COURT OF APPEAL

CANADA
PROVINCE OF QUEBEC
REGISTRY OF MONTREAL

No: 500-09-029590-213
(500-06-000816-161)

DATE: August 17, 2021

BEFORE THE HONOURABLE FRÉDÉRIC BACHAND, J.A.

SAMSUNG ELECTRONICS CANADA INC.
SAMSUNG ELECTRONICS CO., LTD
APPLICANTS – Defendants
v.

OPTION CONSOMMATEURS
RESPONDENT – Plaintiff
and
CHANTAL GAGNON
RESPONDENT – Designated Person

JUDGMENT

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[1] This case involves a class action alleging defects in certain top-load washing machines manufactured and sold by the applicants.

[2] After the respondents filed an expert report analyzing the conditions of three such machines, the applicants sought the Superior Court's authorization to conduct pre-trial examinations of all past users of those machines, as well as incidental orders directing the respondents to provide information relating to each past user. Because the applicants did not know whether past users of the three machines were all class members, their application was based on article 221 para. 3 *C.C.P.* as well as article 587 *C.C.P.*

[3] The Superior Court, District of Montreal (the Honourable Gregory Moore), ruled in the respondents' favour. After having noted that, under article 587 *C.C.P.*, pre-trial examinations of class members can only be held if the court considers that they would be useful for its determination of the issues of law or fact to be dealt with collectively, the judge — who has been managing this case since 2018 — found that this test was not met. He also pointed to the fact that that class members can remain anonymous until the recovery stage, while adding that support for this proposition could be found in *Filion*.[1] Turning next to the applicants' request for information, the judge held that it was overly broad and insufficiently sensitive to issues relating to solicitor-client and litigation privilege, and that the information sought was not useful at this stage of the proceeding. The judge added that the applicants would not be precluded from filing, at a subsequent stage of the proceeding, a more focused application for information.

[4] The applicants now wish to bring the matter to this Court's attention.

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[5] The holding denying the applicants' request to conduct pre-trial examinations of all past users of the three machines is a case management measure relating to pre-trial discovery within the meaning of article 32 *C.C.P.*[2] As such, it can only be appealed if it appears "unreasonable in light of the guiding principles of procedure/*déraisonnable au regard des principes directeurs de la procédure*". That threshold is a high one, as appeals from orders falling within the ambit of article 32 *C.C.P.* are rare and exceptional.[3] It is all the more so in the context of class actions, as judges tasked with overseeing such proceedings are afforded considerable discretion to manage procedural questions arising after authorization has been granted.[4]

[6] When considering whether a judgment denying leave to conduct or limiting the scope of a pre-trial examination appears unreasonable in light of the guiding principles of procedure, one must remain mindful that whatever rights parties to civil proceedings may have to conduct pre-trial examinations do not amount to fundamental rights.[5] Also important here is the fact that the legislature has made clear that parties to a class action have no right *per se* to conduct pre-trial examinations of class members: "[a] party cannot

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1 *Filion c. Québec (Procureure générale)*, 2015 QCCA 352.

2 See *e.g.*: *B.M. c. S.V.*, 2019 QCCA 386 (judge alone), para. 6; *9312-5540 Québec inc. c. Entreprises Érick Boucher inc.*, 2019 QCCA 2055 (judge alone), para. 10; *Ville de Gatineau c. Lespérance*, 2021 QCCA 175 (judge alone), para. 4.

3 *Lavoie c. Maltais*, 2018 QCCA 777, para. 13.

4 *Charles c. Boiron Canada inc.*, 2019 QCCA 1339, para. 49; *Lepage c. Société de l'assurance automobile du Québec*, 2019 QCCA 1981, para. 3.

5 *Crane Canada Inc. c. Sécurité nationale, cie d'assurance,* 2004 CanLII 48772 (QC CA), para. 20; *Ville de Gatineau c. Lespérance*, 2021 QCCA 175 (judge alone), para. 8; *Frères du Sacré-Cœur c. F.*, 2021 QCCA 646 (judge alone), para. 49.

subject a class member other than the representative plaintiff [...] to a pre-trial examination/*[u]ne partie ne peut soumettre un membre, autre que le représentant [...], à un interrogatoire préalable*". While it is true that the legislature has stated that such examinations may be held in exceptional circumstances, the language of article 587 *C.C.P.* indicates that the interests served by that exception are — primarily, if not exclusively — the court's rather than the parties': "[t]he court may make exceptions to these rules if it considers that doing so would be useful for its determination of the issues of law or fact to be dealt with collectively/*[l]e tribunal peut faire exception à ces règles s'il l'estime utile pour décider des questions de droit ou de fait traitées collectivement*" [emphasis added]. Consequently, cases where a judgment denying leave to conduct a pre-trial examination of members of a class action will appear unreasonable in light of the guiding principles of procedure are likely to be very rare, particularly when the applicant's argument focuses on their own substantive, procedural or strategic interests.

[7] On the record as it currently stands, I see no basis upon which to find that this is one such case. My conclusion is the same when I consider the applicants' request from the perspective of article 221 para. 3 *C.C.P.*: to the extent that it was also based on that provision, the impugned judgment does not appear unreasonable in light of the guiding principles of procedure.

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[8] The holding denying the applicants' request for information relating to past users of the three washing machines amounts to a judgment allowing an objection to evidence within the meaning of article 31 para. 2 *C.C.P.*[6] In such cases, leave to appeal is only granted if the matter warrants the Court's consideration in light of factors that include the principle of proportionality, the best interests of justice, the nature and importance of the issues in dispute, as well as the proposed appeal's likelihood of success.[7]

[9] I find that there are no compelling reasons to grant leave to appeal. I come to this conclusion primarily because of two caveats which significantly limit the scope and effect of the judge's holding. The first is his comment to the effect that the disclosure of the information sought was not useful *at this stage of the proceeding*, which signals his inclination to reconsider the matter later on. The second relates to the invitation he explicitly extended to the applicants to file, at a later stage, a more focused request for information, an invitation that follows logically from his earlier finding to the effect that the application was overly broad. In these circumstances, the judge's holding cannot be said to amount to a permanent bar on the applicants' access to information regarding the users

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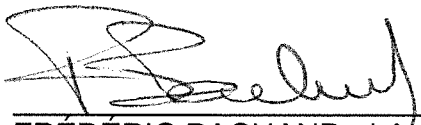
6 *Ravary c. Fonds mutuels CI inc.*, 2018 QCCA 606 (leave to appeal to the Supreme Court of Canada denied: 2019 CanLII 29775 (SCC)), para. 44.

7 See *e.g. Francoeur c. Francoeur*, 2020 QCCA 1748 (judge alone), para. 8.

of the three washing machines. The Court's intervention at this stage of the proceeding would thus be premature.

FOR THESE REASONS, THE UNDERSIGNED:

[10] **DISMISSES** the application for leave to appeal, with costs.



FRÉDÉRIC BACHAND, J.A.

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Date of hearing: August 12, 2021