

SUPERIOR COURT

CANADA
PROVINCE OF QUEBEC
DISTRICT OF MONTREAL

No: 500-06-000615-126

DATE: January 19, 2015

IN THE PRESENCE OF THE HONOURABLE LOUIS LACOURSIÈRE, J.S.C.

MAXIME BELLEY
Petitioner

v.

**TD AUTO FINANCE SERVICES INC. /
SERVICES DE FINANCEMENT AUTO TD INC.**
Respondent

JUDGMENT

[1] Petitioner filed a Motion to Authorize the Bringing of a Class Action and to Ascertain the Status of Representative (the "Motion") on behalf of the following group:

All persons (including their estates, executors, or personal representatives), consumers, corporations, firms, businesses, and other organisations (subject to Article 999 C.C.P.), in all of Canada (subsidiarily in Quebec), whose personal information was stored or saved on a Data Tape, which was lost by Respondent while in transit on or about March 12, 2008, or any other group to be determined by the Court (the "Group").

[2] TD Auto Finance Services Inc. / Services de Financement Auto TD inc. ("TD Auto") is a company which results from an amalgamation of DaimlerChrysler Financial Services Canada Inc. / Services financiers DaimlerChrysler inc. ("DaimlerChrysler") with other entities.

[3] At all relevant times, DaimlerChrysler was involved in the business of leasing and financial services in the automotive industry, and was doing business under various names, inter alia, DaimlerChrysler Financial Services Canada Inc., Services Financiers DaimlerChrysler Canada Inc., Chrysler Credit Canada, Chrysler Financial, Chrysler Financial Canada, Crédit Chrysler Canada, DaimlerChrysler Financial, DaimlerChrysler Services Canada, DaimlerChrysler Services in Canada, Services DaimlerChrysler au Canada, Services DaimlerChrysler Canada, Services Financiers Chrysler, Services Financiers Chrysler Canada, Services Financiers DaimlerChrysler, the whole as appears from the CIDREQ report on DaimlerChrysler from Le registraire des entreprises dated April 21, 2008¹.

CONTEXT

[4] In this matter, it is useful to provide a fairly lengthy summary of the context, for reasons which will quickly become obvious.

[5] This is the second motion seeking authorization to bring a class action against TD Auto based essentially on the same facts.

[6] On March 15, 2012, the undersigned rendered a judgment (the "Mazzonna Judgment") dismissing Anna Mazzonna's Motion to Authorize the Bringing of a Class Action and to Ascribe the Status of Representative against TD Auto, as Respondent in continuance of suit, the initial Respondent being DaimlerChrysler.

[7] Ms Mazzonna had alleged in her motion (the "Mazzonna Motion") that DaimlerChrysler had lost, on or about March 12, 2008, a data tape (the "Data Tape") containing personal information relating to its clients, thereby causing them damages.

[8] The Mazzonna Judgment ruled on the conditions of article 1003 of the *Code of Civil Procedure* ("C.C.P."), which reads as follows:

1003. The court authorizes the bringing of the class action and ascribes the status of representative to the member it designates if of opinion that:

a) the recourses of the members raise identical, similar or related questions of law or fact;

b) the facts alleged seem to justify the conclusions sought;

c) the composition of the group makes the application of article 59 or 67 difficult or impracticable; and

d) the member to whom the court intends to ascribe the status of representative is in a position to represent the members adequately.

¹ R-1.

[9] The Mazzonna Judgment held in essence that Ms Mazzonna's allegations met conditions a) and c) of article 1003 C.C.P. but not conditions b) and d), the former because she did not demonstrate having suffered "compensable" damages and the latter because she could not be an adequate representative of the group she sought to represent because her personal claim did not meet condition b).

[10] On or about May 22, 2012, Maxime Belley filed the Motion against TD Auto in connection with the same Data Tape loss.

[11] As the undersigned had rendered the Mazzonna Judgment, TD Auto suggested that the present case be heard by the same judge; Mr Belley agreed.

[12] In the Motion, Mr Belley seeks to institute a class action on behalf of a group which is basically the same as the one Ms Mazzonna sought to represent.

[13] The common questions raised by Mr Belley, which are essentially those raised in the Mazzonna Motion, are the following:

- a) was Respondent negligent in the handling of and subsequent loss of the personal information of the Group members?
- b) is Respondent liable to pay damages to the Group members as a result of the loss of said information, including actual monetary losses incurred, lost time, inconvenience, anxiety and other moral and/or punitive damages caused by the loss of said information, and if so in what amount?

[14] In the Motion, Mr Belley alleges that he was a victim of an identity theft and that a fraudster purchased four vehicles "immediately following the loss of his personal information", *i.e.* between April 10 and May 13, 2008.

[15] The Motion alleges, *inter alia*, that a VOID cheque from Mr Belley's CIBC account bearing number 115, remitted to a Chrysler dealer, has been used to commit the fraud.

[16] The first link between the Belley and Mazzonna matters appeared in the following context.

[17] At one point during the proceedings in the Mazzonna file, on or around April 8, 2010, Ms Mazzonna sought to amend her motion by introducing, *inter alia*, the following paragraph:

15.4 Furthermore, the story of the identity theft suffered and complaints of one of the Class Members, namely Mr Maxime Belley, was the focus of the November 25, 2008 episode of "La Fracture" which aired on Radio Canada, a copy of said episode on CD-ROM is being filed herewith, as EXHIBIT P-6;

[18] Paragraph 15.4, which Ms Mazzonna sought to introduce by way of amendment, was one of fifty new or modified paragraphs that Ms Mazzonna wanted to introduce. The request to add said paragraph purported to enlighten the Court on the type of damages allegedly suffered by members of the group that Ms Mazzonna sought to represent.

[19] The undersigned rendered a judgment on the motion to amend on October 27, 2010 (the "October 27 Judgment"), stating, specifically with regards to paragraph 15.4, the following:

[15] The Court will deal first with paragraph 15.4.

[16] *La Facture* is a news magazine which deals with consumer issues. The extract which is filed in support of the amended motion was aired by Radio Canada on November 25, 2008.

[17] In a nutshell, the broadcast, that the Court has watched carefully, deals with the case of Mr Maxime Belley, who claims to have been a victim of identity theft as a result of alleged fraudulent use of information contained, according to the news magazine, on a void cheque used in the financing of a vehicle by DaimlerChrysler.

