

SUPERIOR COURT

(Class Actions Chamber)

CANADA
PROVINCE OF QUEBEC
DISTRICT OF MONTREAL

N° : 500-06-000947-180

DATE : July 5, 2019

PRESIDING: THE HONOURABLE GARY D.D. MORRISON, J.S.C.

PANAGIOTIS LEVENTAKIS

Applicant

c.

AUDIBLE INC.

and

APPLE, INC.

and

APPLE CANADA INC.

and

AMAZON.COM, INC.

and

AMAZON.COM.CA, INC.

Defendants

JUDGMENT
(Temporary Stay, Article 577 C.C.P.)

1- OVERVIEW

[1] Panagiotis Leventakis ("Applicant") has filed, and now seeks to temporarily stay an Application for authorization to institute a class action, and this on behalf of the following proposed class:

All persons, entities, partnerships or organizations in Quebec who purchased digital audiobooks from the Defendants ("Class Members"), or any other group to be determined by the Court, between 2003 and 2017 ("Class Period").

[2] The Application to stay is not contested by Respondents.

[3] The essence of the proposed class action is that certain Apple and Amazon corporate entities allegedly chose not to compete with each other in the market for digital audiobooks and instead, purportedly manipulated the market for their mutual benefit, which Applicant alleges is in contravention of the Competition Act, the Consumer Protection Act and the Civil Code of Quebec.

2- CONTEXT

[4] The *Application for Authorization to Institute a Class Action and to Obtain the Status of Representative* ("Quebec Action") was filed on September 28, 2018 before the Quebec Superior Court in the present court file.

[5] The day before, on September 27, 2018, a putative class action proceeding was filed before the British Columbia Supreme Court in *Williams v. Audible Inc. et al.*, court docket number VLC-S-S-1810561 ("BC Action")¹, which allegedly raises the same issues and includes the same members as the Quebec Action.

[6] The BC action is being case managed by Madam Justice Karen Horsman. The undersigned has been informed that case management hearings took place on March 25, 2019 and May 1, 2019, and further that a Pre-Certification Schedule is being prepared.

[7] In fact, a third class action purportedly of the same nature was filed before the Ontario Superior Court of Justice, in *Sweet v. Audible Inc. et al.*, court docket number CV-18-606353-OOC ("Ontario Action")², which is said to intentionally not be moving forward pending the outcome of the BC Action. The Court is referred to this case by way of example only and not as a reason for the proposed stay of proceedings in the present matter.

¹ Exhibit P-2.

² Exhibit P-3.

3- APPLICABLE LAW

[8] In the specific context of Quebec class actions, whether prior to or after authorization proceedings, Article 577 C.C.P. provides the following guiding principles in relation to competing multi-jurisdictional class actions:

The court cannot refuse to authorize a class action on the sole ground that the class members are part of a multi-jurisdictional class action already under way outside Québec.

If asked to decline jurisdiction, to stay an application for authorization to institute a class action or to stay a class action, the court is required to have regard for the protection of the rights and interests of Québec residents.

If a multi-jurisdictional class action has been instituted outside Québec, the court, in order to protect the rights and interests of class members resident in Québec, may disallow the discontinuance of an application for authorization, or authorize another plaintiff or representative plaintiff to institute a class action involving the same subject matter and the same class if it is convinced that the class members' interests would thus be better served.

[9] In order to determine whether proposed class members are indeed part of a multi-jurisdictional class action already underway outside Quebec which might justify an application to stay proceedings, the required analysis must go further.

[10] The jurisprudential consensus is that the Court must consider the rules relating to *lis pendens* in addition to, and even prior to the criteria of Article 577 C.C.P.

[11] The applicable *lis pendens* rules are stipulated at Article 3137 C.C.Q., which reads as follows:

On the application of a party, a Québec authority may stay its ruling on an action brought before it if another action, between the same parties, based on the same facts and having the same subject is pending before a foreign authority, provided that the latter action can result in a decision which may be recognized in Québec, or if such a decision has already been rendered by a foreign authority.

[12] Accordingly, to establish *lis pendens* in the context of private international law matters, including multi-jurisdictional actions, those seeking a stay of the Quebec proceedings are to demonstrate that the actions involve essentially:

1. the same parties;

2. the same facts on which the actions are based, as opposed to the causes of action³;
3. the same subject ("*objet*" in French), and further that:
4. the foreign action is pending;
5. the foreign action can result in a decision which may be recognized in Quebec, and this pursuant to Article 3155 (4) C.C.Q.

