[9] In other words, 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*"[4], 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.

[10] In some cases, proof may also be considered appropriate where it provides the Court with useful and contextual clarification so that it can better understand the facts of the case or the composition of the class.[5]

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1 *Lambert (Gestion Peggy)* v. *Écolait Ltée*, 2016 QCCA 659, paras. 37-38.
2 *Option Consommateurs* v. *Bell Mobilité*, 2008 QCCA 2201; *Harmegnies* c. *Toyota Canada inc.*, 2008 QCCA 380, para. 44.
3 *Asselin* c. *Desjardins Cabinet de services financiers inc.*, 2017 QCCA 1673, para. 38.
4 2012 QCCA 678, para. 36.
5 *Allstate du Canada, compagnie d'assurance* v. *Agostino*, 2012 QCCA 678, at para. 64; see also *A.* v. *Frères du Sacré-Cœur*, 2017 QCCS 34, at para. 29.

[11] That said, the notion of a better understanding by the Court is not an open-door to adducing evidence that is not otherwise appropriate. In exercising its discretion in this regard the Court must still do so with prudence, within the confines of the "*couloir étroit*", and this solely for the purposes of the authorization process and not for the merits of an eventual class actual.

[12] As regards pre-authorization examinations of applicants, they are simply a means of obtaining factual information and to present appropriate proof. Accordingly, the rules applicable to appropriate proof generally also apply to such examinations. Hence, it is not sufficient that an examination address matters of interest for the merits of an eventual class action. The party seeking to conduct such an examination must demonstrate that the proof is necessary for the purposes of the criteria stipulated at Article 575 C.C.P.

[13] With a view to analyzing demands to conduct pre-authorization examinations of applicants, it is useful to cite the summary of applicable criteria as set forth by Justice Suzanne Courchesne in *Option Consommateurs* v. *Samsung Electronics Canada Inc.*[6], which are described as follows:

> *[11] Le Tribunal rappelle certains principes émis par les tribunaux et qui doivent être considérés lorsqu'une demande d'interrogatoire et de communication de documents pré-autorisation lui est soumise :*
>
> - *le juge dispose d'un pouvoir discrétionnaire afin d'autoriser une preuve pertinente et appropriée ainsi que la tenue d'un interrogatoire du représentant, dans le cadre du processus d'autorisation;*
> - *un interrogatoire n'est approprié que s'il est pertinent et utile à la vérification des critères de l'article 575 C.p.c.;*
> - *l'interrogatoire doit respecter les principes de la conduite raisonnable et de la proportionnalité posés aux articles 18 et 19 C.p.c.;*
> - *la vérification de la véracité des allégations de la demande relève du fond;*
> - *le tribunal doit analyser la demande soumise à la lumière des enseignements récents de la Cour suprême et de la Cour d'appel sur l'autorisation des actions collectives et qui favorisent une interprétation et une application libérales des critères d'autorisation;*

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6 2017 QCCS 1751, para. 11.

- *à ce stade, la finalité de la demande se limite au seuil fixé par la Cour suprême, soit la démonstration d'une cause défendable; le tribunal doit se garder d'autoriser une preuve qui inclut davantage que ce qui est strictement nécessaire pour atteindre ce seuil;*

- *le tribunal doit se demander si la preuve requise l'aidera à déterminer si les critères d'autorisation sont respectés ou si elle permettra plutôt de déterminer si le recours est fondé; dans cette dernière hypothèse, la preuve n'est pas recevable à ce stade;*

- *la prudence est de mise dans l'analyse d'une demande de permission de produire une preuve appropriée; il s'agit de choisir une voie mitoyenne entre la rigidité et la permissivité;*

- *il doit être démontré que l'interrogatoire est approprié et pertinent dans les circonstances spécifiques et les faits propres du dossier, notamment en regard des allégations et du contenu de la demande d'autorisation;*

- *le fardeau de convaincre le tribunal de l'utilité et du caractère approprié de la preuve repose sur la partie qui la demande.*

[14] Clearly, these criteria reflect those which are applicable to all proof to be filed during the authorization phase. However, the Court would add that the undesireable use of extensive examinations of petitioners prior to the authorization Hearing, which often extended beyond the authorization criteria and focussed on the merits of the claim, was one of the driving forces behind the modifications made to the class action procedure with a view to reinforcing that it is but a filtering process.

[15] In other words, although prudence should be a governing principle in relation to all decisions made in the "*couloir étroit*" as to proof in the authorization phase, an extra dose of prudence is warranted in relation to demands for examinations at that stage.

[16] How do these principles apply to the present case?

4- ANALYSIS

A) Sworn Statement of Richard Logan (Exhibit RL-1) and Related Documents (Exhibits A to F-4)

[17] Amazon seeks to file the Sworn Statement of Richard Logan, the General Manager and Category Leader, Media, of Amazon.com.ca Inc. The Statement comprises 28 paragraphs and refers to Exhibits A to F-4.

[18] The introductory paragraphs, being 1 to 7, describe the affiant's function, his understanding of the claim and the various Amazon companies who are Respondents to the authorization application.

[19] Paragraph 8 indicates when Amazon.ca was launched and, further, when it began to offer to sell products both as a retailer and as a platform for third party vendors. It refers to Exhibit A in this regard. It is as a result of this paragraph that Applicant Leventakis modified the definition of the Class during the Hearing.