[18] The Court fails to see how adducing this evidence would meet the conditions of section 199 *C.C.P.*

[19] Mr Belley may or may not be a member of the group that the Petitioner seeks to represent. Only the future will tell, if the recourse is authorized by the Court.

[20] However, the circumstances peculiar to Mr Belley, as reported in the news magazine, do not suggest, *prima facie*, that he has been the victim of lost or destroyed information on the disputed Data Tape.

[21] Furthermore, the Court is of the view that this broadcast will be useless when comes the time to assess whether Ms. Mazzonna's allegations allow her to meet the test of section 1003 of the *Code of Civil Procedure*.

[22] The Court will therefore not allow the amended motion to include paragraph 15.4.

[20] On August 30, 2012, the attorneys for TD Auto advised that it would file a Motion to Dismiss, which was served in September of 2012 ("the Motion to Dismiss").

[21] In the Motion to Dismiss, TD Auto argued that, based on article 2848 of the *Civil Code of Quebec* ("C.C.Q.") and on the relevant case law, the October 27 Judgment constituted *res judicata* on Mr Belley's appearance of right, i.e. condition b) of article 1003 C.C.P.

[22] Ruling on the Motion to Dismiss, the Court held that the October 27 Judgment did not constitute *res judicata* on the question of Mr Belley's individual claim.

[23] In its judgment on the Motion to Dismiss, the Court wrote, after reviewing the relevant case law :

[41] The facts pertaining to Mr Belley's alleged damages were introduced only through the news magazine, in the Mazzonna Motion, without the particulars contained in his own motion. It is on this basis that the Court disposed of the amendment seeking to add paragraph 15.4 in the Mazzonna motion.

[42] It would be unfair, given this context, to dismiss the Belley Motion because the Court concluded, on a motion to amend, that Mr Belley may or may not be a member of the Mazzonna group and that the "circumstances peculiar to Mr Belley" as reflected in the news magazine *La Fature*, would not be useful to Ms. Mazzonna in her motion.

[...]

[44] The October 27 Judgment ruled in favour of TD Auto against Ms. Mazzonna; the Court cannot go as far as to state that it ruled in favour of TD Auto against Mr Belley. The October 27 Judgment merely concluded that it was not proper, in the context of the Mazzonna Motion, to allow the amendment.

[45] This, in itself, suffices to dispose of the Motion to Dismiss on the basis of *res judicata*.

[24] From the above, the following context comes to light: based on facts similar to those adduced in support of the Mazzonna Motion but alleging different damages, the Petitioner seeks to be authorized to sue TD Auto.

THE FACTS ALLEGED IN THE MOTION

[25] The facts alleged in the Motion can be summarized as follows.

[26] On March 27, 2008², DaimlerChrysler sent a letter, by regular mail, to Petitioner (and other Group members) (the "Notification Letter"), which stated:

Dear Maxime:

One of the highest priorities at Chrysler Financial is our focus on your privacy and the protection of your personal information. It is for this reason we are writing to you today to notify you of a recent incident we had with the transfer of certain customer information stored on a Data Tape to a licensed third party credit reporting agency. On March 12, 2008, we were notified by United Parcel Services ("UPS") that a Data Tape (the "Data Tape") sent by Chrysler Financial containing certain customer information was destroyed or lost in

² R-3.

transit and never arrived at the agency. The Data Tape cannot be easily accessed and requires specialized software and equipment to read, but it **did contain some personal information that Chrysler Financial had obtained from you (most importantly, name, address, and social insurance number).**

Chrysler Financial, in co-ordination with UPS, is conducting a thorough investigation but at this point in time the Data Tape has not been located. Having said that, we also have no reason to suspect that an unauthorized individual has actually retrieved and is using the personal information contained on the Data Tape, which we reiterate is not readily-accessible. Nonetheless, **as a precautionary measure we are alerting you to this recent incident so that you may be watchful for signs of any possible misuse of your personal information by an unauthorized recipient.**

We apologize for any inconvenience or alarm this may cause you. Chrysler Financial can confirm that this has not happened before within our quality control processes and, **since the incident, we have put into place additional measures with this and other third party agencies to ensure that this will not happen again.** Chrysler Financial has also, on a voluntary basis, **disclosed this incident to the federal Privacy Commissioner's Office and the applicable provincial privacy offices.**

We appreciate your business and want to assure you that Chrysler Financial remains committed to providing exceptional customer service while enforcing the strictest of privacy measures.

If you require any additional information or clarification, please do not hesitate to contact us at 1-800-263-6920.

Yours truly,

Brian Chillman
General Counsel
Chrysler Financial..."
(Emphasis Added)

[27] The "licensed third party credit reporting agency" referred to in this letter is located in Rouyn Noranda, Québec.

[28] The Motion states that the Notification Letter contained the following admissions from TD Auto:

- a) That it, and/or its mandatory UPS, lost the Data Tape which contained the personal information of the Class Members;
- b) That the Class Member should be "watchful for signs of any possible misuse of your personal information by an unauthorized recipient", therefore implicitly admitting that it is reasonably possible that unauthorized persons could

have received, accessed or misused the personal information of the Class Members;

c) That this loss of information may cause Class Members "inconvenience or alarm";

d) That Respondent has "put into place additional measures with this and other third party agencies to ensure that this will not happen again", therefore confirming that the required measures were not originally in place which would have prevented this loss of information in the first place.

[29] The Motion alleges that:

a) In an Affidavit signed in the course of the Mazzonna matter, dated October 17, 2008³, Lynnette M. Barker, Info-Technology Management Senior Manager - Porfolio Systems for DaimlerChrysler (the "Barker Affidavit"), stated that:

- the only personal data which would have been recorded on the Data Tape are the customer's name, address, phone number and in certain cases, the social insurance number as well as other information related to the status and history of the customer's credit with DCFSCI (DaimlerChrysler Financial Services Canada Inc.);

- the tape did not contain any other personal or financial information concerning DaimlerChrysler customers;

b) when cross-examined on June 23, 2009 on her affidavit, Ms Barker conceded that there was a field, in the Data Tape, for a date of birth of the Class members.

[30] The Motion alleges that the date of birth is an important element which would increase the risk of fraud and identity theft and that the members of the Group were justified to assume that DaimlerChrysler would take steps to safeguard their personal information, which it did not.

