

C A N A D A

PROVINCE OF QUEBEC
DISTRICT OF MONTREAL

N^o : 500-06-001063-201

S U P E R I O R C O U R T
(Class Action)

9311408 CANADA INC.,

and

GESTION RIC'ART LTÉE

and

JOENETTE INC.

Applicants

-vs-

AVIVA INSURANCE COMPANY OF CANADA,
and

AVIVA GENERAL INSURANCE COMPANY
and al.

Defendants

N^o : 500-06-001091-202

and

9192-6584 QUEBEC INC. d.b.a. Restaurant
L'Académie

Respondents

**AMENDED APPLICATION TO PARTIALLY STAY THE MOTION FOR
AUTHORIZATION TO INSTITUTE CLASS PROCEEDINGS
(Article 49 C.C.P.)**

TO THE HONOURABLE GARY D.D. MORRISON, JUSTICE OF THE SUPERIOR
COURT OF QUEBEC, IN SUPPORT OF THIS MOTION, THE APPLICANTS
RESPECTFULLY STATE THE FOLLOWING:

1. The Applicants are seeking an Order from the Honourable Court:

- a. To stay the proceedings in respect of the defendant Aviva Insurance Company of Canada of the file of the Respondent, *9192-6584 QUEBEC INC. d.b.a. Restaurant L'Académie v. Aviva et al.*, bearing the number 500-06-001091-202 until the final judgment on the Applicants' Motion for Authorization to institute a class action in *9311408 Canada Inc. v. Aviva et al.*, bearing number 500-06-001063-201.

The Application for Authorization

2. On April 17, 2020, the Applicant, 9311408 Canada Inc. d.b.a. Buzzfit Gym ("**Buzzfit**"), filed an Application for Authorization to institute a class action and to appoint a representative applicant (the "**Buzzfit Application**").
3. On October, 15, 2020, the Applicant Buzzfit filed an Application for leave to add two additional applicants GESTION RIC'ART LTÉE and JOENETTE INC., and to amend the *Second Amended Application for authorization to institute a class action and to appoint a representative plaintiff*. On December 10, 2020, the Honourable Justice Morrison authorized the Applicant Buzzfit to amend its Application by adding additional applicants GESTION RIC'ART LTÉE and JOENETTE INC ("**Applicants**")
4. The Buzzfit Application was filed against twenty-nine defendants, including against Aviva Insurance Company of Canada;
5. As stated in paragraph 1 of the Buzzfit Application, Buzzfit seeks to institute a class action on behalf of:

All businesses (except dentists and dental offices) in the Province of Quebec who, as of March 16, 2020, were subject to a contract of insurance with one or more of the Defendants that included "business interruption" or "operating loss" coverage.

(the "**Class**" or "**Class Members**")

6. As stated above, the Class proposed by Buzzfit include all businesses (except dentists and dental offices) who had active insurance contracts with any one of the defendants that covered business interruption or operating loss.
7. As stated in paragraph 16 of the Buzzfit Application, business interruption insurance enables a business or business owner to recover, from the insurer, income that the business would have expected to generate were it not for the intervention of an unexpected event.
8. As stated in paragraph 24 of the Buzzfit Application, the Government of Quebec ordered that all non-essential businesses be closed in the spring of 2020.
9. The Quebec province-wide shutdown was implemented in response to the COVID-19 pandemic.

The Application to be stayed

10. On August 28, 2020, a subsequent application for authorization (the “**L’Académie Application**”) was filed by 9192-6584 Quebec Inc. dba Restaurant L’Académie (“**L’Académie**”), for a proposed class action against Aviva Insurance Company of Canada, Everest Insurance Company of Canada, Sovereign General Insurance Company and HDI Global Specialty Se, communicated herein as EXHIBIT-1;

As indicated at paragraphs 4 and 5 of the *L’Académie Application* and from the Insurance policy (communicated herein as **EXHIBIT-2**), Académie subscribed to an all-risk commercial insurance policy with the four Defendants, who each have accepted to cover a specific proportion of the risks;

11. As stated in paragraph 22 of the L’Académie Application, L’Académie seeks to institute a class action on behalf of:

All businesses engaged in the operation of a restaurant or bar, in the Province of Quebec who were forced to close their business operations or limit their operations to take out and delivery due as a result of COVID-19 and ensuing governmental order, who sustained a loss as a result and who were denied coverage for Business Interruption Insurance by the Defendants or who have yet to file a claim for Business Interruption Insurance with the defendants as a result of a pre-emptive blanket denial of coverage by insurers, including the defendants (the “**L’Académie Class**”)

12. As stated above, the proposed L'Académie Class includes all restaurants and bars operating in Quebec, that were forced to close due to COVID-19.