[13] Certain case law considers that the analysis of the application to stay should commence with a relatively strict analysis of Article 3137 C.C.Q., whose criteria must be met, including the requirement that the multi-jurisdictional proceeding was pending prior to the filing of the Quebec proceedings.⁴

[14] Other decisions have adopted a more liberal interpretation of Article 3137 C.C.Q. in the context of applications to stay Quebec class action proceedings, with some concluding that a stay could be granted even in the event that there is no *lis pendens*, the whole as described in *Chasles v. Bell Canada*.⁵

[15] In this regard, although the Court does have discretion to grant a stay⁶, that power exists only when the stipulated criteria are actually met. And although it is, in the Court's view, appropriate to adapt the stipulated criteria in relation to class actions, the criteria *per se* cannot be completely ignored. In other words, the discretion does not exist to grant a stay when the criteria are simply not met.

[16] As for the criteria pertaining to whether the foreign action is pending ("*déjà pendante*"), it has been generally recognized as requiring that such action have been filed on a date prior to the Quebec proceeding, and the Quebec Court of Appeal has so determined.⁷

[17] In cases where the application for authorization to institute a class action has been filed in Quebec first, thereby pre-dating the multi-jurisdictional class action filed elsewhere, an otherwise valid foreign judgment should generally not be recognized by a Quebec court pursuant to Article 3155 (4) C.C.Q.⁸ Accordingly, in such cases, a stay of proceedings cannot be granted pursuant to Article 3137 C.C.Q. So, when the Quebec

³ *Canada Post Corp. v. Lépine*, [2009] 1 S.C.R. 549, at para. 51.

⁴ *Garage Poirier & Poirier inc. c. FCA Canada inc.*, 2018 QCCS 107 (Application for permission to appeal : 2018 QCCA 490); *Li c. Equifax inc.*, 2018 QCCS 1892.

⁵ 2017 QCCS 5200, at paras. 25 and following.

⁶ *Fastwing Investment Holdings Ltd. v. Bombardier Inc.*, 2011 QCCA 432.

⁷ *Ibid.*

⁸ *Canada Post Corp.*, *supra* note 3, at paras. 53-55.

class action authorization application predates the non-Quebec class action proceeding, a stay should not be granted.

[18] In the event that the non-Quebec class action predates the Quebec one and, further, the Court determines that all the criteria of Article 3137 C.C.Q. have been met, then it must, in the course of exercising its discretion, take into account the criteria of Article 577 C.C.P. regarding the protection of the rights and interests of Quebec residents. That is to be analyzed on a case-by-case basis.

4- **ANALYSIS**

4.1 ***Lis Pendens***

a) **Same Parties**

[19] The Application to stay is based on the existence of the BC Action, which envisages the following putative class, as described by Applicant:

Customers of Audible, Amazon and Apple ("Class Members", to be defined in the Plaintiff's application for class certification) who purchased audiobooks from the Defendants during the class period.

[20] The Notice of Application in the BC Action seeks to define the class as including all persons in Canada.

[21] As for the period of time to be covered, the BC Action envisages the period from 2003 to certification. The Quebec Action proposes to cover 2003 to 2017.

[22] The putative defendants are the same.

[23] Accordingly, the proposed class members in the BC Action, a pan-Canadian class, include all the defined Quebec Action members.

b) **Same Facts on which Action is Based**

[24] The essential and important facts on which the legal syllogisms are based in both actions are, for the present purposes, the same. They both claim that the named defendants breached statutory obligations by foreclosing competition in the sale of digital audiobooks, resulting in customers being overcharged.

c) **Same Object**

[25] Clearly, the object sought in both actions is the same, being compensation for alleged price overcharges, as well as punitive damages and interest. The BC Action

also seeks restitution of benefits received by defendants in the full amount of the overcharge or, in the alternative, disgorgement of the benefits.

d) BC Action Pending

[26] As mentioned above, the BC Action was filed on September 27, 2018, one day prior to the Quebec Action. It pre-dates the latter. Hence, it was “pending” within the meaning of Article 3137 C.C.Q.

e) BC Action Can Result in a Decision which may be Recognized in Quebec

[27] In this regard, once the non-Quebec proceeding predates the Quebec one and has been instituted before a Canadian court possessing lawful and parallel competence in class action litigation to the Quebec Superior Court, the required demonstration should not be difficult to establish.

