SUPERIOR COURT

CANADA
PROVINCE OF QUÉBEC
DISTRICT OF MONTREAL

No : 500-06-000838-173

DATE : May 28, 2018

BY THE HONOURABLE CHANTAL CHATELAIN, J.S.C.

LAWRENCE CHANDLER

Applicant

v.

VOLKSWAGEN AKTIENGESTLLSCHAFT

Respondent

JUDGMENT
(Motion for authorization to institute a class action)

I. INTRODUCTION

[1] This case constitutes yet another chapter in what some refer to as the "dieselgate" scandal.

[2] The Applicant, Mr. Laurence Chandler, seeks the Court's authorization to bring a class action against Volkswagen Aktiengestllchaft's (**VW**) on behalf of the following group:

> All residents of Québec who purchased VW's securities during the Class Period [i.e. between March 12, 2009, and September 18, 2015] and held all or some of those acquired VW securities until after the Corrective Disclosure [i.e. after September 18, 2015].

[3] Mr. Chandler basically claims that the proposed class members, who invested in VW's securities, suffered monetary damages when the value of their securities dropped as a result of the disclosure of VW's intentional misrepresentations in relation to the compliance of certain of its Volkswagen and Audi diesel-powered automobiles with the applicable emissions standards.

[4] Mr. Chandler seeks the Court's permission to sue VW under Article 1457 of the *Civil Code of Québec* (***CCQ***), which is the general civil liability regime in Québec.

[5] VW contests the motion for authorization. It claims that Mr. Chandler has failed to meet the required criteria to bring a class action in that he has not shown (i) that he has an arguable case; (ii) that a class exists; and (iii) that there is a common question which could move the case forward on a class-wide basis.

[6] For the reasons that follow, the Court finds that the authorization to bring a class action should be granted, except for the claim for punitive damages.

II. ALLEGATIONS IN SUPPORT OF THE PROPOSED CLAIM

[7] Mr. Chandler filed his Motion for Authorization to Institute a Class Action on January 17, 2017. The Motion was amended on December 8, 2017, and re-amended on December 28, 2017 (**Motion for Authorization**).

[8] VW is one of the largest automotive manufacturers in the world, with sales revenue of more than €170,864,000. It is a publicly traded company incorporated under the laws of Germany and its share capital is valued at €1,283,315,873.28.

[9] VW's securities are traded on worldwide stock exchanges, namely the Over The Counter (**OTC**) Markets and the Frankfurt Stock Exchange. The average trading volume rises to hundreds of thousands of securities traded daily.

[10] On July 19, 2012, Mr. Chandler, a Québec resident, purchased VW securities in the form of 300 of VW's sponsored unlisted American Depositary Receipts (**ADR**) listed on the OTC Markets Group for a total of US $9,627.00.[1] On June 14, 2016, Mr. Chandler sold his 300 ADR at US $30.3083 per share for a total of US $9,092.49.

[11] ADR are an American instrument which confers upon its purchaser a form of indirect ownership over foreign securities that are not traded directly on a national

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[1] Exhibit P-12.

exchange in the United States. ADR do not appear to be sold directly in Québec, but rather in the United States.

[12] Five ADR correspond to one underlying ordinary share of VW.

[13] On September 18, 2015, the US Environmental Protection Agency (**EPA**) issued a Notice of Violation of the *Clean Air Act* to VW (as well as other entities in the same corporate group) alleging that VW had installed software on some of its vehicles from model years 2009-2015 that circumvented EPA emissions standards for certain air pollutants.

[14] Concomitantly with the issuance of the Notice of Violation, VW publicly admitted that it had created and installed a software function in the auxiliary emissions control device (**AECD**) of its 2.0L and 3.0L diesel engines (**Corrective Disclosure**). This device (**Cheating Device**) allowed VW to cheat US emissions tests and made its diesel vehicles appear cleaner than they actually were.

[15] The Cheating Device was designed to recognize whether the vehicle was undergoing US emissions testing or whether it was being driven on a road under normal conditions. If the Cheating Device detected that it was being tested, the vehicle would perform in an emissions mode that met US emission standards. If the vehicle was not being tested, it would operate in a different mode which emitted 40 times more atmospheric pollutants than permitted.

[16] According to Mr. Chandler, VW branded its diesel engines as "clean diesel engines", while they were not in light of the applicable emissions standards.

[17] The publication, on March 12, 2009, of VW's 2008 annual report which did not disclose the creation and the implementation of the Cheating Device in its vehicles marks the beginning of the proposed class period. The Corrective Disclosure made by VW on September 18, 2015, marks the end of the proposed class period.

[18] Mr. Chandler argues that throughout the class period, VW engaged in a scheme to defraud its investors by preparing and releasing documents containing misstatements and omissions of material facts regarding its business operations.

[19] Mr. Chandler concludes that as a result of the Corrective Disclosure, the value of VW securities dropped. He notes that by the tenth trading day following the release of the Corrective Disclosure, the value of VW's securities dropped 36.46%.

III. ANALYSIS

A. The Test for Authorization to Bring a Class Action under the *CCP*

[20] Before a person can be authorized to bring a class action on behalf an entire group and be appointed as the class's representative, that person bears the burden of demonstrating that the four conditions set out in Article 575 of the *Code of Civil Procedure* (***CCP***) are met:

> 575. The court authorizes the class action and appoints the class member it designates as representative plaintiff if it is of the opinion that
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> (1) the claims of the members of the class raise identical, similar or related issues of law or fact;
>
> (2) the facts alleged appear to justify the conclusions sought;
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> (3) the composition of the class makes it difficult or impracticable to apply the rules for mandates to take part in judicial proceedings on behalf of others or for consolidation of proceedings; and
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> (4) the class member appointed as representative plaintiff is in a position to properly represent the class members.

[21] As repeatedly outlined in the case law, the authorization stage of a class action is merely a procedural filtering process and the role of the motion judge is limited at this stage:[2]

> [34] […] In clear terms, particularly since its decision in *Infineon*, the Supreme Court has repeatedly emphasized that the judge's function at the authorization stage is only one of filtering out untenable claims. The Court stressed that the law does not impose an onerous burden on the person seeking authorization. "He or she need only establish a 'prima facie case' or an 'arguable case'", wrote LeBel and Wagner JJ. in *Vivendi*, specifying that a motion judge "must not deal with the merits of the case, as they are to be considered only after the motion for authorization is granted".