[31] The Motion alleges that, following the loss of his personal information by DaimlerChrysler, the Petitioner fell victim to fraud and identity theft. Rather than summarizing the Petitioner's allegations, the Court feels appropriate to reproduce them:

April 29, 2008:

[17] On April 29, 2008, Petitioner received a letter dated April 10, 2008 from TD Canada Trust Indirect Credit Centre in Ontario (hereinafter "TD") thanking

³ R-4.

him for setting up a loan which had been arranged through Rockland Ford Sales Ltd on April 10, 2008, a copy of said letter being filed herewith, as **Exhibit R-6**;

[18] Shocked to receive said letter since he had not set up such a loan, Petitioner immediately called TD and spoke to a representative named Sophie, informing her that he had never set up the loan in question;

[19] The said representative informed Petitioner that a Volkswagen Touareg had been purchased on a loan using his identity;

[20] Petitioner contacted his financial institution, the CIBC, in order to have a freeze placed on his account;

[21] Petitioner then tried contacting both the Equifax and TransUnion credit agencies but their offices were closed;

April 30, 2008:

[22] On April 30, 2008, Petitioner went on-line to consult his credit files from Equifax and TransUnion. He noticed that many requests for credit had been filed under his name since March 2008;

[23] Petitioner then contacted Sophie at the TD in order to inquire about the situation. He was told to go to a TD branch in order to fill out certain forms or paperwork and was advised to call the police about the incident;

[24] Petitioner called credit agencies Equifax, TransUnion and Experian in order to ask that a fraud alert be placed on his credit files;

[25] Petitioner called the Montreal Police Department and the Ontario Provincial Police PhoneBusters in order to advise them of the situation;

[26] Petitioner then went to a TD branch in order to fill out the proper paperwork and he was told that an affidavit had to be signed before a notary regarding the fraud incident;

[27] Petitioner also met with a CIBC representative who counseled him to immediately open a new bank account and to close the old account after a one (1) month transition period, which he did. During said one (1) month transition period, Petitioner was forced to receive a telephone call from the CIBC every time a cheque had to go through the account, in order to confirm its validity;

May 1, 2008:

[28] On May 1, 2008, Petitioner consulted his credit file again through the Equifax website and noticed further credit activity on his file;

[29] There was credit request under the HSBC Bank (hereinafter "**HSBC**") and Petitioner therefore contacted the HSBC who informed him that a second

vehicle, namely an Infinity QX56, had been purchased under his name, on April 17, 2008, at Quality Wholesalers in Scarborough, Ontario;

[30] Petitioner also noticed that another request for credit had been made with Fido Solutions as well;

[31] Shocked by the entire situation, Petitioner called Daimlerchrysler and spoke to a representative named Orelie;

[32] The said representative tried to reassure Plaintiff by stating that it would be practically impossible to use the information contained on the Data Tape if someone were to find it. However, the representative did not inform Petitioner:

a) that the envelope which carried the Data Tape had been found empty by UPS; and

b) that the Date of Birth of the Class Members was also on the lost or stolen Data Tape;

[33] The representative promised Plaintiff that an executive at Daimlerchrysler would be contacting him shortly with further information;

May 2, 2008:

[34] On May 2, 2008, Petitioner consulted his credit file again through the TransUnion website and called the Montreal police department to give them an update;

[35] Petitioner also contacted insurance companies *Assurance La Capitale* and *Assurance Banque Nationale* in order to inform them of the fraud that had occurred, since it turned out that fraudulent insurance policies had been contracted using his identity in order to insure the vehicles mentioned above;

[36] Petitioner also called Dell Canada to receive information since it had inquired into his credit. The Dell Canada employee informed him that no items had been purchased using his identity;

[37] Petitioner also had to contact Fido Solutions and fill out and send them a form confirming the fraud;

[38] Plaintiff also met with the notary in order to complete the affidavit required by the TD and Plaintiff remitted the said affidavit to the TD that same day;

May 5, 2008:

[39] On May 5, 2008, a representative of *Assurance La Capitale* called the Petitioner and asked him various additional questions about the identity theft that had occurred;

[40] Thereafter, a Montreal police officer contacted Petitioner asking various questions about the identity theft as well. He also informed Petitioner that there would be at least a six (6) month delay for them to pursue the investigation;

May 6, 2008:

[41] On May 6, 2008, having not received the call back from Daimlerchrysler, Petitioner called back and spoke with Mr. Denis Brochu, a representative of Daimlerchrysler, who merely suggested that it was a "pure coincidence" that Petitioner had fell victim to identity theft after Daimlerchrysler had lost the private information;

May 9, 2008:

[42] On May 9, 2008, Petitioner receives a letter from the Royal Bank of Canada (hereinafter "RBC") informing him that a third vehicle had been purchased using his identity. Petitioner then scheduled a May 13, 2008 appointment with RBC in order to clear up the situation. He also met with a CIBC representative regarding this additional fraud occurrence;

May 12, 2008:

[43] On May 12, 2008, Plaintiff called back the representatives at the HSBC and the TD in order to give them a general update and to inform them of the six (6) month delay the Montreal Police had mentioned;

May 13, 2008:

[44] On May 13, 2008, Petitioner had his meeting with the RBC representative, as mentioned above, and he also met with an employee at the CIBC concerning the various automatic payments which had been set up for the stolen vehicles in question;

[45] During that CIBC meeting, Petitioner received a telephone call from a HSBC representative confirming that a fourth car had been purchased using his identity;

May 20, 2008:

[46] On May 20, 2008, Petitioner communicated with a representative at insurance company *Industrielle Alliance* in order to inform them of the situation;

[47] Furthermore, Mr. Pidcock, a police officer from the City of Ottawa, contacted Petitioner concerning the identity theft and the numerous vehicles purchased using his identity;

May 21, 2008:

[48] On May 21, 2008, Petitioner sent a letter to the police officer Pidcock, explaining his situation and providing copies of the relevant documents, the whole as more fully appears from a copy of said letter, filed herewith, as **Exhibit R-7**;

[49] That same day, Petitioner also received confirmation from *Industrielle Alliance* that the insurance policy mentioned above would be cancelled;

May 28, 2008:

[50] On May 28, 2008, Petitioner sent to *Industrielle Alliance* a written confirmation that he is not the owner or buyer of the stolen vehicle;