[28] As confirmed by the Supreme Court of Canada, multi-jurisdictional and national class actions involve relations between “*equal but different superior courts in a federal system in which civil procedure and the administration of justice are under provincial jurisdiction*”.⁹

[29] In this regard, unless shown in specific cases to be problematic for given reasons, the courts are entitled to consider that judgments rendered by other Canadian Superior courts in class action cases are recognizable in the other provinces, including Quebec.

[30] The Court, in this matter, considers that the Supreme Court of British Columbia has *prima facie* jurisdiction over the BC Action and, further, it is satisfied that the BC court will uphold the fundamental principles of procedure and public order. There is no reason to think otherwise. The BC Action can result in a decision which may be recognized in Quebec.

[31] It is indeed correct that both the BC and Quebec Actions are at their early stages and may not yet have been fully defined. Changes may occur which might possibly impact on the *lis pendens* criteria.

[32] But the Application only seeks a temporary stay, and the Court can maintain close contact with counsel in the Quebec Action so as to ensure that the *lis pendens* criteria continue to be satisfied and the interests of Quebec residents protected.

⁹ *Ibid.* at para. 57.

[33] Moreover, the 2018 *Canadian Judicial Protocol for the Management of Class Actions and the Provision of Class Action Notice* ("CJP"), a Resolution adopted by the Canadian Bar Association¹⁰, which supplements its 2001 Canadian Judicial Protocol, sets forth measures intended to facilitate management of multi-jurisdictional class actions, including communication between judges of different jurisdictions and, as well, protocols pertaining to settlement approval and notices.

[34] In Quebec, the CJP can be applied by the Court in a given case pursuant to Article 241 of the current Directives of the Superior Court of Quebec, District of Montreal.¹¹

[35] Accordingly, in the present file, the said Protocol will also be available to the Court should circumstances warrant during the temporary stay.

[36] Having concluded that the criteria of Article 3137 C.C.Q. are and continue to be met, the Court must now have regard for the protection of the rights and interests of Quebec residents pursuant to Article 577 C.C.Q. before authorizing the requested stay.

4.2 The Rights and Interests of Quebec Residents

[37] Applicant argues that in the event of a temporary stay in the present matter, the interest of Quebec residents will be protected in a number of different ways, and this in addition to the elements already reviewed above in relation to *lis pendens*.

[38] Applicant's lawyer confirms that she can participate in the Hearing in the BC Action and that she will prepare the Quebec law portion of the claim. The Court considers this to be an important element for the purposes of the proposed stay.

[39] The fact that Quebec has its own Consumer Protection Act is not an automatic bar to a stay of proceedings, especially if Quebec civil law is to be pleaded before the non-Quebec court. It is another element to be considered case by case.

[40] Moreover, the BC Action is progressing forward, which is to the benefit of class members. To promote further clarity for the Court, the parties also agree that the undersigned is entitled to contact Justice Horsman in relation to the BC Action, and this without defendants waiving any legal arguments, including those pertaining to jurisdiction.

[41] In the present circumstances, the Court considers that a temporary delay of six (6) months would be appropriate. At the end, thereof, the Court can consider, if so requested, whether a renewal of stay should be granted.

¹⁰ Resolution 18-03-A (2018).

¹¹ *Code of Civil Procedure*, CQLR, c. C-25.01 at arts. 63-65.

[42] Moreover, during the stay, the parties will periodically keep the Court advised of developments in the BC Action and, further, will inform the Court of any judgments or ordinances rendered in that action and provide the latter with a copy thereof.

FOR THESE REASONS, THE COURT:

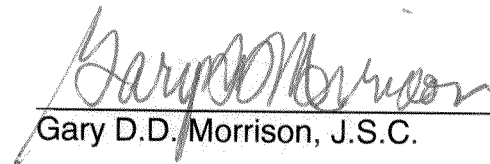
GRANTS the Application to Temporarily Stay the Class Action;

STAYS, until December 17, 2019, the *Application for Authorization to Institute a Class Action and to Obtain the Status of Representative* dated September 28, 2018;

ORDERS the parties to periodically keep the Court advised of developments in the BC Action and, further, to diligently inform the Court of any judgments or ordinances rendered in that action and to provide the latter with a copy thereof;

RESERVES the right of the parties to apply for a renewal of the stay, a further temporary stay or a permanent stay, which the Court will then adjudicate;

THE WHOLE without judicial costs.



Gary D.D. Morrison, J.S.C.

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Hearing : April 11, 2019 (Suspended)

Resumed by
telephone conference: June 12, 2019

Under advisement : June 12, 2019