

Federal Court



Cour fédérale

**Date: 20090827**

**Docket: T-382-09**

**Citation: 2009 FC 852**

[ENGLISH TRANSLATION]

**Montréal, Quebec, August 27, 2009**

**PRESENT: Richard Morneau, Esq., Prothonotary**

**BETWEEN:**

**NANCY BOUCHARD**

**Plaintiff**

**and**

**MITSUBISHI MOTOR SALES  
OF CANADA INC.  
and  
MITSUBISHI MOTORS NORTH AMERICA INC.  
and  
MITSUBISHI MOTORS CORPORATION**

**Defendants**

**REASONS FOR ORDER AND ORDER**

[1] This case involves ruling on two motions filed by two of the three defendants, respectively, against an action brought by the plaintiff in March 2009 under the terms of Part 5.1 of the Federal Courts Rules (the Rules) as a “Proposed Class Proceeding”.

[2] The focus of the motion by the defendant Mitsubishi Motor Sales of Canada Inc. (hereinafter Mitsubishi Canada) seeks to have the plaintiff's statement of claim struck and her action dismissed under Rule 221(1)(a) due to the fact that this Court allegedly does not have jurisdiction to hear the plaintiff's action against it.

[3] The motion and main remedy sought by defendant Mitsubishi Motors North America Inc. (hereinafter Mitsubishi America) are to the same effect. With respect to Mitsubishi America, on August 12, 2009, the plaintiff filed a motion for extension of time to serve the statement of claim that can be found at subsection 203(1) of the Rules because Mitsubishi America raises in its motion the fact that it was not served within the time set out in the Rules. We will address this motion by the plaintiff when dealing with Mitsubishi America's motion to strike.

[4] Defendant Mitsubishi Motors Corporation (hereinafter Mitsubishi Japan) is not involved in this debate at this time since the statement of claim still has not been legitimately served on it. The order accompanying these reasons will extend the plaintiff's time to do so until December 3, 2009.

### **Essential background**

[5] In her statement of claim, the plaintiff sets out, inter alia, the following:

[TRANSLATION]

The plaintiff's cause of action is as follows:

1. The plaintiff wishes to bring a class action on behalf of the persons who are part of the group hereinafter, of which she is a member, namely:

“Any natural person, body corporate, corporation, company or association that purchased or leased from a dealership in Canada, since June 1, 2006, a new vehicle manufactured, imported or distributed by the respondents (*sic*).”

(Hereinafter designated as “the group”)

2. The plaintiff is a lawyer who lives in the greater metropolitan Montréal area and who needs a vehicle to get around;
3. For this purpose, the plaintiff signed a purchase offer and agreement to acquire a new Mitsubishi brand car, as it appears in said purchase offer and agreement, filed jointly in support hereto (...);

#### **DEFENDANTS**

4. Defendants Mitsubishi Motor Sales of Canada Inc. (hereinafter “Mitsubishi Canada”), imports, distributes, sells and leases Mitsubishi brand vehicles, parts and accessories in Canada (...);
  5. Defendant Mitsubishi Motors North America, Inc. (hereinafter “Mitsubishi America”) imports, distributes, sells and leases Mitsubishi brand vehicle, parts and accessories in the United States (...);
  6. Defendant Mitsubishi Motors Corporation (hereinafter “Mitsubishi Japan”) manufactures and coordinates the worldwide distribution, sale, and leasing of Mitsubishi brand vehicles, parts and accessories (...);
  7. Moreover, the defendants are related companies, work together to import and sell all Mitsubishi brand vehicles, parts and accessories in Canada and the United States. However, the retail sale of vehicles is done through dealerships that are not affiliated with the respondents (*sic*);
- (...)
16. Faced with a loss in profit, the respondents (*sic*) therefore conspired among themselves and with their American and

Canadian dealers to restrict the free movement of their products by the Canadian-American border;

17. In fact, in order to prevent the free movement of products from Canada to American consumers, the respondents (*sic*) implemented various measures to isolate both markets from each other;

(...)