[22] Recently, the Court of Appeal stressed that the authorization stage only requires a "superficial examination", intended to dismiss futile and manifestly ill-founded proposed claims.[3]

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2 *Sibiga v. Fido Solutions inc.*, 2016 QCCA 1299, par. 34; *Infineon Technologies AG v. Option consommateurs*, 2013 SCC 59; *Vivendi Canada Inc. v. Dell'Aniello*, 2014 SCC 1.

3 *Asselin v. Desjardins Cabinet de services financiers inc.*, 2017 QCCA 1673, par. 31.

[23] The Court will address each of the criteria of Article 575 *CCP* in turn, starting with the second criterion since it seems logical to address the three other criteria once the Court has determined the nature of the causes of action which could move forward.

B. Whether the Facts Alleged Appear to Justify the Conclusions Sought (Article 575(2) *CCP*)

[24] It is well established that in applying this criterion, the Court must take as true the allegations of the Motion for Authorization, provided that they are accompanied by *some* evidence to form an arguable case. Vague, general or imprecise assertions should not be taken as true and mere assertions without any foundation are insufficient. Nevertheless, any review of evidence pertaining to issues on the merits should be left for trial.[4]

[25] Recently, in the matter of *Zuckerman v. Target Corporation*, Justice Hamilton noted that although the criterion of Article 575(2) tends to be the most contentious issue, case law dictates that it should not be. Justice Hamilton described as follows the limited role of the Court at this stage in assessing the satisfaction of the criterion of Article 575(2) *CCP*:[5]

> [56] This tends to be the most contentious issue at the authorization stage. The recent jurisprudence of the Supreme Court of Canada and the Court of Appeal suggests that it should not be.
>
> [57] The recent jurisprudence of the Supreme Court of Canada and the Court of Appeal makes it very clear that the role of the Court at the authorization stage with respect to the merits of the proposed class action is very limited: the Court is acting as a filter and should refuse authorization only where the proposed class action is frivolous and has no chance of success. In that analysis, the burden on the petitioner is to demonstrate a *prima facie* or arguable case in light of the facts and the applicable law. This means that the petitioner must allege, with sufficient precision and with some supporting evidence, all of the elements of a valid cause of action. The Court is to assume that the petitioner will be able to prove the allegations at trial, unless they are too vague, general or imprecise to amount to anything more than speculation or hypotheses on the petitioner's part or they are clearly contradicted by uncontroverted evidence. The Court must then assess whether the allegations are sufficient for a valid cause of action.
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> [58] The Court will therefore find that the petitioner has not met the condition in article 575(2) in the following circumstances:

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4 *Infineon Technologies AG v. Option consommateurs*, 2013 SCC 59, par. 67-68 and 134.

5 *Zuckerman v. Target Corporation*, 2017 QCCS 110, par. 56-58.

- The petitioner fails to allege an essential element of the recourse that he or she seeks to institute;
- The allegations are too vague to amount to anything more than supposition on the petitioner's part;
- Allegations which are essential to the recourse are clearly contradicted by uncontroverted evidence; or
- The recourse that the petitioner seeks to institute is not valid as a matter of law.

(References omitted)

[26] In sum, the Applicant is not required to prove that his claim will likely be successful. He is only required to present an arguable case, and even if, ultimately, the action may be dismissed on the merits, the class action should be allowed to proceed.[6]

1. Jurisdiction of the Québec Courts

[27] VW pleads that Mr. Chandler's claim must fail since the Québec courts do not have jurisdiction over the matter under Article 3148 *CCQ.* That provision indicates when the Québec authorities have jurisdiction over personal actions of a patrimonial nature, including an action in extra-contractual liability.

[28] In a novel approach, VW states that, at the authorization stage, it is not raising the jurisdiction issue as a preliminary or declinatory exception based on Articles 166 and 167 *CCP*. Rather, VW invokes the lack of jurisdiction of the Québec courts only as part of its argument under Article 575(2) *CCP* respecting whether the facts alleged appear to justify the conclusions sought with respect to the jurisdiction of the Québec courts. Taking VW's approach, the question to be determined by the Court is not whether the Québec courts lack jurisdiction to hear the Motion for Authorization or, ultimately, the proposed action, but rather, at the authorization stage, taking the facts alleged to be true, whether Mr. Chandler has satisfied his burden to demonstrate that the Québec courts appear to have such jurisdiction.

[29] Mr. Chandler contends that VW has already waived its right to raise a declinatory exception based on lack of jurisdiction or that it has attorned to the Superior Court's jurisdiction. Therefore, in his view, the Court should not address VW's argument under Article 575(2) *CCP* since it is merely a subset of the same argument. Subsidiarily, Mr. Chandler submits that the criterion of Article 575(2) is satisfied with respect to the jurisdictional argument.

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[6] *Infineon Technologies AG v. Option consommateurs*, 2013 SCC 59, par. 65.

[30] Considering the framing of the jurisdictional argument by VW and the fact that it is not raising that argument in support of a declinatory exception, the question arises as to whether the Court should even address Mr. Chandler's argument that VW waived its right to raise a declinatory exception based on lack of jurisdiction or has attorned to the Superior Court's jurisdiction.

[31] The Court believes that it should. Indeed, if VW did waive its right to raise a declinatory exception based on lack of jurisdiction of the Québec courts at the authorization stage, it would necessarily follow that VW is also precluded from raising that same jurisdictional argument in the context of the determination of whether the criterion of Article 575(2) is met. Allowing VW to raise the jurisdictional argument under Article 575(2) while it would have waived its right to raise a declinatory exception based on lack of jurisdiction would amount to allowing VW to do indirectly what it cannot do directly, that is to contest the Motion for Authorization on the basis of lack of jurisdiction of the Québec courts or, to put it in VW's words, on the basis of the absence of apparent jurisdiction of the Québec courts. Simply put, in the Court's view, VW cannot have its cake and eat it!