Grounds for the Stay

13. The request to stay the L'Académie Application is based on the *first to file* rule.

- *Schmidt v Johnson & Johnson Inc.*, 2012 QCCA 2132, ¶50-53
- *Moscowitz v Attorney General of Canada*, 2017 QCCS 3961, ¶14-16
- *Badamshin c. Option Consommateurs*, 2017 QCCA 95, ¶9-11, 21-29

14. When considering a stay in these circumstances, the Court must consider the principles of *lis pendens*: (i) – identity of the parties, (ii) – identity of the cause of action, and (iii) – identity of the object.

i) Identity of the parties

15. The parties need not be physically identical in all instances. It is the juridical identity that is required. There is legal identity whenever one person represents another or is represented by him.

16. There is juridical identity of the parties, by representation in this class action setting, when the Court looks to the putative class rather than the applicant and proposed representative plaintiff.

- *Belley v TD Auto Finance Services Inc.*, 2013 QCCS 3014, ¶32-34
- *Varnai v Janssen Inc.*, 2019 QCCS 5090, ¶35

ii) Identity of the Cause of Action

17. The Buzzfit Application and the Academie Application contain the same key legal facts and are similar in the basis in law relied upon.

18. In both applications, the legal facts giving rise to the respective claims of the applicants and proposed classes, stem from the defendants' refusal to adhere to their contractual obligations under their applicable business interruption policies.
19. Both applications are premised on Claims relating to the Aviva defendant's refusal to provide business interruption insurance during COVID-19.

iii) Identity of the Object

20. The identity of the object for both the Buzzfit Application and the Academie Application is clear. Both seek to authorize a class action and have a representative applicant appointed.
21. Both Applications advance legal claims for losses caused by the business closures implemented by the Government of Quebec, resulting from the COVID-19 pandemic.
22. The two Applications need not contain the same conclusions for *res judicata* to exist - the fact that the object in the second application is implicitly included in the first application, insofar as Aviva Insurance Company of Canada is concerned, is sufficient.

Conclusion

23. It is clear that the Buzzfit Application was filed with this Honourable Court, almost four months prior to filing of the Academie Application. (Even if filing of the Applications had only been an hour or a day apart, the first to file rule would still apply.)
24. The three criteria for determining *lis pendence* is well-established, and requires granting a stay in respect of the Academie Application.

25. Both the Buzzfit Application and the L'Académie Application seek the same legal remedy, that being authorization to launch class action proceedings.
26. The legal identity of the Class in both applications are the same (or overlap). The applicants, in their representative capacities for proposed putative class members, represent the same Class.
27. The proposed L'Académie Class, in its entirety, is subsumed by the proposed Class in the Buzzfit Application, insofar as Aviva Insurance Company of Canada is concerned.
28. To have the two Applications litigated in parallel would be contrary to the interest of the administration of justice.

FOR THESE REASONS, MAY IT PLEASE THE COURT:

GRANT the present Application to stay the Respondent's application for leave to institute a class action bearing number 500-06-001091-202 (...);

ORDER the stay of the proceedings and the hearing in respect of 9192-6584 QUEBEC INC. *d.b.a. Restaurant L'Académie v. Aviva et al*, bearing the number 500-06-001091-202 (...), until the final judgment on the Applicants' Motion for Authorization to institute a class action by 9311408 Canada Inc. *v. Aviva et al.*, bearing number 500-06-001063-201;

THE WHOLE without legal costs, except in case of contestation.

MONTRÉAL, June 7, 2021

Merchant Law LLP

MERCHANT LAW GROUP LLP
Attorneys for Applicants

AFFIDAVIT OF ME CHRISTINE NASRAOUI

I, the undersigned, Christine Nasraoui, attorney, practicing my profession with the firm Merchant Law Group LLP., located at 10 Notre-Dame Est, Suite 200, District of Montreal, Province of Quebec, H2Y-1B7, solemnly declare:

1. I am one of the attorneys representing the Applicant in the present matter;
2. All the facts alleged in the present *Amended Application to stay the motion for authorization to institute class proceedings* are true.

AND I HAVE SIGNED:



CHRISTINE NASRAOUI

SOLEMNLY AFFIRMED TO BEFORE ME
AT Laval, this June 7, 2021

COMMISSIONER OF OATHS FOR
ALL THE DISTRICTS OF QUEBEC

Victor Mensah-Dzraku g.a.c.s.

