

# SUPERIOR COURT

CANADA  
PROVINCE OF QUEBEC  
DISTRICT OF MONTREAL

No: 500-06-000862-173

DATE: JUNE 11, 2018

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**PRESIDED BY: THE HONOURABLE SILVANA CONTE, J.S.C.**

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**CHRISTIAN AUGER**  
Petitioner

v.

**GENERAL MOTORS OF CANADA COMPANY**  
and  
**GENERAL MOTORS LLC**  
and  
**ROBERT BOSCH INC.**  
and  
**ROBERT BOSCH LLC**  
Respondents

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**JUDGMENT ON APPLICATIONS TO ADDUCE ADDITIONAL EVIDENCE**  
(article 574 CCP)

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## **INTRODUCTION**

[1] General Motors of Canada Company and General Motors LLC (collectively "GM") seek leave to file copies of the certificates of conformity obtained in accordance with the Clean Air Act of 1990, for the years 2010 to 2016, in order to complete the Court record and allow for a better understanding of the fact record in the Court's analysis of article 575 paragraph (2) of the *Code of Civil Procedure* ("CCP").

[2] Robert Bosch Inc. and Robert Bosch LLC (collectively "Bosch") seek leave to examine Petitioner for a maximum duration of 2 hours on subject matters relating to, amongst other things, Petitioner's individual claim and adequacy to act as class representative.

[3] Petitioner contests both applications except as regards paragraphs c and d of the Bosch subject matters for discovery, which Petitioner leaves to the Court's discretion. According to Petitioner, the recent authorities imposes strict limitations on Respondents' right to adduce additional evidence<sup>1</sup>.

### **CONTEXT**

[4] Christian Auger seeks to authorize a class action against Respondents and act as class representative on behalf of the following proposed class:

All persons, entities or organizations resident in Quebec who purchased and/or leased one or more of the Subject Vehicles equipped with Defeat Devices, or any other group to be determined by the Court.

[5] The Subject Vehicles consist of GM vehicles equipped with a Duramax engine, namely; the GM Sierra 2500 HD and 3500 HD and GM Silverado 2500 HD and 3500 HD, model years 2011 to 2016.

[6] Petitioner alleges that the Subject Vehicles were equipped with illegal defeat devices software designed by Bosch to reduce vehicle emissions only when detecting that the Vehicles were undergoing emissions testing such that they were not "clean diesels" as advertised and marketed and did not comply with federal regulations on emission standards.

[7] Petitioner seeks, in addition to damages, declaratory and injunctive relief as follows:

DECLARE the Defendants have committed unfair, false, misleading, and/or deceptive conduct with respect to their designing, marketing, advertising, leasing, selling and/or representing the Subject Vehicles as having certain levels of lower fuel economy and lower emissions than in reality;

ORDER the Defendants to cease from continuing their unfair, false, misleading, and/or deceptive conduct by designing, marketing, advertising, leasing, selling and/or representing the Subject Vehicles in a false manner;

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<sup>1</sup> *Asselin v. Desjardins Cabinet de services financiers inc.*, 2017 QCCA 1673; *Sibiga v. Fido Solutions inc.*, 2016 QCCA 1299; *Option Consommateurs v. Samsung Eletronics Canada Inc.*, 2017 QCCS 1751 at para 11.

ORDER the Defendants to recall and repair the Subject Vehicles free of charge, or otherwise, to buy back the Subject Vehicles at the original sale price or return any and all lease payments;

DECLARE the Defendants solidarily liable for the damages suffered by the Petitioner and each of the members of the Class;

### **APPLICABLE LAW**

[8] Article 574 CCP grants the court wide discretionary powers when allowing relevant evidence to be adduced at the authorization stage<sup>2</sup>.

[9] As a general rule, evidence is relevant if it assists the court in the analysis of the criteria for authorization set out in article 575 CCP. In addition, the rules of proportionality and orderly progress in the conduct of proceedings contained in articles 18 and 19 CCP must be respected<sup>3</sup>.

