SUPERIOR COURT
(CLASS ACTION)

CANADA
PROVINCE OF QUEBEC
DISTRICT OF MONTREAL

No: 500-06-000956-181

DATE : January 10, 2022

PRESIDING : THE HONOURABLE SYLVAIN LUSSIER, J.S.C.

VANESSA GARTNER
Plaintiff
c.
FORD MOTOR COMPANY OF CANADA, LIMITED
FORD MOTORS COMPANY
Defendants

JUDGMENT
(ON LEAVE TO MODIFY AN APPLICATION FOR AUTHORIZATION)

THE CONTEXT

[1] On November 29, 2018, Plaintiffs Vanessa Gartner and Brian Nicholson filed an initial *Application for Authorization to Institute a Class Action*.

[2] Plaintiffs were seeking to obtain authorization to institute a class action against Defendants on behalf of :

> Sub-Group A:
>
> All residents of Canada (or subsidiarily Quebec), who own, owned, lease and/or leased one or more of the Subject Vehicles, namely:
>
> 2013-2014 Ford Escape;
>
> 2013-2014 Ford Fusion;

2013 Ford Fiesta;

2014-2015 Ford Transit Connect.

Sub-Group B:

All residents of Canada (or subsidiarily Quebec), who have suffered damages and/or disbursed costs as a result of the defects affecting the Subject Vehicles;

Or any other Group(s) or Sub-Group(s) to be determined by the Court;

[3] According to Plaintiffs, the said vehicles were equipped with « defective engines and related parts which are prone to overheating, leak solvent liquid or fuel, stall and in certain circumstances, catch fire »[1].

[4] On June 20, 2019, Plaintiffs filed an *Amended Application for Authorization to Institute a Class Action* to add allegations and mention the partial Transaction Agreement signed by Plaintiffs and Defendants.

[5] On December 20, 2019, Defendants obtained permission to file in evidence the affidavit of Mr. Gregory West and to examine Plaintiffs. Plaintiffs were also authorized to cross-examine Mr. West on the statements made in his affidavit.

[6] On September 29, 2020, Plaintiffs filed an *Application for Permission to Amend the Amended Application for Authorization to Institute a Class Action in* order to remove Mr. Nicholson as Plaintiff, add further allegations and file comments from putative class members.

[7] On November 12, 2020, Plaintiffs' application was granted in part. The modifications to the *Amended Application for Authorization to Institute a Class Action* were authorized, except for the allegations bearing on similar problems having allegedly affected vehicles manufactured by Defendants and given rise to an investigation in South Africa, along with the corresponding exhibits. Plaintiffs were also authorized to file a list of the names and coordinates of the putative class members, but without their comments.

[8] On February 12, 2021, Plaintiff's *Application for Leave to Appeal* the November 12, 2020 judgment was rejected by the Court of Appeal[2].

[9] On July 20, 2021, Ms. Vanessa Gartner filed the new Application to Amend.

[10] By way of the Application to Amend, she wishes to amend the *Re-Amended Application for Authorization to Institute a Class Action* in order to modify the proposed class to add new vehicle models and years, add allegations relating to EcoBoost®

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1 Paragraph 6 of Amended Application for Authorization to Institute a class action.

2 *Gartner* c. *Ford Motor Company of Canada Limited*, 2021 QCCA 236.

engines, file class action pleadings filed in the United States, and file communications with putative class members.

[11] Defendants oppose these amendments judging them either irrelevant at the authorization stage or changing the scope of the issues that will have to be debated during the authorization hearing:

> « Nous entendons contester ces modifications en partie, soit plus particulièrement l'ajout des paragraphes 26.1 à 26.4 et des nouvelles pièces auxquelles ceux-ci réfèrent, soit les pièces R-35, R-36 et R-37. Notre contestation se fonde principalement sur les mêmes motifs que ceux retenus par le tribunal dans votre jugement en date du 12 novembre 2020 dans le présent dossier.
>
> Quant aux autres modifications, nous aurons des représentations à faire quant à la modification substantielle de la définition du groupe (para. 1 et 5) à ce stade-ci des procédures, laquelle serait, selon nous, non-conforme aux principes directeurs de la procédure civile. Si cette modification, de même que l'ajout des paragraphes 8.1 à 8.12, sont autorisées, les défenderesses solliciteront la permission du tribunal afin de produire une preuve appropriée pour traiter de l'allégation voulant que tous les véhicules visés soient prétendument équipés d'un moteur identique. »[3]

QUESTION AT ISSUE

[12] Should the proposed modifications be permitted?