[32] Firstly, the Court will address the issue of whether VW waived its right to raise the lack of jurisdiction of the Québec courts at the authorization stage. Secondly, the Court will turn to the issue of whether the Québec courts appear to have jurisdiction to hear the present matter.

a) Whether VW waived its right to raise a declinatory exception based on lack of jurisdiction

[33] At the outset, the Court notes that the lack of jurisdiction raised by VW relates to jurisdiction *ratione personae*, which can be waived explicitly or implicitly.[7]

[34] While it is true that in its answer dated May 8, 2017, as well as in its letter of June 23, 2017, to the Coordinating Judge of the Class Action Division in Montréal,[8] VW initially reserved its rights to eventually raise declinatory exceptions, VW later confirmed that it would not raise any such exception.

[35] In fact, during a case management conference held on September 1, 2017, the Court specifically asked VW whether it intended to file any declinatory motion and VW responded in the negative.[9] Three other case management conferences were held after that date and the issue of jurisdiction was never raised.

[36] In addition to its clearly stated intention not to raise any declinatory exception, VW is also presumed to have waived the jurisdictional argument at the authorization

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7 *Lagasse v. McElligott*, 1992 CanLII 3580 (QC CA), par. 14-15.
8 Letter from Mr. Stéphane Pitre to the Honourable Pierre-C. Gagnon, dated June 23, 2017.
9 *Procès-verbal d'audience*, dated September 1, 2017.

stage because it filed a motion for leave to submit relevant evidence under Article 574 *CCP* (which motion was granted by the Court) and examined Mr. Chandler out of court under no reserve whatsoever and without ever raising the jurisdictional argument.[10]

[37] In light of the foregoing, the Court determines that VW did, in fact, waive its right to raise a declinatory exception based on lack of jurisdiction at the authorization stage. This implies that VW has also waived its right to raise the jurisdictional argument under Article 575(2). Having reached this conclusion, the Court does not have to address the argument under Article 575(2). However, for the sake of completeness, the Court will address that argument.

b) Whether the Québec courts appear to have jurisdiction to hear the present matter

[38] The Québec courts will have jurisdiction to hear the present matter if any one of the criteria of Article 3148 *CCQ* is satisfied:

> 3148. In personal actions of a patrimonial nature, Québec authorities have jurisdiction in the following cases:
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> (1) the defendant has his domicile or his residence in Québec;
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> (2) the defendant is a legal person, is not domiciled in Québec but has an establishment in Québec, and the dispute relates to its activities in Québec;
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> (3) a fault was committed in Québec, injury was suffered in Québec, an injurious act or omission occurred in Québec or one of the obligations arising from a contract was to be performed in Québec;
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> (4) the parties have by agreement submitted to them the present or future disputes between themselves arising out of a specific legal relationship;
>
> (5) the defendant has submitted to their jurisdiction.
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> However, Québec authorities have no jurisdiction where the parties have chosen by agreement to submit the present or future disputes between themselves relating to a specific legal relationship to a foreign authority or to an arbitrator, unless the defendant submits to the jurisdiction of the Québec authorities.
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> (Our emphasis)

[39] The parties agree that the only relevant criterion in the present matter is the one provided at Article 3148(3). As long as it appears that "a fault was committed in

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[10] *Droit de la famille — 111902*, 2011 QCCS 3356, par. 15.

Québec" or that an "injury was suffered in Québec", the Québec courts have jurisdiction over the matter.

[40] As explained below, the Court finds that, at the authorization stage, taking the facts alleged as true, the Québec courts do appear to have jurisdiction to hear the proposed class action.

(1) Whether a fault was committed in Québec

[41] No contract is alleged to have been entered between Mr. Chandler and VW and Mr. Chandler specifies that the nature of his recourse is extra-contractual.

[42] VW contends that since no fault was committed in Québec, that criterion cannot ground Québec courts' jurisdiction.

[43] The Court agrees with VW's contention.

[44] Based on the allegations of the Motion for Authorization, VW's failure to disclose adverse material facts and the misstatements relating to VW's compliance with the US emission standards all relate to VW's financial information, published in its core or non-core documents.

[45] Although VW's financial information may have been available in Québec, there is no allegation that the documents in which the information is contained emanated from or were prepared in Québec or that any decision to publish that information was made or carried out from Québec.

[46] Also, there is no allegation that VW's alleged violation of the International Financial Reporting Standards (IFRS) would have been committed in Québec.

[47] In that context, the mere allegations that VW "sent Core Documents such as proxies and annual reports as well as non-core documents to investors and Class Members in Québec" or that these documents were "sent to and accessible by investors in Québec"[11] are insufficient to conclude that a fault was committed in Québec.

[48] Therefore, it does not appear that a fault was committed in Québec pursuant to Article 3148(3) *CCQ*.

[11] Motion for Authorization, par. 5, 42 and 44.

(2) Whether an injury was suffered in Québec

[49] Based on the teachings of the Court of Appeal in the matter of *Infineon*,[12] VW argues that no injury was suffered in Québec, as opposed to only being recorded here.

[50] The Court does not agree.

[51] In *Poppy Industries Canada Inc. v. Diva Delights Ltd.*, Justice Roy, writing for the Court of Appeal, recalls that where financial damage is merely recorded in Québec, that fact is not sufficient to ground jurisdiction under Article 3148(3).