[51] That same day, Petitioner wrote a formal demand letter to Brian Chillman, General Counsel for Chrysler Financial (who had signed the original Exhibit R-3 Notification Letter), in which Plaintiff *inter alia*:

a) explained his situation and all the unfortunate problems he had encountered after Daimlerchrysler had lost his personal information on the Data Tape;

b) confirmed that he had been informed that the fraudster had used VOID cheque number 115 when purchasing all four (4) vehicles mentioned above and that it was the same VOID cheque number 115 that he had given to Champlain Dodge Chrysler in May 2004 when he had initially leased his Dodge Caravan from Daimlerchrysler;

c) mentioned the fact that the Ottawa police detective in charge of the investigation had confirmed to Petitioner that he was aware of at least one other person who had received the Notification Letter from Daimlerchrysler and who had fallen victim to a similar identity theft, with three (3) vehicles purchased under that person's identity as well;

d) requested to be informed of the exact nature of the personal information that had been lost so that he may advise the various private and governmental institutions and in order to make sure that such information is changed and cannot be used in the future;

e) confirmed the details of the costs incurred and time spent by Petitioner as of May 23, 2008, dealing with these various fraud occurrences; and

f) put Daimlerchrysler on notice that he was holding it liable for his damages suffered and that he would be filing the proper legal proceeding under the circumstances;

the whole as more fully appears from a copy of Petitioner's demand letter dated May 28, 2008, filed herewith, as **Exhibit R-8**;

[52] Mr. Chillman (and Respondent in general) has to date never responded to Petitioner's said demand letter;

June 3, 2008:

[53] On June 3, 2008, Petitioner met with a notary and signed two (2) affidavits and transmitted same to the HSBC;

June 23, 2008:

[54] Petitioner met with the RBC representative since the RBC had mistakenly sent him a collection letter dated June 16, 2008 regarding a payment due for the stolen vehicle mentioned above;

July 4, 2008:

[55] On July 4, 2008, Petitioner called the Police in order to ask for an update about his case but no new information was available;

[56] Petitioner also contacted the RBC representative to give him the police file numbers in both Montreal and Ottawa. The RBC representative confirms that Petitioner should no longer be receiving collection letters;

[57] Petitioner communicated with Equifax and TransUnion in order to update his file;

July 7, 2008:

[58] On July 7, 2008, Petitioner spoke to a representative of *La Capitale Assurance* who confirmed that it would be cancelling the charges due pursuant to the identity theft mentioned above;

July 12, 2008:

[59] On July 12, 2008, Petitioner received a call from Mr. Girard from the *département de sécurité* of the HSBC and Petitioner had to explain the whole story once again;

July 15, 2008:

[60] On July 15, 2008, Petitioner consulted his credit reports with Equifax and TransUnion and he was forced to update his information once again;

August 22, 2008:

[61] On August 22, 2008, Petitioner received two (2) letters from the HSBC (both dated August 20, 2008) confirming that it had accepted his contestations of the two (2) fraudulent HSBC loans and confirming that the two (2) loan accounts in question would be closed, the whole as more fully appears from a copy of said

letters, together with the September 15, 2008 *Demande de mise à jour de mon dossier d'historique de crédit* form Petitioner filed with Equifax in relation to the HSBC loans in question, filed herewith, *en liasse*, as **Exhibit R-9**;

September 12, 2008:

[62] On September 12, 2008, Petitioner met with a RBC representative for 90 minutes in order to complete the required documentation declaring that he was victim of identity theft, as mentioned above;

September 15, 2008:

[63] As appears from Exhibit R-8, on September 15, 2008, Petitioner forwarded a copy of the two (2) letters received from HSBC in August 2008 (Exhibit R-8) to Equifax. He also sent copies to TransUnion;

September 22, 2008:

[64] On September 22, 2008, Petitioner requested that RBC research the cheque that was used to purchase the stolen vehicle;

[65] That same day, Petitioner sent letters to each of the RBC, the TD, the HSBC and Mr. Brochu at Daimlerchrysler requesting access to his personal information contained in their files, the whole as more fully appears from a copy of said letters, filed herewith respectively as **Exhibit R-10**, **Exhibit R-11**, **Exhibit R-12** and **Exhibit R-13**;

September 25, 2008:

[66] On September 25, 2008, Petitioner received a call from TD confirming that the cheque used for the theft had been a VOID cheque from his CIBC account bearing cheque number 115, which had been remitted to Daimlerchrysler originally, as mentioned above;

September 30, 2008:

[67] On September 30, 2008, Petitioner sent a letter to Mark D. Norman, Chairman, President and Chief Executive Officer of Daimlerchrysler Canada, explaining his situation following the loss of his information and confirming his past telephone conversation with Mr. Brochu on May 6, 2008 (detailed above) and his May 28, 2008 letter to Brian Chillman (Exhibit R-8) that had gone unanswered, the whole as more fully appears from a copy of said letter, filed herewith, as **Exhibit R-14**;

[68] Mr. Norman (and Respondent in general) has to this day never responded to Petitioner's said letter;

October 3, 2008 and thereafter:

[69] On October 3, 2008, Petitioner received a copy of the various documents that Respondent had in its file concerning Petitioner's vehicle lease, a copy of which are filed herewith, as **Exhibit R-15**;

[70] In the fall of 2008, having still not received a response from Respondent, Petitioner contacted *La Facture*, a television news magazine which deals with consumer issues, explaining his unfortunate situation;

[71] Petitioner was later interviewed and on November 25, 2008, Radio-Canada aired Petitioner's story on said news magazine;

[72] Respondent did not contact Petitioner after the *La Facture* episode aired;

[73] Finally, and as a result of the above, Petitioner suffered further damages since his credit score had dropped from a very strong score of 779 on March 15, 2007, to a very weak score of 639 on July 15, 2008. Gradually since July 2008, Petitioner's credit score has been re-established;

THE FAULT ALLEGED IN THE MOTION

[32] The Motion alleges the following negligence on the part of TD Auto.

a) Before the loss of the Data Tape

[33] Petitioner alleges that:

- a) DaimlerChrysler was negligent in allowing personal information relating to all of its Canadian lease customers, entrusted to it in the sole context of the lease of an automobile or truck, to be stored in the USA, in the State of Michigan, when it conducted its business in Canada and knew that it would be making monthly credit reports to a credit agency located in Rouyn Noranda, Province of Quebec;
- b) DaimlerChrysler was negligent in sending the personal information on a "physical" Data Tape, in a sealed envelope, through a regular delivery service by United Parcel Service of Canada Ltd ("UPS") rather than by using a more secure method of transferring information, the whole without even keeping a back-up of the information, so that the precise nature of the material lost cannot be ascertained;
- c) DaimlerChrysler chose not to encrypt or otherwise "password protect" the personal information contained on the Data Tape, making it available to any person who may gain access to it, notably using a tape drive easily available or having it converted into regular DVD format;

- d) DaimlerChrysler did not inform UPS of the content of the Data Tape, namely "sensitive personal information on approximately 240,000 of its customers" and declared a value of US \$5⁴, thereby attributing no value whatsoever (and no concern for) the sensitive personal information of its approximately 240,000 customers; and
- e) DaimlerChrysler decided to favor the reduction of its own shipping costs instead of protecting the personal information collected from its customers.

b) After the loss of the Data Tape

[34] Petitioner alleges that:

- a) after the loss of the Data Tape, DaimlerChrysler was negligent in failing to offer credit monitoring services to its customers or to alert credit bureaus such as Equifax and TransUnion of the loss in order to have the appropriate "red flags" marked on the customers' credit files;
- b) DaimlerChrysler was negligent in delaying the notification to its customers of the loss, which occurred on or about March 12, 2008;
- c) an earlier notification would have helped in preventing further fraud; and
- d) DaimlerChrysler failed to create an Internet webpage or similar service which would have helped its customers gain information as to the status of the lost Data Tape.

.....

[35] The Motion summarizes Petitioner's position on the negligence of TD Auto as follows:

[94] Basically, and as appears from all of the above, Respondent was negligent when it lost the Class Members' personal information and all it did thereafter was to send them the Exhibit R-3 Notification Letters, by regular mail, simply admitting its mistake but offering no relief or assistance whatsoever to their Customers;

[95] Respondent, in the Exhibit R-3 Notification Letters, did not even offer to compensate the Class Members for any loss or damages stemming from the loss of their personal information contained in the Data Tape, which is the very least Respondent should have done under the circumstances;

⁴ R-16.

THE DAMAGES ALLEGED IN THE MOTION

[36] The Motion describes the types of damages suffered by the Petitioner and "likely the other Class Members" as follows:

[96] Petitioner and likely the other Class Members have already and will continue to experience anxiety, fear, inconvenience and/or loss of time due to the loss of their personal information, which has made Petitioner and other Class Members potential targets for fraud and/or identity theft;

[37] The Motion also refers to potential inconveniences and damages of the nature of delays in processing applications for credit, the obligation to monitor accounts for fraud activity and to be "even more attentive than normally necessary concerning the communication of their personal information" and the "obligation, in some cases, to inform their other financial institutions of the loss of information" by DaimlerChrysler.

[38] The Motion describes as follows the other damages suffered or likely suffered by the Petitioner and the members of The Group:

[98] Petitioner and many Class Members have also paid certain fees or costs in order to further protect themselves, such as in order to activate a credit monitoring service, in order to obtain their credit report, in order to replace their personal identification such as social insurance numbers, driver's licence numbers, in order to purchase insurance, etc. Respondent is solely responsible and liable for these costs or fees paid by the Petitioner and/or other Class Members and for the inconvenience caused to Class Members in this regard;

[99] Furthermore, Class Members such as the Petitioner who have already fallen victim to fraud or identity theft have been inconvenienced by the loss of funds and/or loss of time dealing with the fraud, which again Respondent is solely responsible and liable to compensate;

[100] As a result of the loss of information by Respondent detailed hereinabove, certain Class Members such as the Petitioner decided or were advised to completely change their bank account numbers. In the case of the Petitioner particularly, he kept the old bank account open for approximately one month, as a transition period, in order to transfer all his payments to his new account (as per his financial institution's suggestion);

[101] Certain Class Members who chose to change their bank account number were forced to pay certain extra fees or charges in this regard, such as but not limited to the charges associated with ordering of replacements cheques bearing the new account numbers. The Petitioner's financial institution was nice enough to waive these fees for the Petitioner in particular;

[102] Furthermore, and as a result of being forced to change their bank account numbers in this regard, the Petitioner and certain Class Members were also inconvenienced (including loss of time) by being obliged to inform certain

third parties of the change in bank account number, for example informing their employer if automatic deposits are being made, and informing other financial institutions or corporations if automatic debits are being made on the existing account (which usually involves sending a VOID cheque to the organization in order to effect the change in bank account number to be automatically debited). In the case of the Petitioner, he was forced to inform his car and home insurance companies of the change of bank account numbers;

[103] Moreover, said Class Members may have been forced to pay service charges, interest, or penalties when dealing with issues of returned cheques and/or NSF cheques and/or failed automatic debits or credits during the transition period following the change of bank account numbers. Again, Petitioner's particular financial institution waived all fees stemming from his change account (which was only done because of the loss of information by Respondent);

[104] Some Class Members such as Petitioner saw their credit score drop considerably as a result of the loss of information by Respondent. Respondent is liable for all damages and expenses disbursed by the Petitioner and the Class Members in order to monitor and possibly rectify their credit scores;

[39] Finally, the Motion alleges that Class Members suffered punitive damages :

Punitive Damages:

[105] For all of the reasons more fully detailed above, which are reiterated as though recited at length in the present section, Petitioner respectfully submits that Respondent was grossly and/or intentionally negligent and is liable to pay punitive damages to the Class Members;

[106] In fact, without limiting the generality of the forgoing, Respondent was grossly negligent and/or intentionally negligent when it:

- a) decided to send the personal information of the Class Members without encrypting it in the first place, by way of normal UPS delivery;
- b) decided not to inform UPS of the content of the Data Tape in question and to only associate a nominal value of 5.00\$ USD to the Data Tape being sent, therefore associating no value whatsoever to the personal information of the Class Members;
- c) decided to only notify the Class Members several weeks after the loss by way of the Notification Letter sent by regular mail, in which it failed to mention very important information such as the fact that the date of birth was also lost and that the envelop had been located empty;
- d) decided never to even offer to compensate the Petitioner and the Class Members for the measures that had to be taken in order to counter the fraudulent activities made under their names nor to compensate them for any other financial losses stemming from the said loss of information;