[10] The low threshold for authorization, set out by the Supreme Court of Canada<sup>4</sup> and Court of Appeal<sup>5</sup> in recent years, requiring that Petitioner demonstrate an arguable cause of action, has narrowed the scope of the nature of the evidence permitted to be adduced at authorization to that which is “necessary and indispensable”<sup>6</sup> in its analysis of the criteria contained in article 575 CCP.

[11] Nevertheless, as the facts alleged by Petitioner are deemed to be true, the court has discretion to allow Respondent to adduce additional evidence where such evidence would be relevant to its role in filtering out proposed class actions which have no reasonable chance of success on the merits. In that light, courts have permitted a party to correct allegations which are clearly false or complete the record at the authorization stage<sup>7</sup>.

[12] In *Allstate*<sup>8</sup>, the Court of Appeal underlined the importance of allowing a party the opportunity to adduce additional evidence at the authorization stage as follows:

[30] Pour éviter cependant que des recours manifestement voués à l'échec ne soient indûment autorisés et n'entraînent dès lors pour les parties des coûts souvent très importants, le législateur a en quelque sorte prévu une soupape de sécurité en donnant au juge saisi de l'affaire la possibilité de permettre la

<sup>2</sup> The previous caselaw under article 1002 CCP remains applicable. See *Allstate du Canada, compagnie d'assurances v. Agostino*, 2012 QCCA 678 at para 25.

<sup>3</sup> *Option Consommateurs v. Banque Amex du Canada*, 2006 QCCS 6290 at para 20.

<sup>4</sup> *Infineon Technologies AG v. Option Consommateurs*, [2013] 3 S.C.R. 600; *Vivendi Canada v. Dell'Aniello*, [2014] 1 S.C.R. 3.

<sup>5</sup> *Sibiga*, *supra* note 1; *Asselin*, *supra* note 1.

<sup>6</sup> *Asselin*, *supra* note 1 at para 38 and *Options Consommateurs*, *supra* note 1 at para 11.

<sup>7</sup> *Option Consommateurs v. Brick Warehouse*, 2011 QCCS 569 at para 30; *Labranche v. Énergie éolienne des Moulins, s.e.c.*, 2015 QCCS 918 at para 26.

<sup>8</sup> *Allstate du Canada, compagnie d'assurances*, *supra* note 2 at para 30.

présentation d'une preuve appropriée. L'on voulait ainsi éviter que le processus d'autorisation ne devienne qu'une simple formalité où le tribunal se retrouve prisonnier d'allégations dont le seul mérite est d'avoir été consignées par écrit dans une requête pour autorisation, déposée au greffe, et ce, sans affidavit qui en atteste la véracité.

[13] Therefore, the courts must strike a balance between ensuring it is in the position to effectively filter cases without a reasonable cause of action and avoiding that the authorization stage is transformed into a hearing on the merits of the proposed class action.

[14] Finally, the party seeking to adduce the additional evidence has the burden of establishing the relevance of same.

## **ANALYSIS**

### **Exhibit R-1**

[15] GM seeks leave to adduce the United States Environment Protection Agency Certificates of Conformity with the Clean Air Act of 1990 for the Subject Vehicles.

[16] Petitioner argues that the Certificates are not relevant given that compliance with the Clean Air Act cannot be raised as a defense to extra-contractual liability.

[17] The Court in its discretion will allow the filing of the Certificates of Conformity.

[18] The testing of the Subject Vehicles and the status of these vehicles with regards to the Clean Air Act of 1990 have been omitted from the Application and gives rise to the inference, in paragraph 103, that the Subject Vehicles are not compliant with the Clean Air Act which, as counsel for Petitioner has acknowledged at the hearing, is not the case. These facts are relevant to and complete the allegations contained in paragraphs 18, 19, 28, 29, 30, 31 and 73 to 80 of the Petitioner's Application.

[19] As such, the exhibit is useful to the analysis of the demonstration of an arguable case under article 575 (2) CCP and complies with the rules of proportionality in articles 18 and 19 CCP.