[52] However, Justice Roy goes on to explain that Article 3148 sets out a broad basis for jurisdiction. As indicated in *Infineon*, purely economic damage is not *per se* excluded from the scope of Article 3148 *CCQ* and economic damage can serve as a connecting factor, as long as it is suffered in Québec:[13]

> [40] Much has been written on the situs of the injury when the loss is an economic loss: some suggest a broader interpretation of Article 3148 (3) C.C.Q., others prefer a more restrictive approach. In 2013, the Supreme Court of Canada addressed the issue in *Infineon Technologies AG v. Option consommateurs*, in a judgment authorizing a class action. It referred to the distinction between damage suffered in Québec and damage simply recorded in Québec:
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> > [45] Damage suffered in Québec is an independent factor under art. 3148(3): the damage does not need to be tied to the locus of the injury or of the fault, unlike in the case of art. 3168, to give one example. Any one of the four individual factors listed in art. 3148(3) would constitute a sufficient connection with the province to ground jurisdiction […]. In terms of the type of damage covered by art. 3148(3), there is no principled reason to exclude purely economic damage from its scope. The plain language of art. 3148(3) does not preclude economic damage from serving as a connecting factor, nor is the recovery of a purely economic loss prohibited in Québec civil law […]. It is clear from the Québec jurisprudence that economic damage can serve as a connecting factor under art. 3148(3) […].
> >
> > [46] *Quebecor Printing*, a case the appellants rely on, should not be read so broadly as to systematically exclude a purely economic loss as a type of damage to which art. 3148(3) applies. Rather, that case indicates that where financial damage is merely recorded in Québec, that fact is not sufficient to ground jurisdiction under art. 3148(3). To satisfy the requirement of art. 3148(3), the damage must be *suffered* in Québec. As Kasirer J.A. explained in the judgment of the Court of Appeal in the case

[12] *Option Consommateurs v. Infineon Technologies, a.g.*, 2011 QCCA 2116, par. 64, conf'd *Infineon Technologies AG v. Option consommateurs*, 2013 SCC 59, par. 46.

[13] *Poppy Industries Canada Inc. v. Diva Delights Ltd.*, 2018 QCCA 163, par. 40-41.

> at bar, there is a distinction between damage that is substantially suffered in Québec and damage that is simply recorded in Québec on the basis of the location of the plaintiff's patrimony:
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> > [*Préjudice*] is to be distinguished from the "*dommage*/damage" that is the subjective consequence of the injury relevant to the measure of reparation needed to make good the loss. As a result, in specifying "damage was suffered in Québec/un préjudice y a été subi" as the relevant connecting factor, article 3148(3) seeks to identify the substantive *situs* of the "bodily, moral or material injury which is the immediate and direct consequence of the debtor's default" (article 1607 C.C.Q.) and not the *situs* of the patrimony in which the consequence of that injury is recorded. [para. 65]
>
> [47] This application of the C.C.Q. is not, as the appellants assert, a novel, or undue, extension of Québec's jurisdiction. Rather, it is based on the language of art. 3148(3) and on the jurisprudence. As this Court stated in *Spar Aerospace*, at para. 58, "[t]here is abundant support for the proposition that art. 3148 sets out a broad basis for jurisdiction."
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> [41] The legislator replaced the word "damage" with the word "injury" in May 2014, as part of a series of amendments made to ensure terminological uniformity without changing the substance of the text, as allowed by section 3 of the Act respecting the Compilation of Québec Laws and Regulations.
>
> (References omitted)

[53] Here, the Court finds that on a *prima facie* basis, there is an arguable argument to be made that the loss alleged to have been incurred by Mr. Chandler was not merely a loss recorded in Québec, but rather an injury that was really suffered in Québec. Based on the facts as pleaded, Mr. Chandler :

a) Resides in Québec;

b) Made his purchase and sell orders for VW securities in Québec;

c) Received confirmation of the purchase and sell orders in Québec;

d) Held the securities in Québec; and

e) Suffered monetary loss in Québec.

[54] This is sufficient to establish the Court's jurisdiction at this stage, not only with respect to Mr. Chandler, but also the whole class as defined.

[55] Considering the conclusion of the Court, it is not necessary to address Mr. Chandler's additional argument that the Court also has jurisdiction to hear the present matter pursuant to Section 236.1 of the *Securities Act.*[14]

2. Whether Mr. Chandler appear to have a valid cause of action in damages

[56] Mr. Chandler's proposed claim is based on Article 1457 *CCQ* which reads as follows:

> 1457. Every person has a duty to abide by the rules of conduct which lie upon him, according to the circumstances, usage or law, so as not to cause injury to another.
>
> Where he is endowed with reason and fails in this duty, he is responsible for any injury he causes to another person by such fault and is liable to reparation for the injury, whether it be bodily, moral or material in nature.

[57] The requisite elements for a claim in damages based on extra-contractual liability under Article 1457 *CCQ* are the following: (i) that the defendant committed a fault, (ii) that the plaintiff suffered an injury, and (iii) that there is a causal link between the fault and the injury.

[58] The legal syllogism put forward by Mr. Chandler is straightforward. He argues that pursuant to Article 1457 *CCQ*, VW was required to disclose facts that could affect the price of its securities as well as the decision of a reasonable investor to acquire VW's securities, or conversely that VW was required not to disclose facts that it knew to be false or constitute misrepresentations. According to Mr. Chandler, the failure to respect these obligations constituted a fault and the loss suffered by the proposed class members results from that fault.

[59] To succeed at trial, Mr. Chandler will need to prove the allegations on the balance of probabilities. At the authorization stage, all that he is required to do, however, is to demonstrate (not prove) that he appears to have (not that he has) a valid cause of action. In sum, his burden is merely to demonstrate a *prima facie* or arguable case in light of the alleged facts and the applicable law.[15]

[60] The Court is satisfied that Mr. Chandler has alleged facts with sufficient particularity to support his legal syllogism and the civil liability claim:

a) With respect to the fault, it is alleged that VW committed a fault by making misrepresentations about its business affairs and products;

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[14] CQLR, c. V-1.1.

[15] *Infineon Technologies AG v. Option consommateurs*, 2013 SCC 59, par. 65-67 and 127.

At the hearing, VW admits that the facts alleged are sufficient to constitute a fault for the purposes of the authorization stage.

b) With respect to the injury, it is alleged that Mr. Chandler purchased VW ADR and suffered damages from the loss of value of this ADR once the Corrective Disclosure confirming the installation on its vehicles of the Cheating Device was published; and

c) With respect to the causal link, it is alleged that the injury was caused by VW's misrepresentations.

[61] VW pleads that Mr. Chandler does not appear to have a valid cause of action because there is no proof that Mr. Chandler relied on VW's misrepresentations to purchase his VW securities.

[62] The Court disagrees, on the basis that reliance is not required under Québec law.