[107] Considering the above and considering the fact that Respondent has violated various laws which have been enacted in order to protect the class members personal information, Respondent is liable to pay punitive damages to all of the Class Members due to the loss of private information itself, aside from any other compensable damages suffered by the Class Members;

[108] Respondent's above detailed actions qualify its fault as intentional which is a result of wild and foolhardy recklessness in disregard for the rights of the Class Members, with full knowledge of the immediate and natural or at least extremely probable consequences that its action would cause to the Class Members;

[109] Respondent's negligence has shown a malicious, oppressive and high-handed conduct that represents a marked departure from ordinary standards of decency. In that event, punitive damages should be awarded to Class Members;

THE LAW

[40] In a recent judgment⁵, the Court summarized the state of the law regarding the application of article 1003 C.C.P.:

[25] Deux grands principes sous-tendent l'application de l'article 1003 *C.p.c.*

[26] D'abord, l'appréciation des critères doit se faire conformément à l'esprit des amendements de 2002, c'est-à-dire en évitant que la procédure d'autorisation ne se transforme en pré-enquête sur le fond.

[27] Ensuite, les conditions de l'article 1003 *C.p.c.* ne doivent pas être interprétées de façon si restrictive qu'elles ne permettraient plus au recours collectif de remplir son objectif social, c'est-à-dire de permettre à des parties aux ressources limitées (et aux réclamations souvent modestes) d'obtenir réparation. Par ailleurs, une interprétation trop libérale pourrait amener l'utilisation du recours collectif à mauvais escient.

[28] La Cour suprême, dans un arrêt récent⁽⁴⁾, décrit ainsi le rôle du juge saisi d'une demande d'autorisation d'exercer un recours collectif :

[37] L'étape de l'autorisation permet l'exercice d'une fonction de filtrage des requêtes, pour éviter que les parties défenderesses doivent se défendre au fond contre des réclamations insoutenables : *Infineon Technologies AG c. Option Consommateurs*, 2013 CSC 59, par. 59 et 61. Par contre, la loi n'impose pas au requérant un fardeau onéreux au stade de l'autorisation; il doit uniquement démontrer l'existence d'une « apparence sérieuse de droit », d'une « cause défendable » : *Infineon*, par. 61-67; *Marcotte c. Longueuil (Ville)*, 2009 CSC 43, [2009] 3 R.C.S. 65, par. 23. En conséquence, le juge doit simplement déterminer si le

⁵ *Erik Charest v. Dessau inc. et al.*, 2014 QCCS 1891 ; appeal dismissed on November 3, 2014, 500-09-024488-140 (Doyon, St-Pierre and Schragger JJ.).

requérant a démontré que les quatre critères énoncés à l'art. 1003 *C.p.c.* sont respectés. Dans l'affirmative, le recours collectif est autorisé. La Cour supérieure procède ensuite à l'examen du fond du litige. Ainsi, lorsqu'il vérifie si les critères de l'art. 1003 sont respectés au stade de l'autorisation, le juge tranche une question procédurale. Il ne doit pas se pencher sur le fond du litige, étape qui s'ouvre seulement après l'octroi de la requête en autorisation : *Infineon*, par. 68; *Marcotte*, par. 22.

[29] La jurisprudence a développé certains grands axes, applicables au dossier en l'instance, pour guider le juge saisi de la demande d'autorisation :

a) le juge doit simplement s'assurer que le requérant satisfait aux critères de l'article 1003 *C.p.c.* sans oublier le seuil de preuve peu élevé prescrit par cette disposition^[5];

b) le juge jouit d'une discrétion dans l'appréciation des quatre critères de l'article 1003 *C.p.c.*^[6]. Cependant, une fois ces quatre critères jugés satisfaits, il est dépouillé de tout pouvoir additionnel et il doit autoriser le recours^[7];

c) l'analyse des critères d'autorisation doit bénéficier d'une approche généreuse plutôt que restrictive. Ainsi, le doute doit jouer en faveur des requérants, c'est-à-dire en faveur de l'autorisation du recours collectif^[8];

d) la règle de la proportionnalité de l'article 4.2 *C.p.c.* doit être considérée dans l'appréciation de chacun des critères de l'article 1003 *C.p.c.* mais ne constitue pas un cinquième critère indépendant^[9];

e) le défaut de satisfaire un seul des quatre critères de l'article 1003 *C.p.c.* devrait entraîner le rejet de la requête^[10];

f) le juge doit exclure de son examen les éléments de la requête qui relèvent de l'opinion, de l'argumentation juridique, des inférences, des hypothèses ou de la spéculation. Le requérant doit alléguer des faits suffisants pour que soit autorisé le recours^[11];

g) enfin, le Tribunal doit s'assurer que les parties ne soient pas inutilement assujetties à des litiges dans lesquels elles doivent se défendre contre des demandes insoutenables. Le fardeau imposé au requérant consiste à établir une cause défendable^[12].

[4] Vivendi Canada inc. c. Dell'Aniello, 2014 CSC 1.

[5] Infineon Technologies AG c. Option Consommateurs, 2013 CSC 59, par. 59.

[6] Union des consommateurs c. Bell Canada, 2012 QCCA 1287, par. 89.

[7] Bouchard c. Agropur coopérative, 2006 QCCA 1342, par. 36.

[8] Infineon Technologies AG, précité, note 5, par. 60; Union des consommateurs, précité, note 6, par. 117.

[9] Vivendi Canada inc, précité, note 4, par. 66.

- [10] Option Consommateurs c. Novopharm ltée, 2006 QCCS 118, par. 71; appel rejeté 2008 QCCA 949; demande de permission d'en appeler à la Cour suprême rejetée, 2008 CANLII 63502 (CSC).
- [11] Option Consommateurs c. Bell Mobilité, 2008 QCCA 2201, par. 37-38.
- [12] Infineon Technologies AG, précité, note 5, par. 61-67.

[41] The Court of Appeal recently reiterated⁶ the guidelines which should be followed in assessing whether the conditions of 1003 C.C.P. have been met:

[35] La Cour suprême a récemment saisi l'occasion du pourvoi dans *Infineon Technologies AG*¹ pour rappeler que, à l'étape de l'autorisation, le tribunal doit s'assurer que les critères de l'article 1003 C.p.c. sont satisfaits en ayant à l'esprit le seuil de preuve peu élevé que requiert cette disposition.

[36] Une application large des conditions d'autorisation répond en effet à une volonté de faciliter l'exercice des recours collectifs comme moyen d'atteindre les objectifs de dissuasion et d'indemnisation².