### **Examination of Petitioner**

[20] Bosch seeks permission to examine Petitioner on the following subject matters:

- a) The representations seen and considered by the Plaintiff prior to his purchase of his 2015 GMC Sierra SLT 2500 HD Diesel vehicle;
- b) The Plaintiff's knowledge and investigation as to the existence and nature of a "Defeat Device" in his vehicle;

- c) The repairs or other work performed on the Plaintiff's vehicle, by whom and for what;
- d) The current situation of the Plaintiff's vehicle;
- e) The nature and quantum of the damages purportedly suffered by the Plaintiff;
- f) Plaintiff's participation in the preparation of the Application and his knowledge/investigation of the allegations made therein; and
- g) Plaintiff's communications with other members of the putative class.

[21] Petitioner contests all subject matters except for items c and d which are left to the Court's discretion.

[22] Respondent Bosch argues that as regards items a, the Application is silent as regards to the alleged misleading representations or advertisements that would have been made by Bosch in support of its request for an injunction and declaration against both Respondents solidarily. Indeed, counsel for Petitioner acknowledged that he was not aware of any representations or advertisements that would have emanated from Bosch and has not alleged that they have made any such representations or advertisements. However, Petitioner has not offered to modify the Application nor withdraw the allegations made against Bosch.

[23] In light of the foregoing, the Court finds that adducing additional evidence on this subject is necessary and useful to its analysis of article 575(2) CCP.

[24] With respect to item b, Petitioner's knowledge and investigation as to the Defeat Device is set out in paragraphs 106 and 108 of the Application and Exhibit R-30. Bosch has not established on what basis additional evidence adduced regarding Petitioner's knowledge and investigation is indispensable to the Court's analysis of the criteria contained in article 575 CCP.

[25] As regards items c and d, which are not contested, the Court will allow Respondent to question Petitioner on the repairs to his vehicle and current status of same in order to ascertain what problems, if any, have been incurred by Petitioner. This evidence is relevant to the analysis of article 575(2) and the composition of the proposed class.

[26] With respect to item e, the nature and quantum of the Petitioner's damages are adequately set out in paragraphs 100 to 102, 104 to 107, and 109 to 112 and Bosch has not established how such an examination would be necessary to the Court's analysis at the authorization stage.

[27] With respect to items f and g, dealing with the adequacy of Petitioner as a class representative under art. 575(4) CCP, the Court does not find an examination to be

necessary or indispensable. The Petitioner's participation and investigation of the allegations are not issues which are relevant to his: i) interest, ii) competence, or iii) absence of conflict and is already set out with sufficient specificity in paragraphs 100 to 112 and 128 to 139<sup>9</sup>.

[28] Also, Petitioner's communication with other members of the class is not necessary or relevant to the criteria of art. 575(4) and is already set out with sufficient specificity in paragraphs 138 to 139<sup>10</sup>.

[29] The examination will be held out of court for a maximum duration of two hours, at a time and place to be agreed upon by the parties.

**FOR THESE REASONS, THE COURT:**

[30] **GRANTS** Respondents General Motors of Canada Company and General Motors LLC Application for leave to adduce relevant evidence;

[31] **ALLOWS** Respondents General Motors of Canada Company and General Motors LLC to file the Certificates of Conformity for the Subject Vehicles for the years 2011 to 2016 as Exhibit R-1 en liasse;

[32] **GRANTS**, in part, Respondents Robert Bosch Inc. and Robert Bosch LLC Application for leave to examine Petitioner;

[33] **ALLOWS** Respondents Robert Bosch Inc. and Robert Bosch LLC to examine Petitioner out of court for a maximum duration of two hours, at a time and place to be agreed upon by the parties, on the following subject matters:

a) The representations seen and considered by the Plaintiff prior to his purchase of his 2015 GMC Sierra SLT 2500 HD Diesel vehicle;

c) The repairs or other work performed on the Plaintiff's vehicle, by whom and for what;

d) The current situation of the Plaintiff's vehicle;

[34] **THE WHOLE**, with costs to follow suit.

  
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SILVANA CONTE, J.S.C.

<sup>9</sup> Pierre-Claude LAFOND, *Le recours collectif comme voie d'accès à la justice pour les consommateurs*, Montréal, Éditions Thémis, 1996, p. 419.

<sup>10</sup> *Lévesque v. Vidéotron, s.e.n.c.*, 2015 QCCA 205.

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