[63] VW conflates the notions of causality and reliance. These are two different, though sometime overlapping concepts. The confusion of VW seems to originate from its misconception that a claim under Article 1457 *CCQ* is equivalent to a misrepresentation claim brought under the common law. Again, these are two different concepts.

[64] In *Ménard v. Matteo*, Justice Buffoni explained that although the civil law and the common law are systems of great internal consistency and that they often arrive at the same legal solution for a given set of facts, their approach is fundamentally different.[16]

[65] To establish causation, one must show that the injury suffered was an immediate and direct consequence of the fault.[17] Subject to the requirement of directness, causality under Québec's general civil liability regime simply requires that a plaintiff prove that the injury suffered results from the fault that was committed or, in other words, that the injury is caused by the fault committed.

[66] Furthermore, although the element of causation must be demonstrated for all the members of the group, in some circumstances, causality may be inferred. A collective determination of causation is possible if proven facts establish a presumption of fact that may apply to all members of the group.[18]

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16 *Ménard v. Matteo*, 2011 QCCS 4287, par. 54.
17 Article 1607 *CCQ*.
18 *Biondi v. Syndicat des cols bleus regroupés de Montréal (SCFP-301)*, 2010 QCCS 4073, par. 136-146

[67] The Court is aware that in *Theratechnologies*, Justice Abella, writing for the Supreme Court of Canada, made reference to reliance in describing the causality requirement. She said:

> [28] […] To establish civil liability, claimants were required to prove a fault, such as the publication of misinformation or the failure to meet a statutory disclosure obligation; that they suffered prejudice; and that there was a causal link between the fault and the prejudice — that is, that they had relied on the misinformation in making the trade […]
>
> (Our emphasis)

[68] However, at paragraph 27, Justice Abella specifies that reliance is a requisite element of the tort of negligent misrepresentation in the common law jurisdiction. The reference to reliance at paragraph 28 only seems to be an indication of the equivalent, yet different, requirement under Québec law.

[69] Therefore, for the purposes of a claim under Article 1457 *CCQ*, the Court finds that although reliance may often be sufficient to prove causation, it is not necessary. In other words, reliance is not necessarily a requisite element of causality. Although it may be easier to prove causality in the presence of reliance, there can nevertheless be causality without reliance.

[70] Here, Mr. Chandler claims that the causality element is satisfied in that as a result of VW's fault, its stock was artificially inflated during the class period and plummeted after the publication of the Corrective Disclosure, thus causing the alleged injury.

[71] Mr. Chandler will need to prove that theory at trial, but at the authorization stage, these allegations appear to justify the conclusions sought.

[72] In any event, should reliance be a requisite element under Québec civil law, the Court is of the view that the Motion for Authorization alleges reliance with sufficient particularity for the purposes of the authorization stage.

[73] Paragraph 4 of the Motion for Authorization alleges that "In order to encourage investors to purchase its securities, the Defendant published its core and non-core documents on its website which was accessible to and read by investors in Québec".

[74] At paragraphs 73 and 74, Mr. Chandler alleges the following:

> 73. The Plaintiff relied on the fact that the Defendant's portrayal of its business, affairs and operations was truthful and accurate;
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> 74. The Plaintiff would not have purchased VW's securities had he been aware that the Defendant had established and implemented a fraudulent scheme

> to defeat US emissions tests. Moreover, the same is true of the Class as VW's misrepresentations and omissions of fact were material;

[75] In addition, Mr. Chandler testified that prior to investing in a company, he systematically reviews its financial statements.[19] He also testified that prior to purchasing VW's ADR, he "debated the merits and looked at some financial data" with his investment counsellor and that he reviewed VW's 2012 financial results.[20] Assuming that reliance is required under Québec law, reliance on some of the financial information of VW is sufficient at this stage.

[76] The fact that Mr. Chandler only reviewed some of the financial information of VW as opposed to the integrality of its annual reports is irrelevant at this stage because Mr. Chandler complains not only that VW made false representations in its financial documents, but also that it failed to disclose the existence of the Cheating Device. Claiming that Mr. Chandler should have reviewed the annual reports to rely on an absence of disclosure is a *non sequitur*.

[77] In sum, Mr. Chandler's legal syllogism covers all the requisite elements for a claim in damages under Article 1457 *CCQ* and is supported by allegations that are accompanied by some evidence to form an arguable case.

3. Claim for punitive damages

[78] At paragraph 77 of the Motion for Authorization, Mr. Chandler seeks "punitive damages due to the Defendant's deliberate and egregious conduct over the span of six (6) years."

[79] VW argues that Mr. Chandler's claim for punitive damages must fail, as Mr. Chandler does not have a stand-alone right to punitive damages in this case.

[80] Under Article 1621 *CCQ*, punitive damages can only be awarded where they are provided for by a specific enabling enactment:[21]

> 1621. Where the awarding of punitive damages is provided for by law, the amount of such damages may not exceed what is sufficient to fulfil their preventive purpose.
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> Punitive damages are assessed in the light of all the appropriate circumstances, in particular the gravity of the debtor's fault, his patrimonial situation, the extent of the reparation for which he is already liable to the creditor and, where such is the

[19] Exhibit P-37, Transcript of Mr. Chandler's Examination, p. 8 lines 19-25, to p. 9 lines 1-14, p.9 line 23-25 to p. 10 lines 1-16.
[20] Exhibit P-37, Transcript of Mr. Chandler's Examination, p. 12 line 21 to 23.
[21] *Cinar Corporation v. Robinson*, 2013 SCC 73, par. 113.

> case, the fact that the payment of the reparatory damages is wholly or partly assumed by a third person.
>
> (Our emphasis)

[81] The Court agrees that the claim for punitive damages should not be authorized. The cause of action proposed by Mr. Chandler is grounded solely on Article 1457 *CCQ* and the law does not provide for the award of punitive damages for that cause of action.