ANALYSIS

a) Addition of models

[13] Plaintiff proposes to modify the Class by adding members owning other Ford models, equipped with the EcoBoost® engines, to the existing list:

- 2013-(...) 2019 Ford Escape;
- 2013-(...) 2019 Ford Fusion;
- 2014-2015 Ford Fiesta;
- (...) 2013-2015 Ford Transit Connect;
- 2015 -2018 Ford Edge;
- 2017- 2019 Lincoln MKC:
- 2017-2019 Lincoln MKZ.

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[3] Courriel du 17 août 2021.

[14] This addition of models comes with particularized allegations concerning the defects and consequences thereof, affecting the EcoBoost® engines, at paragraphs 8.1 to 8.12.

[15] According to Defendants, this addition completely changes the scope of the issues that will have to be debated during the authorization hearing. However, as appears from the above contesting email, there is no formal objection to the particular amendment.

[16] Defendants argue that they will be required to submit a new application for leave to adduce evidence to respond to this new allegation to demonstrate that the use of the EcoBoost® brand does not mean that it is the same engine for all vehicle models and years. They require to be given the opportunity to clarify which type of engine is used for which type of vehicle.

[17] These arguments raise two completely different questions.

[18] The addition of new models and particularized allegations may give rise to the right to seek to adduce evidence in conformity with article 574 CCP. This is not ground for objecting to the addition.

[19] Allowing modifications is the rule, refusing them the exception. The Court must verify whether the proposed amendments delay the proceeding, are contrary to the interests of justice, or result in an entirely new application having no connection with the original one[4].

[20] There is no doubt that allowing the amendments will delay the proceedings. Defendants will be allowed to present a request for permission to file additional evidence. In the circumstances, the Court has to decide whether this delay is contrary to the interests of justice. As Justice Stephen Hamilton, while of this Court, wrote:

> 31 The fact that the amendment adds complexity to the debate and lengthens the trial does not justify the refusal of the amendment. Many amendments add complexity and length. Article 206 C.C.P. says that an amendment can be refused where it would delay the proceedings. In the present matter, even though the original application was filed in October 2016, little progress has been made and the case is far from a trial. The only useful steps which have taken place are that Honeywell made a motion for particulars and Bombardier provided them, the parties agreed on some confidentiality measures, and the parties made a joint motion for case management. The parties have not yet proceeded with the first examination on discovery because of a disagreement on the scope of the examination and the documents to be produced in advance of the examination. As a result, there is nothing that has been done in the file that will need to be undone or redone. The Court cannot in these circumstances conclude that the amendment delays the proceedings[5].

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[4] Article 206 CCP.

[5] *Bombardier inc. c. Honeywell International Inc.,* 2018 QCCS 846.

While section 231 of the *Directives de la Cour supérieure pour le District de Montréal* provides that the request for authorization should be heard within a year of its filing, there is no specific sanction for failure to do so, and Plaintiff remains in control of her proceedings, under the supervision of the case management judge. Abuses may be controlled by the award of costs, or other management rulings, but the undersigned does not find that we are there yet.

[21] Inclusion of multiple yearly models is current in similar class actions.[6] As stated by Justice Lukasz Granosik:

> 38 Le défi pratique que ce dossier semble représenter ne constitue pas pour autant un empêchement à autoriser l'action collective. Certes, cette dernière, telle que proposée, est ambitieuse et nécessiterait un exercice de recherche factuelle longue et fastidieuse, mais elle n'est pas vouée à l'échec pour cette raison. Au contraire, le Tribunal rappelle que la nature même d'une action collective, réside en une mesure d'accès à la justice visant la réparation équitable à tous les membres du groupe.
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> 39 À défaut, si on empruntait la logique de Best Buy, il aurait fallu autoriser autant d'actions collectives qu'il y a de modèles ou de types de produits, voire de garanties supplémentaires pour chaque appareil vendu. De fait, Best Buy par sa contestation du syllogisme basée sur la multitude de situations factuelles, attaque surtout la notion de questions de droit ou de fait identiques, similaires ou connexes et non pas le critère de l'apparence de droit[7].

