COURT OF APPEAL

CANADA
PROVINCE OF QUEBEC
REGISTRY OF MONTREAL

No: 500-09-028325-199
(500-06-000691-143)

DATE: 14 JUNE 2019

IN THE PRESENCE OF THE HONOURABLE PATRICK HEALY, J.A.

FRÉDÉRICK DUGUAY
PETITIONER - Plaintiff
v.

COMPAGNIE GENERAL MOTORS DU CANADA

and

GENERAL MOTORS LLC
RESPONDENTS - Defendants

JUDGMENT

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[1] The petitioner seeks leave to appeal against a judgment of the Superior Court, rendered in the course of a proceeding, that dismissed an application pursuant to art. 251 C.C.P. for the disclosure of documents by the respondents.

[2] The petitioner is the designated representative in a class action against the respondents that seeks compensation for members of the class arising from the consumption of gasoline in the Volt model of vehicles. The petitioner claims that the respondents failed to disclose that the vehicles consumed gasoline at low temperatures, even when fully charged to operate by electricity, and that this omission contradicted the respondents' public representations concerning the consumption of fuel with a consequential loss.

[3] The petitioner requested that the respondents disclose data collected by the computer system in the vehicles of each member of the class, which would permit the petitioner's expert to evaluate the rate of consumption of gasoline while each vehicle was fully charged to operate on electricity. The petitioner claimed that this data was necessary to assess an order for collective recovery and the calculation of damages. The respondents disclosed this data with respect to the petitioner's vehicle but not with respect to the vehicles of other members in the class. The Superior Court dismissed the petitioner's application for an order that respondents disclose the requested data with respect to the other members of the class. The petitioner now claims that this decision may be assimilated to a judgment that sustains an objection to evidence and that it causes irremediable injury to the petitioner's action.

[4] The petitioner's motion for leave is properly framed in accordance with the jurisprudence of the Court and doctrinal writing.[1] It is appropriate to assimilate the dismissal of an application for the disclosure of documents to a decision to sustain an objection to evidence. In both instances the decision can have material consequences on the outcome of an action. In this case, for example, the petitioner claims in effect that the absence of an order for production would be tantamount to excluding the evidence of an expert. The petitioner affirms that dismissal of the request for disclosure prevents proof of value of the claim made against the respondents.

[5] The evidence sought by the petitioner is not a document on paper but electronically stored data. Electronic data has been characterised as "material evidence" for the purpose of a request under art. 251 C.C.P. and for this reason may be considered in the same manner as other documents. Further, it is not disputed in this case that the data sought might be relevant to the preparation, presentation and disposition of the petitioner's action.

[6] The Superior Court dismissed the petitioner's application for disclosure on two grounds.[2] First, while the relevant data exist in the hands of the respondents, there are no "documents" that collate, compile and present the information sought by the petitioner. Second, no such documents could be made to exist without imposing upon the respondents an unreasonable burden to assemble and present the information for analysis by the petitioner's expert. In short, the Superior Court concluded that a party has an obligation to disclose material and accessible information that already exists in its possession or is reasonably accessible to it but no obligation to undertake all means necessary to create admissible evidence for subsequent production by the opposing party.

[7] To reach this conclusion the Superior Court relied upon uncontradicted evidence to the effect that to provide the requested information for each of the 13,341 vehicles

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1 *Ravary* v. *Fonds mutuels CI inc.*, 2018 QCCA 606; *Imperial Oil* v. *Jacques*, 2014 SCC 66; Rochon & Le Colleter, *Guide des requêtes devant le juge unique de la Cour d'appel* (2013).

2 Royer & Piché, *La preuve civile*, 5th ed. (2016), paragraph 686.

concerned in the action would require an intensive manipulation and reorganisation of the massive volume of relevant data.

[8] The right to the disclosure of material evidence is not unlimited and the presiding judge has the discretion to reduce the financial and administrative burden on a requested party by imposing reasonable constraints.[3] This discretion exists to ensure an appropriate measure of proportionality between the right of a party to prove its case with accurate evidence and the duty of cooperation that lies with the defendant. The exercise of this discretion necessarily entails that the search for truth at trial will be diminished in some measure but not to point that a plaintiff's claim is effectively extinguished.

[9] As stated by Morissette J.A. in *J.G.* v. *Nadeau*, "a palpable and overriding error is in the nature not of a needle in a haystack, but of a beam in the eye. And it is impossible to confuse these last two notions.[4] There is nothing in the present motion that could support the conclusion that the Superior Court exercised its discretion to dismiss the respondent's application for disclosure in a manner that could be characterised as palpable and overriding error.

[10] **FOR THESE REASONS, THE UNDERSIGNED:**

[11] **DISMISSES** the motion for leave to appeal, with costs of justice.

PATRICK HEALY, J.A.

Mtre Mathieu Charest-Beaudry
Mtre Clara Poissant-Lespérance
TRUDEL JOHNSTON & LESPÉRANCE
For Appellant

Mtre Stéphane Pitre
Mtre Anne Merminod
BORDEN LADNER GERVAIS
For Respondents

Date of hearing: 11 June 2019

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3 *Imperial Oil* v. *Jacques*, 2014 SCC 66, paragraph 85.

4 *J.G.* v. *Nadeau*, 2016 QCCA 167, paragraph 77, approved and translated in *Benhaim* v. *St-Germain*, 2016 SCC 48, paragraph 39.