

SUPERIOR COURT
(Class Action)

CANADA
PROVINCE OF QUEBEC
DISTRICT OF MONTREAL

N° : 500-06-000750-154

DATE : JULY 21, 2016

PRESIDING : THE HONOURABLE PIERRE LABELLE, J.S.C.

SHAI MEDALSY
Petitioner

-vs-

THE TORONTO-DOMINION BANK
Respondent

JUDGMENT

**INTRODUCTION AND THE PROPOSED
AMENDMENT FOR SETTLEMENT PURPOSES**

[1] Petitioner has filed an "Application for Authorization to Amend the Motion to Authorize the Bringing of a Class Action and to Ascribe the Status of Representative (For Settlement Purposes Only), to Authorize the Class Action for Settlement Purposes, and for Approval of the Settlement Approval Notice to Class Members", pursuant to Articles 574 and following, 585 and 590 of the Code of Civil Procedure (the "**C.C.P.**").

[2] On July 17, 2015, Petitioner filed his original Motion to Authorize the Bringing of a Class Action and to Ascribe the Status of Representative (the "**Motion for Authorization**") against the Respondent, as appears from the Court Record.

[3] Through his Motion for Authorization, Petitioner was seeking to be appointed representative of a national class, namely representing all Canadians TD Travel Credit Card clients.

[4] The Petitioner and the Respondent have agreed to the terms of a transaction (the Settlement Agreement which has been filed as Exhibit P-2), the whole subject to the approval of this Court, and without any admission of liability whatsoever by the Respondent and for the sole purpose of resolving the dispute between the parties.

[5] In this regard, the Settlement approval hearing has already been scheduled for October 27, 2016.

[6] For settlement purposes only, and as a condition precedent of a proposed settlement agreement between the parties, Petitioner has requested permission to amend the Motion for Authorization *inter alia* in order to no longer seek to represent a national class and therefore modify the class action group definition to only persons in the province of Quebec.

[7] Petitioner also wishes to amend the Motion for Authorization in order to refer to and file a September 25, 2015 letter sent by Respondent to the Putative Class Members, as new Exhibit R-6, and in order to incorporate the new articles and new terminology of the new Code of Civil Procedure;

[8] The Court holds that the amendment is in the best interest of the Putative Class Members, and it will grant permission *pro forma* to Petitioner to amend his Motion for Authorization, for settlement purposes, in accordance with "Amended Application for Authorization to Institute a Class Action (for Settlement Purposes Only)", dated June 16, 2016 (filed as Exhibit P-1) (the "**Amended Application for Authorization**");

AUTHORIZATION OF THE CLASS ACTION FOR SETTLEMENT PURPOSES

[9] The Respondent consents to the authorization of the Amended Application for Authorization, as a class proceeding for settlement purposes only.

[10] In the context of a settlement, the criteria set forth at Article 575 C.C.P. must still be met, albeit they are somewhat attenuated¹.

[11] The allegations of the Amended Application for Authorization are deemed to be true at this stage of the proceedings².

¹ *Vallée c. Hyundai Auto Canada Corp.*, 2014 QCCS 3778; *Schachter c. Toyota Canada inc.*, 2014 QCCS 802; *Markus c. Reebok Canada inc.*, 2012 QCCS 3562; *Richard c. Volkswagen Group Canada inc.*, 2012 QCCS 5534; *Focsa v. Diamond Pet Foods Inc. et al.*, 500-06-000612-123, Superior Court, Honorable Justice Thomas M. Davis, J.S.C.

² *Infineon Technologies AG v. Option Consommateurs*, 2013 SCC 59; *Vivendi Canada Inc. v. Dell'Aniello*, 2014 SCC 1.

[12] In light of this relaxed standard and, the Amended Application for Authorization and the exhibits in support thereof justify granting of the said Amended Application for Authorization.

[13] At paragraph 56 of the Amended Application for Authorization, the Petitioner sets out the claims of the Class Members that he believes raise identical, similar or related issues of law or fact (Article 575 (1) C.C.P.), namely the following:

- a) Are the Exhibit R-3 TD Travel Card Agreements consumer contracts and/or contracts of adhesion?
- b) Was Respondent legally permitted to unilaterally modify the terms and conditions of the Exhibit R-3 TD Travel Card Agreements and the TD Travel Rewards Programs, reducing the redemption value as of August 16, 2015 of the TD Points earned and accumulated by the Class Members before August 16, 2015?
- c) Should these modifications to the R-3 TD Travel Card Agreements and the TD Travel Rewards Programs be declared null?
- d) Should injunctive relief be ordered forcing Respondent to reinstate the value of \$50 per 10,000 TD Points increments (or 200 TD Points for each \$1), concerning all of the Class Members' TD Points earned and accumulated on their TD Travel Card before August 16, 2015?
- e) Is Respondent liable to pay compensatory and/or moral and/or punitive/exemplary damages to the Class Members and, if so, in what amount?

[14] The facts alleged appear to justify the conclusions sought by the Petitioners (Article 575 (2) C.C.P.).