[22] The addition does not result in an entirely new demand. As stated by Justice Martin F. Sheehan in a similar case:

> [11] Ainsi, les questions soulevées par l'ajout du sous-groupe proposé sont connexes avec celles qui ont fait l'objet du jugement d'autorisation. Les faits allégués paraissent justifier les conclusions recherchées. De plus, le nombre de personnes concernées justifie l'utilisation du mécanisme de l'action collective[8].

[23] Allowing the amendment does not relieve Plaintiff from establishing that she personally has a valid claim,[9] or that the record contains sufficient allegations to allow the eventual inclusion of the added models in the class action[10]. But it is not at this stage of the proceedings that these matters will be decided.

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6 *Grand-Maison* c. *Mazda Canada inc.*, 2016 QCCS 2428 ; *Hand* c. *Denso International America*, 2021 QCCS 3145 (in appeal); *Daunais* c. *Honda Canada inc.*, 2019 QCCS 621; *Champagne* c. *Subaru*, 2018 QCCA 1554.

7 *Union des consommateurs* c. *Magasins Best Buy ltée (Future Shop Entrepôt de l'électronique et Best Buy)*, 2016 QCCS 3294, appel accueilli en partie, 2018 QCCA 445; demande d'autorisation d'appel à la Cour suprême rejetée, no 38117, 2 mai 2019.

8 *Daunais* c. *Honda Canada inc.*, 2021 QCCS 78.

9 *Hand* c. *Denso International America*, 2021 QCCS 3145 (in appeal); *Champagne* c. *Subaru*, 2018 QCCA 1554, at par. 22.

10 *Daunais* c. *Honda Canada inc.*, 2019 QCCS 621.

[24] The addition of new models is accordingly permitted, along with the addition of the relevant paragraphs, including paragraphs 6.1, 8.1 to 8.12, 19.1 and 20.3 to 20.13.

b) Allegation of US class proceedings

[25] Plaintiff wants to allege the existence of US class proceedings instituted in various jurisdictions since the institution of the present proceedings "in order to further fulfill the burden to demonstrate an arguable case."[11]

[26] Plaintiff argues that Article 55 of the *Regulation of the Superior Court of Québec in civil matters*[12] requires that the application for authorization be accompanied by a copy of all other applications for authorization to bring a class action dealing in whole or in part with the same subject matter.

[27] In the case of *Gagnon c. Intervet Canada Corp.*[13], Justice Pierre C. Gagnon ruled that the requirement of Article 55 encompassed foreign proceedings and allowed the modification adding a reference to such proceedings. He cautioned, however:

> [79] Le Tribunal refuse de statuer à ce stade sur la valeur probante de tels ajouts, problématique réservée au moment de vérifier le respect des critères de l'article 575 C.p.c.

[28] In opposing to the mention of the US proceedings, Defendants rely on the recent judgment of Justice Donald Bisson in *Hazan* v. *Micron Technology*[14]:

> [63] (…)
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> 6) La référence aux deux actions collectives américaines est insuffisante (Pièces R-1, R-1A, R-2 et R-5) :
>
> Cette référence est insuffisante car il s'agit de procédures faites par des parties demanderesses, et non pas de jugements ni même d'actes d'accusation. Ces procédures ont été rédigées par des avocats américains et donc, par définition, leur contenu ne peut constituer une allégation de fait. Elles sont plutôt de la nature de l'opinion, de l'argumentation juridique, des inférences ou des hypothèses non vérifiées; elles ne contiennent aucune référence à des déclarations de culpabilité ni à des plaidoyers de culpabilité en matière d'infraction ou de délit de concurrence. Les recherches qu'auraient faites les avocats américains dont il est fait état au communiqué de presse Pièce R-2 sont de la même nature et ne peuvent servir à établir une apparence de droit. Il en est de même du témoignage de personnes dont l'identité a été gardée confidentielle. Les défenderesses ajoutent que les deux actions collectives américaines ont été rejetées sur requête en rejet, mais ceci ne change rien car il ne revient pas aux tribunaux québécois de faire l'analyse des débats ayant cours ou ayant eu cours dans d'autres juridictions; […]

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[11] Par. 26.1 of the Third Amended Application to Institute a Class Action.
[12] CQLR c 25.1, r 0.2.1.
[13] 2020 QCCS 1591.
[14] 2021 QCCS 2710 (in appeal).