**CONSPIRACY BY THE RESPONDENTS (*sic*)**

20. As a result of competition in Canada, it would be normal for the prices of Mitsubishi products to drop to gradually reach the prices of American Mitsubishi products. However, the defendants, through their conspiracies, behaviours and instructions with their dealers, have artificially kept the prices of cars in Canada approximately 25% higher by preventing the importation of new vehicles from the United States to Canada;
21. To prevent Canadian consumers from taking advantage of the buying opportunities in the United States, and to increase their prices at the expense of those consumers, the defendants conspired together with their affiliated agents and dealers to maintain and charge consumers artificially higher prices that they could have asked for in a true free market for Mitsubishi vehicles;
22. The main goal of this conspiracy was to increase their profits in Canada and to prevent the natural erosion of Canadian prices by competition;

[6] It appears that this statement of claim by the plaintiff is similar to, if not substantially the same as, an equivalent proceeding filed in May 2008 by the plaintiff with the Superior Court of Québec, with that proceeding being struck the Court in December 2008 due to the lack of *ratione loci* jurisdiction under article 3148 of the *Civil Code of Quebec* (C.C.Q.).

## Analysis

[7] As for Mitsubishi Canada's motion, it essentially raises that this Court, by proceeding with the same analysis and application of article 3148 of the C.C.Q. as that done by the Superior Court of Québec in December 2008, must arrive at the same conclusion of a lack of jurisdiction.

[8] Article 3148 of the C.C.Q. reads:

**Art. 3148.** In personal actions of a patrimonial nature, a Québec authority has jurisdiction where

- (1) the defendant has his domicile or his residence in Québec;
- (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;
- (3) a fault was committed in Québec, damage was suffered in Québec, an injurious act occurred in Québec or one of the obligations arising from a contract was to be performed in Québec;
- (4) the parties have by agreement submitted to it all existing or future disputes between themselves arising out of a specified legal relationship;
- (5) the defendant submits to

Art. 3148. Dans les actions personnelles à caractère patrimonial, les autorités québécoises sont compétentes dans les cas suivants :

- 1° Le défendeur a son domicile ou sa résidence au Québec;
  - 2° Le défendeur est une personne morale qui n'est pas domiciliée au Québec mais y a un établissement et la contestation est relative à son activité au Québec;
  - 3° Une faute a été commise au Québec, un préjudice y a été subi, un fait dommageable s'y est produit ou l'une des obligations découlant d'un contrat devait y être exécutée;
  - 4° Les parties, par convention, leur ont soumis les litiges nés ou à naître entre elles à l'occasion d'un rapport de droit déterminé;
  - 5° Le défendeur a reconnu leur compétence.
- Cependant, les autorités

its jurisdiction.

However, a Québec authority has no jurisdiction where the parties, by agreement, have chosen to submit all existing or future disputes between themselves relating to a specified legal relationship to a foreign authority or to an arbitrator, unless the defendant submits to the jurisdiction of the Québec authority.

québécoises ne sont pas compétentes lorsque les parties ont choisi, par convention, de soumettre les litiges nés ou à naître entre elles, à propos d'un rapport juridique déterminé, à une autorité étrangère ou à un arbitre, à moins que le défendeur n'ait reconnu la compétence des autorités québécoises.

[9] I believe that Mitsubishi Canada, which is a Canadian corporation, is wrong to bring up the matter of this Court's jurisdiction based on the applicability of article 3148 of the C.C.Q.

[10] In her statement of claim, the plaintiff clearly appeals to the *Competition Act*, R.S.C., 1985, c. C-34, as amended (the Act). In fact, at paragraph 34 of the statement, the plaintiff argues that the defendants acted in violation of the provisions of subsection 45(1) of the Act and that consequently (paragraph 35), all members of the group are entitled to claim damages from the defendants under subsection 36(1) of the Act.

