

SUPERIOR COURT

CANADA
PROVINCE OF QUEBEC
DISTRICT OF MONTREAL

No.: 500-06-001092-200

DATE: June 3, 2021

BY THE HONOURABLE MARTIN F. SHEEHAN, J.S.C.

LUC BARRÉ

Applicant

v.

VOLKSWAGEN GROUP CANADA INC.

and

THE VOLKSWAGEN GROUP OF AMERICA INC.

and

AUDI CANADA INC.

and

AUDI OF AMERICA LLC.

Defendants

JUDGMENT

OVERVIEW

[1] Defendants, Volkswagen Group Canada Inc., The Volkswagen Group Of America Inc., Audi Canada Inc. and Audi of America LLC. ("**Volkswagen**"), present a motion under article 574 of the *Code of Civil Procedure* ("**C.C.P.**") for leave to file relevant evidence. Volkswagen believes the evidence is necessary to contest the authorization of a class action that Applicant wishes to file against it.

[2] Applicant contests the motion on the basis that the evidence is not essential.

CONTEXT

[3] The context is as follows:

[4] Applicant seeks authorization to file a class action on behalf of all persons in Quebec who are or were the owners or lessees of Volkswagen or Audi vehicles affected by a timing chain system defect.

[5] He alleges that this defect renders defendants liable for compensatory and punitive damages.

ANALYSIS

1. Is the Evidence that Volkswagen Wishes to File Useful and Essential to Assess whether the Authorization Criteria Are Met?

1.1 Applicable Law

[6] A class action is a proceeding by which a person, the representative, can sue on behalf of all members of a class who have a similar claim. Since the class representative is not specifically mandated to act on behalf of the members, prior authorization of the court is required before a class action can be commenced.¹

[7] The role of the court at the authorization stage has been described as “screening”. It must weed out frivolous and untenable claims that clearly do not meet the requirements for authorization of a class action (article 575 of the *Code of Civil Procedure* (“**C.C.P.**”)). The merits of the case must be considered only after the action has been authorized.²

[8] Article 574 C.C.P. provides that an application for authorization to institute a class action must set out: (i) the facts on which it is based; (ii) the nature of the action; and (iii) the group on whose behalf the person intends to act. It adds that the application for authorization is contested orally and that “the court may allow relevant evidence to be submitted”.

[9] The principles that must guide the court when considering an application to file relevant evidence at the authorization stage of a class action are well known. These principles may be summarized as follows:

9.1. The filing of appropriate evidence requires prior leave of the court. An agreement between the parties on this issue does not bind the court.³

¹ *L’Oratoire Saint-Joseph du Mont-Royal c. J.J.*, 2019 SCC 35, para. 6.

² *Desjardins Cabinet de services financiers inc. c. Asselin*, 2020 SCC 30, para. 55; *L’Oratoire Saint-Joseph du Mont-Royal c. J.J.*, *supra*, note 1, para. 7; *Infineon Technologies AG c. Option consommateurs*, 2013 SCC 59, paras. 59, 61, 65 and 68.

³ *Allstate du Canada, compagnie d’assurances c. Agostino*, 2012 QCCA 678, paras. 25 and 27; *Ward c. Procureur général du Canada*, 2021 QCCS 109, para. 17.