[29] Again, the question is not to be decided at this stage but Plaintiff's counsel is put on notice that, allowing the reference to the US proceedings does not relieve him of his burden to allege the facts in support of his conclusions in his application for authorization. The presence of the US proceedings in the Court record, whether as exhibits or as a reference required by Court Rules, is not permission to treat their allegations as being made in the present file.

[30] The filing of the US proceedings is allowed but their introduction as being "In order to further fulfill the burden to demonstrate an arguable case" is not. Without this introductory sentence, the addition of paragraphs 26.1 and 26.2 is allowed.

c) Comments from putative class members

[31] Plaintiff wants to add paragraphs 26.3 and 26.4, alleging "various online submissions and communications received by the undersigned attorneys in this regard, communicated herewith as Exhibit R-36, under seal and the whole for purposes of the authorization hearing only."

[32] In addition, Plaintiff proposes to file a video and pictures of a 2013 Ford Fusion, received from a putative class member, which had caught fire while driving on November 23, 2020, as Exhibit R-37.

[33] Defendants oppose this amendment, arguing that Plaintiff is attempting, for a second time, to file communications and comments from putative class members in support of her New Application for Authorization.

[34] Notwithstanding denegation from Plaintiff's counsel, the Court does not see how this is not a second attempt to introduce putative class members' comments. The matter was settled with the Court of Appeal refusing leave to appeal the undersigned's judgment of November 12, 2020.

[35] At the risk of repeating itself, the Court reminds Plaintiff that it is her own case that will be scrutinized at the authorization hearing, and no one else's[15]. Justice Chantal Corriveau recently reminded the parties of this principle in *St-Laurent* c *Nintendo of Canada Ltd*[16]:

> [7] La jurisprudence refuse au stade de l'autorisation le dépôt de commentaires émanant de membres potentiels. En effet, tant que la demande d'exercer une action collective n'est pas autorisée, seule la situation des demandeurs est examinée afin de décider si les critères d'autorisation sont rencontrés.

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[15] *Sofio* c. c. *Organisme canadien de réglementation du commerce des valeurs mobilières (OCRCVM)*, 2015 QCCA 1820, par. 11 ; *Daigle* c. *Club de golf de Rosemère*, 2019 QCCS 5801, par. 14; *Ehouzou* c. *Manufacturers Life Insurance Company*, 2021 QCCA 1214, par. 45.

[16] C.S.M., No 500-06-001122-213; November 4th, 2021.

[36] The addition of paragraphs 26.3 and 26.4 and corresponding exhibits is refused.

CONCLUSIONS

FOR THESE REASONS, THE COURT:

GRANTS partial leave to amend the Authorization to Institute Class Action;

AUTHORIZES the addition of paragraphs 6.1, 8.1 to 8.12, 19.1 and 20.3 to 20.13 and of corresponding exhibits;

AUTHORIZES the modification of the proposed class, Sub-Group A;

AUTHORIZES the addition of paragraphs 26.1 and 26.2, without the introductory phrase "In order to further fulfill the burden to demonstrate an arguable case";

ALLOWS the filing into the Court record of the Consolidated Class Action Complaint for Damages dated June 21, 2021, Exhibit R-35;

REFUSES the addition of paragraphs 26.3 and 26.4 and corresponding exhibits R-36 and R-37, and **ORDERS** same to be removed from the Court record;

THE WHOLE, with costs to follow suit.

SYLVAIN LUSSIER., J.S.C.

Me David Assor
Me Joannie Lévesque
LEX GROUP INC.
Attorneys for Plaintiff Vanessa Gartner

Me Simon Jun Seida
BLAKES CASSELS & GRAYDON LLP
Attorneys for Defendants Ford Motor Company of Canada, Limited and Ford Motor Company.

Hearing date : November 8th, 2021