[82] The Motion for Authorization specifically alleges a right of action solely under Article 1457 *CCQ*:

> VI - RIGHT OF ACTION UNDER ART. 1457 OF THE CIVIL CODE OF QUÉBEC
>
> 70. The Plaintiff asserts a civil right of action under art. 1457 of the CCQ on behalf of all class Members against the Defendant based on its misrepresentations, egregious conduct, fraud, negligence and breach of its general duty of diligence owed to the Class Members;
>
> 71. The Defendant's violations of its duty of diligence are particularized herein;
>
> 72. The Defendant did not fulfill its legal obligations warranted by its special relationship with the Class Members;

[83] Furthermore, in addressing the criterion of Article 575(2) *CCP* which entails the assessment of the causes of action proposed by a person seeking to institute a class action and the legal syllogism that supports these causes of action, Mr. Chandler again only refers to a cause of action under Article 1457 *CCQ*:

> VII – CRITERIA OF ART. 575 CCP
>
> A. The facts alleged appear to justify the conclusions sought
>
> 80. The Defendant's Core Documents contained misrepresentations of material facts;
>
> 81. The Defendant released its Core Documents on a yearly basis;
>
> 82. From 2009 to 2015, the Defendant released Core Documents containing misrepresentations which failed to disclose the fact that it had installed a Cheating Device in its vehicles in order to comply with US emission standards;
>
> 83. The Defendant intentionally or negligently breached its duty as imposed under art. 1457 CCQ by making misstatements regarding the Cheating Device, thus giving rise to the Plaintiff's claim for misrepresentations;

> 84. Additionally, the Defendant intentionally failed to recognize adequate provisions as per Standard 37 of the IAS;
>
> 85. In light of the above, the Defendant is directly liable to the Plaintiff and Class Members;
>
> (Our emphasis)

[84] It transpires clearly from the Motion for Authorization that the only cause of action alleged by Mr. Chandler is a violation of the general duty imposed under Article 1457 *CCQ*. No other causes of action are alleged in the Motion for Authorization.

[85] Mr. Chandler does not dispute that punitive damages cannot be claimed in a cause of action grounded solely on Article 1457 *CCQ*. However, to circumvent that impediment, Mr. Chandler adds at the hearing that his right to information pursuant to Section 44 of the Québec *Charter of Human Rights and Freedoms*[22] has been breached. That Section guarantees that:

> 44. Every person has a right to information to the extent provided by law.

[86] Since Section 49 of the *Charter* provides that punitive damages may be awarded if there is an unlawful and intentional interference with any of the rights and freedoms that the *Charter* recognizes, Mr. Chandler pleads that his claims for punitive damages should be authorized. Article 49 reads as follows:

> 49. Any unlawful interference with any right or freedom recognized by this Charter entitles the victim to obtain the cessation of such interference and compensation for the moral or material prejudice resulting therefrom.
>
> In case of unlawful and intentional interference, the tribunal may, in addition, condemn the person guilty of it to punitive damages.

[87] Mr. Chandler acknowledges that the right which is protected under Section 44 of the *Charter* is a right to information as "provided by law". In order to fit into that mould, Mr. Chandler claims that his right to information provided by law which was violated is his right to have VW provide full and fair disclosure pursuant to the general principles of civil liability under Article 1457 *CCQ* as well as his statutory right to have VW accurately disclose information under Section 74 of the *Securities Act.*

[88] The Court cannot accept these arguments.

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[22] CQLR, c. C-12 (***Charter***).

[89] Firstly, as appears from the wording of Section 44 of the *Charter* and as confirmed by the parliamentary debate surrounding its adoption,[23] the legislator did not provide an absolute right to information. Although the *Charter* must receive a broad and liberal interpretation, Section 44 of the *Charter* only guarantees the right to information when that right is provided for in a specific statute. That is the meaning of the words "to the extent provided by law" or, in French "*dans la mesure prévue par la loi*". According to the Court, it is not possible to invoke that the general principles of civil liability under Article 1457 *CCQ* afford a right to information within the meaning of Section 44 of the *Charter*. Rather, to claim an infringement to Section 44 of the *Charter*, a claimant must identify a specific statutory provision providing a right to information.

[90] Secondly, with respect to the alleged violation to Section 74 of the *Securities Act*, Mr. Chandler cannot ask the Court to read into the Motion for Authorization a completely different cause of action which is simply not there. The Motion for Authorization does not allege any breach of any reporting obligations under the *Securities Act* and the proposed cause of action in the Motion for Authorization is not related to any alleged breach under the *Securities Act*. Mr. Chandler's reliance on Section 74 of the *Securities Act* appears to be an afterthought only designed to build a tentative foundation for a claim in punitive damages which is non-existent.

[91] In light of the above conclusions, it is not necessary to determine whether VW, although it is admittedly not a reporting issuer under the *Securities Act*, nevertheless has obligations under the *Securities Act*.

[92] The Court is aware that at the authorization stage, the Motion for Authorization must be read broadly and that the petitioner's burden to demonstrate a *prima facie* or arguable case is low.[24] However, even read as broadly as possible, the allegations of the Motion for Authorization do not appear to justify the conclusions sought in relation to the claim for punitive damages. Any question relating to that cause of action will thus not be authorized.

C. Whether the Claims Raise Identical, Similar or Related Issues of Law or Fact (Article 575(1) *CCP*)

[93] The Court must apply a flexible approach to the assessment of this criterion. The identification of only one common issue is sufficient if that issue allows the resolution of a portion of the dispute which is not insignificant:[25]

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[23] Québec, Assemblée nationale, Journal des débats. Commissions parlementaires, Commission permanente de la justice, 3e sess., 30e légis., 26 juin 1975, « Étude du projet de loi n° 50 — Charte des droits et libertés de la personne », p. B-5115.

[24] *Union des consommateurs v. Bell Mobilité inc.*, 2017 QCCA 504, par. 42.

[25] *Sibiga v. Fido Solutions inc.*, 2016 QCCA 1299, par. 122; *Infineon Technologies AG v. Option consommateurs*, 2013 SCC 59, par. 60 and 72-73; *Vivendi Canada Inc. v. Dell'Aniello*, 2014 SCC 1, par. 41-47, 53, 55 and 57-58.