- 9.2. In determining whether to allow the filing, the court must strike the right balance between rigidity and permissiveness. The summary nature of the authorization process requires such caution.⁴
- 9.3. The proposed evidence must be limited and proportionate to what is essential and indispensable to assess the criteria for authorization set out in article 575 C.C.P.⁵ The court must be mindful of the principles of proportionality and reasonable conduct of proceedings set out in articles 18 and 19 C.C.P.⁶
- 9.4. The court must be careful not to transform the authorization phase into a pre-trial hearing. At the authorization stage, the allegations in the motion should be presumed true without the need to test their veracity. The court should limit itself to analyzing the proposed legal syllogism and avoid assuming the role of the ultimate trier of facts.⁷
- 9.5. On the other hand, the court, when faced with a request for the filing of relevant evidence, should avoid passing judgment on the quality of the arguments that the defendant may wish to make. Its role is simply to decide whether defendant is entitled to have the information required to present these arguments.⁸
- 9.6. Where evidence consists of sworn statements, these should attest to neutral and objective facts, as opposed to controversial or contentious issues that are best left for evidentiary assessment on the merits of the case. Evidence that may be challenged with regard to its truthfulness, scope or probative value should not be permitted as such evidence should not be considered at the authorization stage.⁹

⁴ *Allstate du Canada, compagnie d'assurances c. Agostino, supra*, note 3, para. 35.

⁵ *Lambert (Gestion Peggy) c. Écolait Itée*, 2016 QCCA 659, para. 38; *Allstate du Canada, compagnie d'assurances c. Agostino, supra*, note 3, para. 35, quoting with approval justice Clément Gascon (then at the Superior Court) in *Option Consommateurs c. Banque Amex du Canada*, 2006 QCCS 6290, para. 20.

⁶ *Ward c. Procureur général du Canada, supra*, note 3, para. 17; *Option Consommateurs c. Samsung Electronics Canada inc.*, 2017 QCCS 1751, para. 11; *Kramar c. Johnson & Johnson*, 2016 QCCS 5296, paras. 22 and 25.

⁷ *Desjardins Cabinet de services financiers inc. c. Asselin, supra*, note 2, paras. 9 and 74; *Infineon Technologies AG c. Option consommateurs, supra*, note 2, paras. 67 and 68; *Godin c. Aréna des Canadiens inc.*, 2020 QCCA 1291; *Ward c. Procureur général du Canada, supra*, note 3, para. 17.

⁸ *Option Consommateurs c. Banque Laurentienne du Canada*, 2015 QCCS 2794, para. 23; *Piro c. Novopharm Ltd.*, SOQUIJ AZ-50253736, paras. 35 and 51 (motion for leave to appeal continued *sine die* (C.A., 2004-06-16) 500-09-014618-045).

⁹ *Association pour la protection automobile (APA) c. Banque de Montréal*, 2021 QCCA 676, paras. 62 and 67; *Durand c. Subway Franchise Systems of Canada*, 2020 QCCA 1647, paras. 51 to 54; *Lambert (Gestion Peggy) c. Écolait Itée, supra*, note 5, para. 37.

9.7. The burden of demonstrating the utility and necessity of the evidence rests with the party seeking leave to file this evidence.¹⁰

[10] Applying these principles, courts have generally allowed the filing of evidence consisting of:

- 10.1. Contracts relevant to the members' claims;¹¹
- 10.2. The nature of a defendant's business and the regulatory environment in which it operates;¹²
- 10.3. Evidence that supplements an incomplete or incorrectly identified document;¹³
- 10.4. Evidence that demonstrates, on its face, the obvious falsity of certain allegations;¹⁴
- 10.5. Evidence that demonstrates the lack of jurisdiction of the Superior Court when such lack of jurisdiction is raised.¹⁵

1.2 Discussion

[11] The application for authorization states that "Each of the Defendants are part of a common enterprise, one worldwide corporate entity, acting together for common goals. Each Defendant created and executed a common business plan to manufacture and sell their vehicles throughout the world including in Quebec. The Defendants are therefore solidarily liable."¹⁶

¹⁰ *Allstate du Canada, compagnie d'assurances c. Agostino*, supra, note 3, para. 35, quoting with approval justice Clément Gascon (then at the Superior Court) in *Option Consommateurs c. Banque Amex du Canada*, supra, note 5, para. 20.