[20] The remainder of the Logan Sworn Statement essentially seeks to contradict Applicant's allegations.

[21] The primary factual issues on which the Application to exercise a class action is based are the following two (2):

1. the website "*Buy Box*" function, which appears to consumers during their purchase experience on www.amazon.ca;

2. the existence of an alleged unlawful agreement between Amazon and third party vendors according to which the latter agree not to compete with Amazon by not having certain of their products, as platform vendors, appear in the "*Buy Box*", whereas Amazon products do. According to Applicant, this agreement enables Amazon to allegedly "*charge super-competitive prices for all new Books*", which constitutes an unlawful premium.

[22] Not surprisingly, Amazon denies these allegations. It seeks to adduce proof to demonstrate that there exists no such agreement to avoid competition for the "*Buy Box*" function.

[23] A reading of the Leventakis Application makes it abundantly clear that he provides absolutely no factual basis for his allegations relating to the alleged agreement between Amazon and third-party vendors or, otherwise, the manner in which the "*Buy Box*" function operates. No personal knowledge is alleged. Neither is another source of information identified.

[24] Given such vague allegations, the Court is of the view that it is appropriate to permit Amazon to adduce evidence, even at this stage, for the purpose of establishing, on a summary analysis, that such allegations are improbable or manifestly false. Such proof could be essential and indispensable for authorization purposes.

[25] Moreover, should no such agreement appear to exist, the manner in which decisions are actually made regarding which products appear in the "*Buy Box*" could be relevant at the authorization phase.

[26] It may well be that Applicant is citing an interesting source of information, whether it be another law suit or investigative report, but he fails to inform the Court thereof. Such vagueness, in the Court's view creates a situation whereby Amazon's demand to file paragraphs 1 to 20 of the Logan Sworn Statement is both reasonable and justified, as are Exhibits A to F, to which they refer for these specific purposes.

[27] As regards paragraphs 21 to 24 dealing with the specific products purchased by Applicant, the Court is of the view that the said paragraphs contain both self-serving and theoretical facts, as do the Exhibits D and F-6 to which they refer for that specific purpose. Accordingly, they should not be authorized as appropriate proof at this stage.

[28] Insofar as paragraphs 25 and 28 of the Logan Sworn Statement are concerned, the Court is of the view that the alleged proof contained therein is not presently appropriate, being of a nature which would be primarily relevant for the merits of the case.

B) Leave to Examine Applicant

[29] Amazon seeks to examine Applicant, for two hours, regarding four issues:

1. Applicant's transaction history with www.amazon.ca stores;

2. the prices paid by Applicant for the items listed at Exhibit P-12 and his claim that he paid an overcharge;

3. that he was not aware of the alleged anti-competitive practices; and

4. Applicant's pre-application activity and verifications.

[30] Leventakis does not contest conducting a two-hour examination regarding items a) to c), but he objects to item d), while Amazon insists on all four subjects.

[31] That said, the Court is not bound to adhere to an applicant's agreement with a respondent's demand. There are cases in which it would be appropriate to fully endorse the parties' agreement. This is not such a case.

[32] The Court is of the view that Amazon seeks to make proof in relation to the merits of the proposed class action, and not as regards the authorization phase.

[33] The Amazon demand is, with respect, overkill. An applicant's personal knowledge of the damages in such cases, and the manner to calculate same, is generally not a matter of personal knowledge. Rather, often it requires the opinion of experts.

[34] In a case of this nature, even if Applicant were to admit that he personally was unable to calculate damages resulting from anti-competitive conduct, it would not lead to the conclusion that the authorization demand should be refused on that basis.

[35] Moreover, Applicant's pre-application activity and verifications appear to have no relevance to the authorization process in the present case. The Court of Appeal has on numerous occasions made the point that the threshold for qualifying as a representative is very low indeed. In the present case, there is no hint or suggestion of any conflict or other viable reason to examine Applicant in this regard.

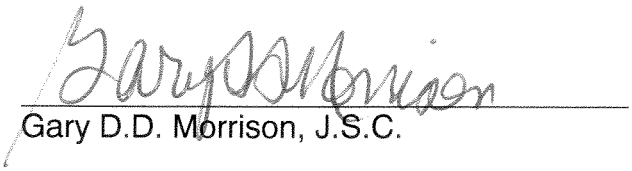
[36] Accordingly, the Court is of the view that the proposed examination of Applicant is not appropriate in the circumstances.

FOR THESE REASONS, THE COURT:

GRANTS, in part, Respondents' demand to adduce appropriate proof;

PERMITS Respondents to produce as appropriate proof, paragraphs 1 to 20 of the Logan Sworn Statement, as well as Exhibits A to E thereof, to the extent that they refer to such paragraphs, and solely for such specific purposes;

THE WHOLE without judicial costs.



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

Mtre. Careen Hannouche
Klein Avocats Plaideurs inc.
Attorneys for the Petitioner

Mtre. Margaret Weltrowska
Mtre. Erica Shadeed
Mtre. Mélissa Desgroseillers
DENTONS CANADA
Attorneys for the Respondents

Date of Hearing : January 17, 2020