> [122] In *Vivendi*, LeBel and Wagner JJ. proposed a "flexible" approach to article 1003(a) according to which the identification of one common question would be sufficient. Their Lordships recognized that variation might exist within the class and that this was not a bar to meeting the common question requirement. Drawing on decided cases in Québec, they wrote:
>
> > [58] […] To meet the commonality requirement of art. 1003(a) C.C.P., the applicant must show that an aspect of the case lends itself to a collective decision and that once a decision has been reached on that aspect, the parties will have resolved a not insignificant portion of the dispute. […] All that is needed in order to meet the requirement of art. 1003(a) C.C.P. is therefore that there be an identical, related or similar question of law or fact, unless that question would play only an insignificant role in the outcome of the class action. It is not necessary that the question make a complete resolution of the case possible.

[94] In *Vivendi Canada Inc. v. Dell'Aniello*, the Supreme Court of Canada cautioned about importing into Québec the commonality requirement applicable in the common law provinces because of the significant distinctions between the two legal regimes. The test is simply not the same:[26]

> [53] Although the expression "common issues" is frequently used by Québec judges and authors, its content is not exactly the same as that of the expression "identical, similar or related questions of law or fact". It would be difficult to argue that a question that is merely "related" or "similar" could always meet the "common issue" requirement of the common law provinces. The test that applies in Québec law therefore seems to be less stringent. Because of the differences in the wording of the applicable legislation, the case law on class actions from the common law provinces is not determinative where the application of the criterion of art. 1003(a) is concerned.
>
> [54] In addition, it can be seen from the Québec courts' interpretation of art. 1003(a) C.C.P. that their approach to the commonality requirement has often been broader and more flexible than the one taken in the common law provinces. The Québec courts propose a flexible approach to the common interest that must exist among the group's members: P.‑C. Lafond, *Le recours collectif comme voie d'accès à la justice pour les consommateurs* (1996), at p. 408.

[95] Although VW admits that the facts alleged are sufficient to constitute a fault for the purposes of the authorization stage, it specifically denies the existence of a fault for the purposes of the hearing on the merits. That question will thus be contested on the merits.

[96] According to the Court, the question of whether VW committed a fault by creating and installing the Cheating Device in its vehicles and by claiming that its diesel engines

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[26] *Vivendi Canada Inc. v. Dell'Aniello*, 2014 SCC 1, par. 53-54.

complied with the applicable emissions standards raises common issues of law and fact. That question is far from being insignificant and the answer provided will significantly advance the claim for the benefit of the entire class.

[97] That alone suffices for the criterion of Article 575(1) *CCP* to be met.

[98] Although individual queries may arise as to the circumstances surrounding the purchase of securities from each member or the assessment of individual damages, considering the importance of the common issue identified by the Court, the possibility that such individual questions arise is not sufficient to negate the fact that the criterion of Article 575(1) *CCP* is easily met in this case. Furthermore, without deciding the matter, the Court notes that it is possible that the judge hearing the merits of this case will rely on presumptions and inference to answer these questions.[27]

[99] In his Motion for Authorization, Mr. Chandler proposes that the following questions of fact and law be dealt with collectively:

i) During the Class Period, did the Defendant deceive the Representative Plaintiff and Class Members, as well as the general public?

ii) If so, was the Defendant's deceit intentional?

iii) During the Class Period, did the Defendant publish documents that contained misrepresentations?

iv) If so, were those misrepresentations intentional?

v) Did the Defendant's misrepresentations cause damages to the Representative Plaintiff and Class members?

vi) If so, is the Defendant liable to the Representative Plaintiff and Class members for those damages under Article 1457 of the *CCQ*?

vii) What are the damages sustained by the Class Members? and

viii) Does the Defendant's conduct warrant an award in punitive damages and if so, in what amount?

[100] Considering that the Court is not authorizing the claim for punitive damages, proposed question viii) becomes irrelevant.

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[27] *Catucci v. Valeant Pharmaceuticals International Inc.*, 2017 QCCS 3870, par. 322-323; *Ménard v. Matteo*, 2011 QCCS 4287, par. 51 and 61-69; *Comité syndical national de retraite Bâtirente inc. v. Société financière Manuvie*, 2011 QCCS 3446, par. 98-99; *Biondi v. Syndicat des cols bleus regroupés de Montréal (SCFP-301)*, 2010 QCCS 4073, par. 131, 136-143, varied on appeal 2013 QCCA 404 although not on the principles.

[101] As for proposed questions ii) and iv), although they are notably set out to constitute a foundation for the claim in punitive damages, the Court will nevertheless authorize these questions because the qualification of the nature of the fault alleged to have been committed by VW may be relevant under Article 1457 *CCQ*. Indeed, even if intent to harm and willingness to cause damages are not required in order to find a civil fault, the distinction between an intentional act and an involuntary act may be of some interest in the assessment of the compensation to be awarded or, in some instances, in the determination of causation.[28]

D. Whether the Composition of the Class makes it Difficult or Impracticable to Apply the Rules for Mandates or Consolidation of Proceedings (Article 575(3) *CCP*)

[102] To meet the Article 575(3) *CCP* requirement, the Applicants must show, at a minimum, that there is a class, and that the class is of a size or nature that makes the procedural alternatives to class procedure difficult or impracticable.

[103] To determine whether the Applicants have met their burden, the Court must generally be provided with some information as to the potential size of the group and its essential characteristics.

[104] VW pleads that the criterion of Article 575(3) has not been met as Mr. Chandler failed to allege that a single other Québec resident purchased VW ADR or is in a situation similar to that of his own.[29]

[105] The Court does not agree. First, the proposed class is not limited to residents who purchased ADR, but rather purports to include residents of Québec who purchased VW securities during the Class Period.

[106] Second, in *Lambert (Gestion Peggy) v. Écolait ltée*, Justice Bélanger, writing for the Court of Appeal, indicated that this criterion must receive the same broad and liberal interpretation as the other criteria to authorize a class action.[30]

[107] In that context, the Court finds that the allegations of the Motion for Authorization are sufficient to satisfy this criterion. In particular, paragraphs 93 to 96 notably allege the following:

a) As of December 31, 2015, VW's share capital consisted of 295,089,818 ordinary securities and 206,205,445 preferred securities;

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[28] Vincent Karim, *Les obligations*, 4th Ed., Vol. 1, Montréal, Wilson & Lafleur, 2015, p. 1067-1068, at para 2527 and 2529.