[11] These two sections of the Act read as follows:

**Recovery of damages**

**36.** (1) Any person who has suffered loss or damage as a result of

(a) conduct that is contrary to any provision of Part VI, or

**Recouvrement de dommages-intérêts**

**36.** (1) Toute personne qui a subi une perte ou des dommages par suite :

a) soit d'un comportement allant à l'encontre d'une disposition de la partie VI;

(b) the failure of any person to comply with an order of the Tribunal or another court under this Act,

b) soit du défaut d'une personne d'obtempérer à une ordonnance rendue par le Tribunal ou un autre tribunal en vertu de la présente loi,

may, in any court of competent jurisdiction, sue for and recover from the person who engaged in the conduct or failed to comply with the order an amount equal to the loss or damage proved to have been suffered by him, together with any additional amount that the court may allow not exceeding the full cost to him of any investigation in connection with the matter and of proceedings under this section.

peut, devant tout tribunal compétent, réclamer et recouvrer de la personne qui a eu un tel comportement ou n'a pas obtempéré à l'ordonnance une somme égale au montant de la perte ou des dommages qu'elle est reconnue avoir subis, ainsi que toute somme supplémentaire que le tribunal peut fixer et qui n'excède pas le coût total, pour elle, de toute enquête relativement à l'affaire et des procédures engagées en vertu du présent article.

### **Evidence of prior proceedings**

(2) In any action under subsection (1) against a person, the record of proceedings in any court in which that person was convicted of an offence under Part VI or convicted of or punished for failure to comply with an order of the Tribunal or another court under this Act is, in the absence of any evidence to the contrary, proof that the person against whom the action is brought engaged in conduct that was contrary to a provision of Part VI or failed to comply with an order of the Tribunal or another court under this Act, as the case may be, and any evidence given in those proceedings as to the effect of those acts or

### **Preuves de procédures antérieures**

(2) Dans toute action intentée contre une personne en vertu du paragraphe (1), les procès-verbaux relatifs aux procédures engagées devant tout tribunal qui a déclaré cette personne coupable d'une infraction visée à la partie VI ou l'a déclarée coupable du défaut d'obtempérer à une ordonnance rendue en vertu de la présente loi par le Tribunal ou par un autre tribunal, ou qui l'a punie pour ce défaut, constituent, sauf preuve contraire, la preuve que la personne contre laquelle l'action est intentée a eu un comportement allant à l'encontre d'une disposition de la partie VI ou n'a pas obtempéré à une ordonnance

omissions on the person bringing the action is evidence thereof in the action.

rendue en vertu de la présente loi par le Tribunal ou par un autre tribunal, selon le cas, et toute preuve fournie lors de ces procédures quant à l'effet de ces actes ou omissions sur la personne qui intente l'action constitue une preuve de cet effet dans l'action.

### **Jurisdiction of Federal Court**

(3) For the purposes of any action under subsection (1), the Federal Court is a court of competent jurisdiction.

### **Limitation**

(4) No action may be brought under subsection (1),

(a) in the case of an action based on conduct that is contrary to any provision of Part VI, after two years from

(i) a day on which the conduct was engaged in, or

(ii) the day on which any criminal proceedings relating thereto were finally disposed of;

whichever is the later; and

(b) in the case of an action based on the failure of any person to comply with an order of the Tribunal or another court, after two

### **Compétence de la Cour fédérale**

(3) La Cour fédérale a compétence sur les actions prévues au paragraphe (1).

### **Restriction**

(4) Les actions visées au paragraphe (1) se prescrivent :

a) dans le cas de celles qui sont fondées sur un comportement qui va à l'encontre d'une disposition de la partie VI, dans les deux ans qui suivent la dernière des dates suivantes :

(i) soit la date du comportement en question,

(ii) soit la date où il est statué de façon définitive sur la poursuite;

b) dans le cas de celles qui sont fondées sur le défaut d'une personne d'obtempérer à une ordonnance du Tribunal ou



years from

d'un autre tribunal, dans les deux ans qui suivent la dernière des dates suivantes:

(i) a day on which the order of the Tribunal or court was contravened, or

(i) soit la date où a eu lieu la contravention à l'ordonnance du Tribunal ou de l'autre tribunal,

(ii) the day on which any criminal proceedings relating thereto were finally disposed of,

(ii) soit la date où il est statué de façon définitive sur la poursuite.

whichever is the later.

