

## BLG successfully dismisses leave to appeal in class action for reasonable limitation on disclosure of “material evidence”

June 27, 2019

On June 14, 2019, the Court of Appeal dismissed the leave to appeal the decision in *Duguay v. Compagnie General Motors du Canada*, 2019 OCCC 1297. Healy J.A. upheld the Superior Court’s decision and stated that the presiding judge was justified to impose reasonable constraints on the application for disclosure.

### Judicial History

The petitioner, Frédéric Duguay, is the designated representative of the class action against GM. The class members claimed that the respondent failed to disclose the consumption of gasoline at below zero temperatures by the Volt model, even when fully charged to operate by electricity. The petitioner requested GM to disclose data collected by the computer system in the vehicles of each member of the class. He claimed that this data was necessary for the expert to evaluate the rate of consumption of gasoline and to assess an order for collective recovery and the calculation of damages

Duguay’s request was based on article 251 of the Civil Code of Procedure (C.C.P.). The Superior Court conferred that a request for prior disclosure of documents in a class action was governed by the same rules as in an ordinary civil proceeding. However, the information requested by Duguay was not accessible by the defendant through reasonable means. Although electronic data is considered « material evidence » for the purpose art. 251 C.C.P. and the data sought might be relevant for the petitioner’s action, the intensive manipulation and reorganisation of the massive volume of relevant data for each of the 13,341 vehicles did not justify the request. In other words, a party has an obligation to disclose material and accessible information that already exists in its possession or is reasonably accessible. However, this obligation does not impose a duty to undertake all means necessary to create admissible evidence upon opposing party’s request.

The Superior Court dismissed the application for disclosure on two grounds. First, while the relevant data exist in the hands of the respondent (in the form of “Big Data”), there are no “documents” that collate, compile and present the information sought by the

petitioner. Second, no such documents could be created without imposing upon the respondents an unreasonable burden.

## Court of Appeal Judgment

Healy J.A. upheld the Superior Court’s decision, stating that no palpable and overriding error was found in the judgment. The right to the disclosure of material evidence is not unlimited and the presiding judge has the discretion to reduce the financial and administrative burden on a requested party by imposing reasonable constraints. This limitation serves to ensure an appropriate proportionality between the right of a party to prove its case with accurate evidence and the duty of cooperation that lies with the defendant.

Anne Merminod and Stéphane Pitre, with the assistance of Alexandra Bornac, successfully dismissed the petitioner’s motion for leave in front of the Court of Appeal.

Expertise

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