[29] VW makes the same argument in relation to the criterion of article 575(1). The Court will however deal with the argument under the criterion of article 575(3).

[30] *Lambert (Gestion Peggy) v. Écolait ltée*, 2016 QCCA 659, par. 57.

b) VW's securities are publicly traded on worldwide stock exchanges, namely the OTC Markets and the average trading volume rises to hundreds of thousands of securities daily;

c) There are thousands of investors located in Québec who are members of the putative Class;

[108] In this instance, it is reasonable to take these facts for granted and infer the existence of a class.[31] In addition, the nature of the proposed class action and complexity of the evidence required to put the case forward, including potential expert evidence, makes it unlikely that an individual would take up that undertaking.

[109] That being said, the Court wishes to comment on the fact that on April 11, 2018, i.e. after the Motion for Authorization had been taken under advisement, counsel for Mr. Chandler took upon himself, without seeking the prior authorization of the Court, to send to the Court, via e-mail, additional argument and documentation in order to bolster his argument as to the existence of a class. Being faced with a *fait accompli*, counsel for VW responded in the same fashion. Such conduct, apart from being discourteous and unfitting, is not in accordance with the rules of procedures, particularly Article 323 *CCP*. The fact that this matter concerns the authorization to bring a class action does not allow counsel to ignore the rules applicable to all proceedings. To make it clear, the Court did not consider the additional argument and documentation provided by counsel for Mr. Chandler after the matter had been taken under advisement.

E. Whether the Representative Plaintiff is Adequate (Article 575(4) *CCP*)

[110] VW does not contest that the criterion of Article 575(4) *CCP* is met in this case.

[111] To satisfy Article 575(4) *CCP*, the representative plaintiff must establish that he or she is (1) competent, (2) has a sufficient interest in the proposed action, and (3) is not in a conflict of interest with the proposed class members.[32] In *Infineon*, the Supreme Court specifies that “No proposed representative should be excluded unless his or her interest or competence is such that the case could not possibly proceed fairly.” [33]

[112] The ability of a person to adequately represent the proposed class is assessed liberally and the threshold to satisfy this criterion is low, if not minimalist.[34]

[113] Considering the absence of contestation and the allegations of the Motion for Authorization, the Court agrees that this criterion is satisfied.

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31 *Lévesque v. Vidéotron, s.e.n.c.*, 2015 QCCA 205, par. 27.
32 *Fortier v. Meubles Léon ltée*, 2014 QCCA 195, par. 141.
33 *Infineon Technologies AG v. Option consommateurs*, 2013 SCC 59, par. 149.
34 *Infineon Technologies AG v. Option consommateurs*, 2013 SCC 59, par. 149-150; *Lévesque v. Vidéotron, s.e.n.c.*, 2015 QCCA 205, par. 23.

IV. CONCLUSION

[114] In sum, the Court finds that Mr. Chandler has met all the authorization requirements of Article 575 *CCP*, except for the claim for punitive damages. Mr. Chandler is thus authorized to bring a class action against VW.

[115] Considering that, at the hearing, the parties did not address the content of the notice to class members and the manner of dissemination of the notice, this matter will be dealt with at a subsequent hearing. The parties are directed to submit the proposed notice to class members and the distribution plan of the notice within the next 45 days.

FOR THESE REASONS, THE COURT:

[116] **GRANTS** in part the Motion for Authorization to Bring a Class Action ;

[117] **APPOINTS** the Applicant Mr. Laurence Chandler as representative of the persons included in the class described as:

> All residents of Québec who purchased Volkswagen Aktiengestllchaft's (**VW**) securities during the Class Period (i.e. between March 12, 2009, and September 18, 2015) and held all or some of those acquired VW securities until after September 18, 2015.

[118] **IDENTIFIES** the issues to be dealt with collectively as follows:

a) During the Class Period, did the Defendant deceive the Representative Plaintiff and Class Members, as well as the general public?

b) If so, was the Defendant's deceit intentional?

c) During the Class Period, did the Defendant publish documents that contained misrepresentations?

d) If so, were those misrepresentations intentional?

e) Did the Defendant's misrepresentations cause damages to the Representative Plaintiff and Class members?

f) If so, is the Defendant liable to the Representative Plaintiff and Class members for those damages under Article 1457 of the *Civil Code of Québec*? and

g) What are the damages sustained by the Class Members?

[119] **AUTHORIZE** the class action proceedings to seek the following conclusions:

a) GRANT this class action on behalf of the Class;

b) GRANT the Plaintiff's action against the Defendant in respect of the rights

of action asserted against the Defendant;

c) CONDEMN the Defendant to pay to the Plaintiff and Class Members compensatory damages for all monetary lasses;

d) ORDER collective recovery in accordance with Articles 595 to 598 of the *Code of Civil Procedure*;

e) THE WHOLE with interest and additional indemnity provided for in the *Civil Code of Québec* and with full costs and expenses, including expert fees, notice fees and fees relating to administering the plan of distribution of the recovery in this action;

[120] **ORDERS** the publication of a notice to the class members in accordance with Article 579 of the *Code of Civil Procedure*, pursuant to a further order of the Court approving the content of the notice, and **ORDERS** Defendants to pay for said publication costs;

[121] **DIRECTS** counsel for the parties to submit to the Court the proposed notice and distribution plan no later than 45 days from the present judgment, or at any other date that may be authorized by the Court, as the case may be, upon request of counsel;

[122] **FIXES** the delay for a class member to opt out of the class at 60 days from the date of the publication of the notice to the members and **DECLARES** that all members of the class who have not requested their exclusion from the class in the prescribed delay will be bound by any judgment to be rendered on the class action to be instituted;

[123] **WITH LEGAL COSTS** against Defendant including the costs related to the publication of the notices to class members.

_____
CHANTAL CHATELAIN, J.S.C.

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Dates of hearing : February 5 and 6, 2018

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