**PART VI**  
**OFFENCES IN RELATION**  
**TO COMPETITION**

**Conspiracy**

**45.** (1) Every one who conspires, combines, agrees or arranges with another person

*(a)* to limit unduly the facilities for transporting, producing, manufacturing, supplying, storing or dealing in any product,

*(b)* to prevent, limit or lessen, unduly, the manufacture or production of a product or to enhance unreasonably the price thereof,

*(c)* to prevent or lessen, unduly, competition in the production, manufacture, purchase, barter, sale, storage, rental, transportation or supply of a product, or in the price of insurance on persons or property, or

*(d)* to otherwise restrain or injure competition unduly, is guilty of an indictable offence and liable to

**PARTIE VI**  
**INFRACTIONS**  
**RELATIVES À LA**  
**CONCURRENCE**

**Complot**

**45.** (1) Commet un acte criminel et encourt un emprisonnement maximal de cinq ans et une amende maximale de dix millions de dollars, ou l'une de ces peines, quiconque complète, se coalise ou conclut un accord ou arrangement avec une autre personne :

*a)* soit pour limiter, indûment, les facilités de transport, de production, de fabrication, de fourniture, d'emmagasinage ou de négoce d'un produit quelconque;

*b)* soit pour empêcher, limiter ou réduire, indûment, la fabrication ou production d'un produit ou pour en élever déraisonnablement le prix;

*c)* soit pour empêcher ou réduire, indûment, la concurrence dans la production, la fabrication, l'achat, le troc, la vente, l'entreposage, la location, le transport ou la fourniture d'un produit, ou dans le prix d'assurances sur les personnes ou les biens;

*d)* soit, de toute autre façon, pour restreindre, indûment, la concurrence ou lui causer un

imprisonment for a term not exceeding five years or to a fine not exceeding ten million dollars or to both. préjudice indu.

[12] However, as it appears in subsection 36(3) of the Act, this Court has jurisdiction over actions set out in subsection 36(1) of the Act.

[13] Consequently, with respect to Mitsubishi Canada, the jurisdiction of this Court over the plaintiff's action is therefore clearly established through subsection 36(3), and this finding means that the main remedy of Mitsubishi Canada's motion for lack of jurisdiction is without merit.

[14] As for Mitsubishi America's motion, since it is an American corporation, it follows that the analysis cannot end with the observation of the presence of subsection 36(3) of the Act.

[15] In *Desjean v. Intermix Media, Inc.* [2006] F.C.J. No. 1754, affirmed in appeal by the Federal Court of Appeal in [2007] F.C.J. No. 1523 (*Desjean*), the Court had to assess whether it had jurisdiction over an American defendant, i.e. Intermix Media, Inc. (hereinafter Intermix), against the plaintiff's allegations that through its activities, Intermix was guilty of deceptive, fraudulent and illegal practices, thereby violating subsections 52(1), 52(1.1) and paragraph 52(2)(e) of the Act.

[16] At paragraph 6 of his decision, De Montigny J. describes these activities as follows:

[6] In his statement of claim for a proposed class action, Mr. Desjean alleges that Intermix offers ostensibly free software

programs, such as screensavers and games, that anyone can download. Without disclosure to consumers, however, Intermix surreptitiously tacks onto these programs one or more additional programs that deliver ads and other invasive content. Thus, when Mr. Desjean installed a “free” Intermix screensaver or game on his computer, he also unwittingly installed one or more spyware programs. In this manner, known as “bundling”, Intermix has spread its advertising programs onto Mr. Desjean’s hard drive.

[17] Of course, the plaintiff had brought her action to this Court in accordance with the provisions of section 36 of the Act.