NOTICE OF PRESENTATION

TO:

Me Laurent Debrun
SPIEGEL SOHMER
1255 Rue Peel, bureau 1000
Montréal, Québec, H3B 2T9
T: 514 875-3564
F: 514-875-8237
C: 514-238-1625
Attorney of the Applicant L'Académie

Me Erik Azran
STIKEMAN ELLIOTT
1155 boulevard René-Lévesque Ouest
41e étage
Montréal QC H3B 3V2
Téléphone : (514) 397-3169
Télécopieur : (514) 397-3489
eazran@stikeman.com
Attorney of the defendants Aviva

TAKE NOTICE that the present “*Application to stay the motion for authorization to institute class proceedings*”, will be presented for adjudication on June 14, 2021 in front of Honourable Justice Gary D.D. Morrison of the Superior Court of Quebec, District of Montreal.

DO GOVERN YOURSELVES ACCORDINGLY.

MONTREAL, June 7, 2021

Merchant Law LLP

MERCHANT LAW GROUP LLP
Attorneys for Applicants

From: [Microsoft Outlook](#)
To: eazran@stikeman.com
Subject: Relayé : 9311408 Canada inc. c. Aviva Insurance Company of Canada et al.-(500-06-001063-201) NOTIFICATION of THE APPLICANTS AMENDED APPLICATION TO STAY THE MOTION FOR AUTHORIZATION TO INSTITUTE CLASS PROCEEDINGS 500-06-001091-202
Date: Monday, June 7, 2021 5:21:43 PM
Attachments: [9311408 Canada inc. c. Aviva Insurance Company of Canada et al.-\(500-06-001063-201\) NOTIFICATION of THE APPLICANTS AMENDED APPLICATION TO STAY THE MOTION FOR AUTHORIZATION TO INSTITUTE CLASS PROCEEDINGS 500-06-001091-202 .msg](#)

La remise à ces destinataires ou groupes est terminée, mais aucune notification de remise n'a été envoyée par le serveur de destination :
eazran@stikeman.com (eazran@stikeman.com) <mailto:eazran@stikeman.com>
Objet : 9311408 Canada inc. c. Aviva Insurance Company of Canada et al.-(500-06-001063-201) NOTIFICATION of THE APPLICANTS AMENDED APPLICATION TO STAY THE MOTION FOR AUTHORIZATION TO INSTITUTE CLASS PROCEEDINGS 500-06-001091-202

From: [Microsoft Outlook](#)
To: ldebrun@spiegelsohmer.com
Subject: Relayé : 9311408 Canada inc. c. Aviva Insurance Company of Canada et al.-(500-06-001063-201)
NOTIFICATION of THE APPLICANTS AMENDED APPLICATION TO STAY THE MOTION FOR AUTHORIZATION TO
INSTITUTE CLASS PROCEEDINGS 500-06-001091-202
Date: Monday, June 7, 2021 5:21:49 PM
Attachments: [9311408 Canada inc. c. Aviva Insurance Company of Canada et al.-\(500-06-001063-201\) NOTIFICATION of THE
APPLICANTS AMENDED APPLICATION TO STAY THE MOTION FOR AUTHORIZATION TO INSTITUTE CLASS
PROCEEDINGS 500-06-001091-202 .msg](#)

La remise à ces destinataires ou groupes est terminée, mais aucune notification de remise n'a été envoyée par le serveur de destination :
ldebrun@spiegelsohmer.com (ldebrun@spiegelsohmer.com) <mailto:ldebrun@spiegelsohmer.com>
Objet : 9311408 Canada inc. c. Aviva Insurance Company of Canada et al.-(500-06-001063-201) NOTIFICATION of THE APPLICANTS
AMENDED APPLICATION TO STAY THE MOTION FOR AUTHORIZATION TO INSTITUTE CLASS PROCEEDINGS 500-06-001091-202

N^o.: 500-06-001063-201

S U P E R I O R C O U R T
D I S T R I C T O F M O N T R E A L

CANADA INC.
and
GESTION RIC'ART LTÉE
and
JOENETTE INC.

Applicants

-vs-

AVIVA INSURANCE COMPANY OF CANADA,
-and Al.

Defendants

N^o : 500-06-001091-202

and

9192-6584 QUEBEC INC. d.b.a. Restaurant L'Académie

Mise en cause

AMENDED APPLICATION TO STAY THE MOTION FOR
AUTHORIZATION TO INSTITUTE CLASS PROCEEDINGS
(Article 49 C.C.P.)

ORIGINAL

Me Christine Nasraoui
MERCHANT LAW GROUP LLP
10, rue Notre-Dame Est, Suite 200
Montreal, Quebec H2Y 1B7
Telephone: (514) 842-7776
Telecopier: (514) 842-6687
BC 3841