¹¹ *Benabou c. StockX*, 2020 QCCS 418, para. 10; *Morier c. Ouellet Canada inc.*, 2019 QCCS 5159, para. 23; *Société AGIL OBNL c. Bell Canada*, 2019 QCCS 4432, para. 9; *Charbonneau c. Location Claireview*, 2019 QCCS 4196, para. 58 (motion for leave to appeal dismissed, 2019 QCCA 2056); *Gagné c. Rail World*, 2014 QCCS 32, paras. 77, 136 and 137.

¹² *Morier c. Ouellet Canada inc.*, supra, note 11, para. 22; *Labranche c. Énergie éolienne des Moulins, s.e.c.*, 2015 QCCS 918, paras. 48 and 52.

¹³ *Gagnon c. Intervet Canada Corp.*, 2019 QCCS 4651, para. 36 (motion for leave to appeal dismissed, 2020 QCCA 248); *Seigneur c. Netflix International*, 2018 QCCS 1275, para. 29.

¹⁴ *De Auburn c. Desjardins assurances générales inc.*, 2021 QCCS 959, paras. 11 and 12; *Benabou c. StockX*, supra, note 11, para. 9; *Gagnon c. Intervet Canada Corp.*, supra, note 13, para. 35; *Charbonneau c. Location Claireview*, supra, note 11, para. 53.

¹⁵ *Gagnon c. Intervet Canada Corp.*, supra, note 13, para. 37; *Regroupement des cols bleus retraités et pré-retraités de Montréal c. Ville de Montréal*, 2018 QCCS 808, para. 14.

¹⁶ Para. 8 of the Application for Authorization to file a class action.

[12] Volkswagen wishes to file a sworn statement by Mr. Andrew Noble who is a Senior Director, Technical Service & Warranty at Volkswagen Group Canada Inc. The purpose of the statement is to address the role of each of the defendants in the manufacturing, importing, marketing and distribution of Volkswagen and Audi vehicles in Canada.

[13] Applicant objects on the basis that this evidence is premature and should be assessed on the merits.

[14] The affidavit of Mr. Noble has eight paragraphs. It is limited in scope to explaining the role of the defendants in the distribution of Volkswagen and Audi vehicles in Canada.

[15] Given the generality of the statement in the application for authorization, this evidence is necessary to determine whether the class action should be authorized and, if so, against which defendants. The evidence is in line with the principle of proportionality and falls within the narrow corridor established by the case law.

[16] Filing of the sworn statement is authorized.

2. Is a Cross-Examination of Mr. Noble on his Sworn Statement Helpful and Essential to Assessing Whether the Criteria for Authorization Are Met?

2.1 Applicable Law

[17] The principles that should guide the court in assessing whether to allow an examination overlap with those applicable to the granting of leave to file relevant evidence:

- 17.1. An examination is appropriate only if it is essential to meet the criteria of article 575 C.C.P. It must also comply with the principles of reasonableness and proportionality set out in articles 18 and 19 C.C.P.¹⁷
- 17.2. An examination whose purpose is to conduct a pre-inquiry into the allegations presented at the authorization stage or test the quality of the alleged evidence should not be allowed.¹⁸
- 17.3. Cross-examination of an affiant whose affidavit the court has permitted to be filed is not automatic and should be allowed only if necessary.¹⁹

¹⁷ *Morier c. Ouellet Canada inc.*, *supra*, note 11, para. 30; *Option Consommateurs c. Samsung Electronics Canada inc.*, *supra*, note 6, para. 11; *Option Consommateurs c. Banque Amex du Canada*, *supra*, note 5, para. 20.

¹⁸ *Perron c. Famille Marie-Jeunesse*, 2020 QCCS 4679, para. 47; *Milliard c. Kraft Heinz Canada*, 2019 QCCS 2430, para. 22; *Morier c. Ouellet Canada inc.*, *supra*, note 11, para. 30; *Seigneur c. Netflix International*, *supra*, note 13, para. 22; *Option Consommateurs c. Samsung Electronics Canada inc.*, *supra*, note 6, para. 11.