[18] According to De Montigny J. in *Desjean*, there are three ways in which a court may assert jurisdiction over foreign defendants. The Court stated as follows at paragraph 23 of its decision:

[23] There are three ways in which a court may assert jurisdiction over an out-of-country defendant. It may assume jurisdiction if the defendant is physically present within the territory of the court. Second, the foreign resident may consent to submit the dispute to the Canadian court’s jurisdiction. Third, the court may declare itself competent to hear the case, in appropriate circumstances. This case raises the third possibility.

[Emphasis added.]

[19] I believe that here too, in the case of Mitsubishi America, we must assess whether the circumstances justify it.

[20] In *Desjean*, in appeal, Pelletier J.A. summarizes the approach taken by De Montigny J. of the Federal Court as follows; application that allowed de Montigny J. to maintain that the Federal Court did not have jurisdiction over Intermix:

[4] (...) After summarizing the facts and the parties' arguments, he briefly reviewed the case law on the jurisdiction of Canadian courts pertaining to foreign defendants Relying on *Morguard Investments Ltd. v. De Savoye*, [1990] 3 S.C.R. 1077 (*Morguard*), *Tolofson v. Jensen*; *Lucas (Litigation Guardian of) v. Gagnon*, [1994] 3 S.C.R. 1022 (*Tolofson*) and *Hunt v. T&N plc*, [1993] 4 S.C.R. 289 (*Hunt*), he concluded that, before exercising their jurisdiction over a foreign defendant who has no presence in Canada and who has not submitted to their jurisdiction, Canadian courts require a real and substantial connection between the defendant, the cause of action and Canada. The judge then turned to an analysis of the circumstances giving rise to the dispute, in light of the factors delineated in *Muscutt v. Courcelles* (2002), 213 D.L.R. (4th) 577 (Court of Appeal for Ontario) (*Muscutt*), to determine whether there was in fact a real and substantial connection between the respondent, the cause of action as set out in Mr. Desjean's statement of claim and Canada.

[Emphasis added.]

[21] In its written representations at paragraphs (5) to (13), Mitsubishi America, referring to a man named John P. McElroy, 'General Counsel' at Mitsubishi America, highlights as follows a wide range of factors that compare closely with the factors retained by De Montigny J. in *Desjean*:

- 5) MMNA is a corporation having its domicile in the State of California, more specifically in the city of Cypress.
  - Tab B, Paragraph 9 of the Affidavit, DMR page 8
  - Tab B, Exhibit 4 of the Affidavit, DMR page 80
- 6) MMNA does not currently have, nor did it have, at anytime during the Class Period a place of business in the Province of Quebec or in Canada, nor did it have any employees in either Quebec or Canada during the relevant times.
  - Tab B, Paragraphs 10 and 12 of the Affidavit, DMR page 9
- 7) MMNA does not hold or possess any assets in the Province of Quebec or in Canada, nor did it hold or possess any during the Class Period.

- Tab B, Paragraph 11 of the Affidavit, DMR page 9
- 8) MMNA is not involved in the retailing of vehicles or car parts in any Canadian market.
  - Tab B, Paragraph 13 of the Affidavit, DMR page 9
- 9) MMNA does not sell or distribute motor vehicles or any other product at the retail level in Canada nor in Quebec.
  - Tab B, Paragraph 14 of the Affidavit, DMR page 9
- 10) Furthermore, MMNA holds no bank accounts anywhere in Canada nor does it pay any provincial or federal taxes in the Canada.
  - Tab B, Paragraph 15 of the Affidavit, DMR page 9
- 11) MMNA is not registered with any federal authority as exercising commercial activities anywhere in Canada and is not registered in any provincial jurisdiction in Canada as a corporate entity doing business in said jurisdictions.
  - Tab B, Paragraph 16 of the Affidavit, DMR page 9
- 12) All of MMNA's management, pricing, merchandising, and operational decisions are conducted outside of Canada and in no way involve any Canadian retail market.
  - Tab B, Paragraph 17 of the Affidavit, DMR page 9
- 13) During the Class Period MMNA did not advertise its products in Canada or Quebec, or have any marketing strategy for the Canadian Market. Any advertising or marketing strategy in effect would have been exclusive to the US automobile retail market.
  - Tab B, Paragraph 18 of the Affidavit, DMR page 9

[22] I therefore consider that, faced with the factors above and the Federal Court's decision, as affirmed in appeal, in *Desjean*, here must find that none of these factors, taken in isolation or as a whole, as well as vague allegations from the plaintiff's statement of claim, do not allow us to

find that there is a real and substantial link between Mitsubishi America, the cause of action as set out in the plaintiff's statement of claim and Canada.