[15] The composition of the Group makes it difficult or impracticable to apply the rules for mandates to sue on behalf of others or for consolidation of proceedings (Article 575 (3) C.C.P.), because *inter alia*:

- a) the Class Members are likely numbered in the multiple thousands and are scattered across the province;
- b) the Class Members could not be reached by Petitioner or his attorneys since only the Respondent has the list of the Class Members and Respondent;

[16] The Petitioner, who is requesting to be appointed as Representative Plaintiff is in a position to properly represent the Class Members (Article 575 (4) C.C.P.) for the following reasons which are alleged at paragraph 59 of the Amended Application for Authorization, namely that Petitioner:

- a) is a Class Member;
- b) understands the nature of the action and has the capacity and interest to fairly and adequately protect and represent the interests of the Class Members;
- c) is available to dedicate the time necessary for the present action before the Courts of Quebec and to collaborate with Class Counsel in this regard;
- d) is ready and available to manage and direct the present action in the interest of the Class Members and is determined to lead the present file until a final resolution of the matter, the whole for the benefit of the Class Members;
- e) does not have interests that are antagonistic to those of other Class Members;
- f) has given the mandate to the undersigned attorneys to obtain all relevant information to the present action and intends to keep informed of all developments;
- g) has given the mandate to the undersigned attorneys to post the present matter on their firm website in order to keep the Class Members informed of the progress of these proceedings and in order to more easily be contacted or consulted by said Class Members;
- h) is, with the assistance of the undersigned attorneys, ready and available to dedicate the time necessary for this action and to collaborate with other Class Members and to keep them informed;

[17] The Court therefore concludes that for settlement purposes, all four (4) criteria of Article 575 C.C.P. have been met, that an arguable case has been demonstrated by the Petitioner, and that accordingly, the Class Action should be authorized *pro forma* and the Petitioner appointed Representative Plaintiff.

APPROVAL OF THE NOTICE OF APPROVAL HEARING

[18] Finally, and as detailed in the Exhibit P-2 Settlement Agreement, the parties also request that this Court approve the content and dissemination method of the Notice of approval hearing to be sent to the Putative Class Members, in both English and French, copies of which have been filed as Schedule "B" and Annexe "C" respectively;

[19] The Court has reviewed and approves the content and dissemination method of the Notice of Approval hearing to be sent to the Putative Class Members, namely to be sent by Respondent, by regular mail, at its costs.

[20] This Judgment is based upon the foregoing findings of fact and conclusions of law, which are supported by the substantial evidence presented by the Parties hereto, all of which the Court has considered and is in the Record.

FOR THESE REASONS, THE COURT:

[21] **AUTHORIZES** Petitioner to amend *pro forma* the "Motion to Authorize the Bringing of a Class Action and to Ascribe the Status of Representative", as set forth in the AMENDED APPLICATION FOR AUTHORIZATION TO INSTITUTE A CLASS ACTION (FOR SETTLEMENT PURPOSES ONLY) Exhibit P-1;

[22] **AUTHORIZES** the filing of the Amended application for authorization to institute a class action (for settlement purposes only) as per Exhibit P-1;

[23] **AUTHORIZES** the bringing of a class action *pro forma* against the Respondent as per the Amended application for authorization to institute a class action (for settlement purposes only) (Exhibit P-1), for the purposes of settlement only;

[24] **ORDERS** that for the purposes of this Judgment, the definitions contained in the Settlement Agreement (Exhibit P-2) shall apply and be incorporated by reference;

[25] **GRANTS** *pro forma* Petitioner the status of representative for bringing the said class action for the benefit of the following group of persons, namely:

All persons in the Province of Quebec who are a Primary Cardholder or Authorized User (Additional Cardholder) of a "TD Travel Card" (« carte de crédit Voyage TD ») offering the "TD Travel Rewards Programs" (« Programme de Primes-voyages TD ») :

- the "TD First Class Travel Visa Infinite Card" (« Carte Visa Infinite TD Classe Ultime Voyages »);
- the "TD Platinum Travel Visa Card" (« Carte Visa TD Platine Voyages »);
- the "TD Classic Travel Visa Card" (« Carte Visa TD Classique Voyages ») and/or
- the "TD Business Travel Visa Card" (« Carte Visa TD Voyages Affaires »).

[26] **APPROVES** the content of the Notice of approval hearing to the Putative Class Members, in English and French, Schedule "B" and Annexe "C";

[27] **ORDERS** the notices Schedule "B" and Annexe "C" shall be sent and disseminated as per the conditions and terms set out in the Settlement Agreement, Exhibit P-2, to each Putative Class Members;

[28] **APPROVES** the form and content of the Right of Exclusion as set out in the notices, Schedule "B" and Annexe "C";

[29] **ORDERS** that the hearing for the settlement approval is to be held on October 27, 2016, at 9:00, in room 15.07 at the Montreal Courthouse, 1 Notre-Dame Street East;

[30] **ORDERS** that a French version of the Settlement Agreement, Exhibit P-2, be made available for consultation purposes on Petitioner Class Counsel's website;

[31] **THE WHOLE** without legal costs.



PIERRE LABELLE, J.S.C.

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Date of Hearing : July 21, 2016