[37] On dit ainsi de la procédure d'autorisation qu'elle ne constitue pas un procès sur le fond, mais plutôt un mécanisme de filtrage servant simplement à écarter les demandes frivoles pour éviter que des parties aient à se défendre contre des demandes insoutenables.

[38] À cette étape, les faits allégués sont tenus pour avérés, mais il est impératif que ceux-ci paraissent justifier les conclusions recherchées, ce qui suppose que les allégations soient suffisamment précises de façon à soutenir efficacement la reconnaissance du droit revendiqué³.

[39] Mon collègue, Jacques Dufresne, souligne à cet égard que :

Le juge autorisateur doit adopter, il est vrai, une démarche analytique souple, mais encore faut-il que les allégations de la requête ne participent pas uniquement de généralités. En effet, plus l'allégation est générale, moins les faits ressortent, et plus on court le risque de se rapprocher davantage de l'opinion. Bref, les allégations de fait doivent être suffisamment précises de manière à soutenir efficacement la reconnaissance du droit revendiqué et ainsi permettre au juge autorisateur d'en apprécier la suffisance⁴.

[40] Les autres éléments de preuve versés au dossier dont les pièces, les déclarations sous serment ainsi que les interrogatoires doivent également être pris en compte par le juge saisi de la demande d'autorisation⁵.

[41] Le requérant assume alors un fardeau de démonstration et non de preuve⁶. Il n'a pas à établir que sa demande sera probablement accueillie, il lui suffit de démontrer « l'existence d'une cause défendable eu égard aux faits et au droit applicable »⁷.

⁶ *Toure v. Brault & Martineau inc.*, 2014 QCCA 1577 (Morissette, Savard, Gagnon JJ.).

- [1] Infineon Technologies AG c. Option consommateurs, 2013 CSC 59, [2013] 3 R.C.S. 600, par. 67.
 [2] Marcotte c. Ville de Longueuil, 2009 CSC 43, [2009] 3 R.C.S. 64, par. 22.
 [3] Infineon Technologies AG, précité, note 1, par. 67; Labelle c. Agence de développement des réseaux locaux de services de santé et de services sociaux - région de Montréal, 2011 QCCA 334, par. 59-60.
 [4] Fortier c. Meubles Léon ltée, 2014 QCCA 195, par. 69.
 [5] Union des consommateurs c. Bell Canada, 2012 QCCA 1287, par. 88, requête pour autorisation de pourvoi à la CSC refusée, 17 janvier 2013, 34994.
 [6] Martin c. Société Telus Communications, 2010 QCCA 2376, par. 32.
 [7] Infineon Technologies AG, précité, note 1, par. 65.

DISCUSSION

i) *The common issues (article 1003 a) C.C.P.)*

[42] TD Auto does not contest the Motion with regards to condition 1003 a) C.C.P.

[43] As a general rule, the Court must determine whether the claims of the members of the Group have a common denominator in order to assess whether the recourse of the members raises identical, similar or related questions of fact or law. The Court has to be satisfied that the class action will be to the benefit of all of the members of the Group.

[44] There is one basic common denominator for the members of the Group: they have all had their personal information lost on or about March 12, 2008.

[45] Is this sufficient for the condition of article 1003 a) C.C.P. to be met?

[46] The Court of Appeal⁷ has adopted a somewhat flexible approach to the interpretation of the condition of 1003 a) C.C.P.:

[17] Les objectifs du recours collectif sont: l'économie de ressources judiciaires, l'accès à la justice et la modification des comportements. Présumant que les allégations de la requête sont vraies, les deux derniers objectifs, de toute évidence, sont ici satisfaits. Quant au premier, il le sera si la détermination des questions communes au groupe est susceptible d'avancer de façon significative les recours individuels des membres.

[22] Or, la seule présence d'une question de droit commune, connexe ou similaire est suffisante pour satisfaire la condition à l'article 1003 a) C.p.c. si elle n'est pas insignifiante sur le sort du recours; elle n'a cependant pas à être déterminante pour la solution du litige: *Comité d'environnement de la Baie inc. c. Société de l'électrolyse et de chimie de l'Alcan ltée*, [1990] R.J.Q. 655 (C.A.), paragr. 22 et 23. Il suffit en fait qu'elle permette l'avancement des réclamations sans une répétition de l'analyse juridique.

⁷ *Collectif de défense des droits de la Montérégie (CDDM) v. Centre hospitalier régional du Suroît du Centre de santé et de services sociaux du Suroît*, 2011 QCCA 826.

[23] Il est fort possible que la détermination des questions communes ne constitue pas une résolution complète du litige, mais qu'elle donne plutôt lieu à des petits procès à l'étape du règlement individuel des réclamations. Cela ne fait pas obstacle à un recours collectif.

[47] The fact that personal information belonging to all the members of the Group was lost in the same circumstances would raise similar questions of fact or law that would not be insignificant on the fate of the claim. The question is: would this circumstance, common to all members, allow for the advancement of the claims "sans une répétition de l'analyse juridique"?

[48] The answer is yes.

[49] In the current state of the case law, the fact that several "little trials" (or, the Court adds, groups of trials) might be necessary for an individual resolution of the members' claims is not an impediment to the condition of article 1003 a) C.C.P. being met.

[50] The Court therefore concludes that the condition of article 1003 a) C.C.P. is satisfied.

ii) The condition of article 1003 c) C.C.P.

[51] There is no debate on the issue of condition 1003 c) C.C.P. being met: the composition of the Group makes the application of articles 59 or 67 C.C.P. difficult or impracticable.

[52] The Motion alleges that the number of people included in the Group is estimated at 239,277⁸.

iii) The appearance of right (article 1003 b) C.C.P.)

[53] The Court will deal now with the condition of article 1003 b) C.C.P. Do the facts alleged in the Motion seem to justify the conclusions sought?

[54] As the Court already proceeded to analyse this question in the Mazzonna Judgment on the basis of similar facts and felt that part of the "appearance of right" condition was satisfied, it is sensible to reproduce part of said judgment before dealing with causation and damages:

[24] The legal syllogism proposed by the Petitioner in support of the appearance of right is the following. After entering into a contract of lease of a Chrysler vehicle, the Petitioner entrusted DaimlerChrysler with protected private information; this information was lost and the Notification Letter is clear not only as to the loss but also as to the fact that the loss may cause clients "inconvenience or alarm" in that the information can fall into the wrong hands. As

⁸ Par. 123 a) of the Motion.

to the damages, Petitioner argues that there is *prima facie* evidence that she suffered stress and she also claims that she is entitled to punitive damages.