¹⁹ *Ouellet c. Lasik MD inc.*, 2020 QCCS 1711, para. 53; *Salazar Pasaje c. BMW Canada inc.*, 2018 QCCS 5635, para. 19.

- 17.4. When cross-examination of an affiant is allowed, it shall be limited to the facts set out in the affidavit.²⁰
- 17.5. The rule set out in article 228(3) C.C.P. whereby the witness must answer under reserve all questions subject to objections based on lack of relevance applies to an examination allowed under article 574 C.C.P.²¹
- 17.6. When an examination is allowed, it may be held in the presence of the court,²² out of court²³ or even in writing.²⁴
- 17.7. When the examination is held without the presence of the court, it is conducted under article 295 C.C.P. and not under articles 221, 222 or 226 C.C.P. Therefore, the transcript of the examination automatically forms part of the court record.²⁵
- 17.8. As is the case for a motion seeking leave to file relevant evidence, the burden of proving the necessity of the examination lies with the party who requests it.²⁶

2.2 Discussion

[18] Applicant wishes to examine Mr. Noble.

[19] Although the right to such an examination of the affiant is not automatic, the courts generally permit such an examination to take place, limiting its scope in time and to the matters raised by the affidavit.²⁷

[20] Such an examination is appropriate here.

[21] Applicant has made a general statement to the effect that defendants are part of a “common enterprise” to distribute Volkswagen and Audi vehicles in Canada. The affidavit of Mr. Noble states that certain defendants “play no role in the research, design, testing, manufacture, importation, distribution, marketing, promotion or sales” of the vehicles which are the subject of the class action.

²⁰ *Hand c. Denso International America inc.*, 2021 QCCS 1671, paras. 51 and 52; *Benabou c. StockX*, *supra*, note 11, para. 34.

²¹ *Google Canada Corporation c. Elkoby*, 2016 QCCA 1171, para. 24.

²² *Gagnon c. Intervet Canada Corp.*, *supra*, note 13, para. 78; *Barré c. CDPQ Infra inc.*, 2019 QCCS 3609, para. 44; *Rabin c. HP Canada Co.*, 2017 QCCS 3636, para. 35.

²³ *Patenaude c. Montréal (Ville de)*, 2011 QCCS 6977, para. 40.

²⁴ *Benabou c. StockX*, *supra*, note 11, para. 34; *Morier c. Ouellet Canada inc.*, *supra*, note 11, para. 47; *Gartner c. Ford Motor Company of Canada, Limited*, 2019 QCCS 5459, para. 20.

²⁵ *Patenaude c. Montréal (Ville de)*, *supra*, note 23, para. 40; *Quesnel c. KPMG, s.r.l.*, 2007 QCCS 3990, para. 21.

²⁶ *Morier c. Ouellet Canada inc.*, *supra*, note 11, para. 30.

²⁷ *Zouzout c. Canada Dry Mott's Inc.*, 2019 QCCS 2271, para. 48; *Letarte c. Bayer inc.*, 2018 QCCS 873, para. 20.

[22] It is in the interest of justice that this issue be determined prior to the authorization hearing. If this cannot be done, an examination will help the judge to differentiate between the facts which are in dispute and those that are not.

[23] Applicant's request to examine Mr. Noble is granted. The examination will be limited to the facts raised in the sworn statement and will be no longer than 60 minutes.

FOR THESE REASONS, THE COURT:

[24] **GRANTS** Respondents' Application for Leave to Adduce Relevant Evidence;

[25] **ALLOWS** Respondents to file the sworn declaration of Andrew Noble dated May 25, 2021;

[26] **ALLOWS** Applicant to examine Mr. Andrew Noble out of court for no more than 60 minutes on the subject matters raised in the sworn statement, such examination to take place prior to July 31, 2021;

[27] **THE WHOLE** with costs to follow suit.

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