[23] Thus, the Court must allow with costs Mitsubishi America's motion and proceed in that respect to strike the plaintiff's statement of claim and dismiss her action on the grounds of lack of jurisdiction in respect of this defendant. The costs here are allowed in favour of Mitsubishi America because at this stage, the Court considers that this case has not reached the circumstances or stages of subsection 334.39(1) *in limine* of the Rules and that therefore, Rule 339 cannot come into play to prevent the principles and rules that moreover apply to an individual action in terms of costs.

[24] Given this finding, the Court, as part of Mitsubishi America's motion, does not have to rule on the other remedies sought by it. Likewise, and even if it had been led to allow it otherwise, this Court does not have to rule on the plaintiff's motion for extension of time to serve the statement of claim that can be found at subsection 203(1) of the Rules and that concerned Mitsubishi America.

[25] Moreover, if we come back to Mitsubishi Canada's motion and the other remedies it is seeking, namely the special management of the plaintiff's action and the stay of its defence for the time being, there are grounds to decide on this as follows.

[26] As for special management, the plaintiff is right to point out that an order for that end is pointless, since Rule 384.1 already provides that an action brought by a member of group of persons on behalf of the group is automatically a specially managed action.

[27] As for whether the Court should allow Mitsubishi Canada to simply file its defence after the Court has rule on the motion for leave of the action as a class action, or alternatively, following what the judge or prothonotary might decide to be designated as case manager, it is my view that there are grounds to immediately rule as follows.

[28] After reading the plaintiff's statement of action and the parties written representations on this remedy, and after listening to their counsel on the same matter, I find that the filing of Mitsubishi Canada's defence at this stage will not help the Court in its adjudication of the motion for leave, and that filing at that stage would only result in additional costs. Consequently, Mitsubishi Canada's defence only needs to be served and filed thirty (30) days after this Court has rule on the plaintiff's motion for leave.



**ORDER**

1. The motion by Mitsubishi Motor Sales of Canada Inc. is only allowed in part so that this party's defence only has to be served and filed thirty (30) days after this Court has ruled on the plaintiff's motion for leave. Nevertheless, costs for this motion are awarded to the plaintiff.
  
2. The motion by Mitsubishi Motors North America Inc. is allowed with costs, and the Court orders, in respect of this party, the striking of the plaintiff's statement of claim and the dismissal of her action on the grounds of this Court's lack of jurisdiction over this defendant.
  
3. The plaintiff has until December 3, 2009, to complete the service of her statement of claim on defendant Mitsubishi Motors Corporation.

**“Richard Morneau”**

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Prothonotary

**FEDERAL COURT**  
**SOLICITORS OF RECORD**

**DOCKET** T-382-09

**STYLE OF CAUSE:** NANCY BOUCHARD  
and  
MITSUBISHI MOTOR SALES  
OF CANADA INC.  
MITSUBISHI MOTORS NORTH AMERICA INC.  
MITSUBISHI MOTORS CORPORATION

**PLACE OF HEARING:** Montréal, Quebec

**DATE OF HEARING:** August 24, 2009

**REASONS FOR ORDER:** PROTHONOTARY MORNEAU

**DATED:** August 27, 2009

**APPEARANCES:**

James R. Nazem FOR THE PLAINTIFF

Éric Vallières FOR THE DEFENDANTS

**SOLICITORS OF RECORD:**

Nazem, Lévy-Soussan, Lauzon,  
Ratelle FOR THE PLAINTIFF  
Montréal, Quebec

McMillan LLP FOR THE DEFENDANTS  
Montréal, Quebec