[25] This is the legal syllogism and the Petitioner states that it is up to the judge at trial to determine the degree of stress and inconvenience she suffered and whether it is enough to warrant compensation.

[26] As conditions 1003 a) and 1003 b) *CCP* are somewhat interrelated, the Court states from the outset that the questions raised by the Petitioner to illustrate that she has met the condition of Article 1003 a) *CCP* (identical, similar or related questions of law or fact) are coherent with the proposed legal syllogism:

a) Was Defendant negligent in the handling of and subsequent loss of the personal information of the Group Members?

b) Is Defendant liable to pay damages to the Group Members as a result of the loss of said information, including actual monetary losses incurred as well as pain, suffering, inconvenience, anxiety and other moral and/or punitive damages caused by the loss of said information?

[27] First, the Court comes to the conclusion that there is a *prima facie* demonstration that negligence is involved in the loss of the Data Tape.

[28] DaimlerChrysler chose to transfer the Data Tape, which contained personal information on some 240,000 clients, through the services of UPS. The fact is that a sealed shipping package was picked up on March 10, 2008 by a UPS driver at DaimlerChrysler's facility in Sterling Heights, Michigan, for shipment to Rouyn-Noranda, Quebec.

[29] A UPS clerk, in Montreal, inspected the package on March 11, 2008 and noted that the packaging was torn and the Data Tape not in the package. The fate of the Data Tape is unknown.

[30] In summary, the Petitioner contracted with the Respondent, entrusted it with her information and the Respondent did not, *prima facie*, meet its obligations to store, keep and transfer the information safely.

[55] Petitioner has made a demonstration of negligence on the part of TD Auto.

[56] TD Auto claims that, even if the loss of the Data Tape was negligent, Petitioner fails to demonstrate, *prima facie*, that he has suffered direct and immediate damages as a result of said loss.

[57] The Petitioner does have to demonstrate on a *prima facie* basis that he has an arguable cause of action, irrespective of that of any other purported class members. TD Auto claims that there is no demonstration of a causal link between the loss of the Data Tape and the alleged fraud and identity theft suffered by Mr Belley.

[58] TD Auto insists on the fact that Petitioner himself has admitted, when interviewed for "La Facture" aired on Radio-Canada on November 25, 2008, that a cheque (from his CIBC account) bearing no 115, was key to the frauds perpetrated against him (la "clé de l'histoire").

[59] It may or may not be that the identity theft and fraud alleged by Mr Belley are a result of the loss of the Data Tape. TD Auto invites the Court to decide, at this stage of the proceedings, that they are not.

[60] With all due respect, the Court is of the view that this is a question to be determined on the merits. The Petitioner has alleged in detail the facts which occurred as of April 29, 2008. They took place shortly after the Data Tape loss. The Court ought not to rule on the question of the causal link between said loss and the alleged identity theft and fraud without more evidence and testimony on the subject.

[61] The time link between the Data Tape loss and the alleged identity theft and fraud allow the Court to conclude to an arguable case for the Petitioner.

[62] TD Auto pleads that the Petitioner has failed to establish the existence of a group that has suffered damages as a result of the Data Tape loss or that, at the very least, the statement that members of the Group did suffer said damages is unsupported or speculative⁹.

[63] Petitioner has filed a list of some 140 purported Group members¹⁰, some having added personal comments. TD Auto counters that only 3 of them have made a very general affirmation that they have been victims of identity theft, that they do not mention having suffered any damages as a result, that there is not one iota of evidence that any member of the Group of some 240 000 people, except for Petitioner, has been the victim of identity theft.

[64] TD Auto adds that, in the absence of financial loss caused by fraud or identity theft, the law does not recognize claims for damages unsubstantiated by objective medical and other evidence, such as anxiety, fear, inconvenience and loss of time.

[65] Once again, the Court is of the view that it would be unfair and premature to conclude from an analysis of comments of purported Group members gathered on a list that members of the Group have not suffered damages similar to those alleged by Petitioner.

[66] In the Mazzonna Judgment, the Court held that Ms Mazzonna had not suffered "compensable" damages and that, therefore, her individual claim could not serve as a basis for authorizing a class action. In this instance, the Court does not reach this conclusion with respect to the Petitioner and cannot, from a cursory look at comments

⁹ Par. 90, 96, 99 and 121 of the Motion.

¹⁰ R-20.

on a list of potential members, conclude that the members of the Group have not suffered damages as a consequence of the Data Tape Loss.

[67] Finally, TD Auto claims that Petitioner cannot ask for punitive damages. Essentially, it argues that the Motion does not contain specific facts that would show that TD Auto intentionally interfered with the fundamental rights of its customers.

[68] Once again, it is premature, based on the allegations of the Motion, to rule that Petitioner, or members of the Group, would not be entitled to punitive damages.

[69] The facts alleged in the Motion provide an arguable case that TD Auto's negligence in the handling of the delivery, the loss and the consequences of the loss of the Data Tape might constitute an illicit and intentional violation of a right, the right to respect for one's private life, protected by the *Charter of Human Rights and Freedoms*¹¹.

[70] The Court is of the view that Petitioner has satisfied condition b) of article 1003 C.C.P.

iv) *The condition of article 1003 d) C.C.P.*

[71] Contrary to what the Court held in the Mazzonna Judgment where Ms Mazzonna was found not to meet condition 1003 d) C.C.P., Petitioner does satisfy said condition.

[72] The Motion alleges the following with regards to the Petitioner's capacity to adequately represent the numbers of the Group¹²:

- a) His personal information was lost by Respondent as described hereinabove;
- b) He has already and will continue to suffer anxiety, inconvenience, stress, loss of time, and out-of-pocket expenses as a result of said loss of information;
- c) He has already fallen, and may in the future fall, victim to fraud and/or identity theft because of Respondent's loss of his personal information;
- d) He has followed this matter since March of 2008 and decided to institute the present proceedings after the Mazzonna file failed to be authorized by this Honorable Court due to the level of damages suffered by Mrs. Mazzonna specifically, which level of damages pales in comparison to the level suffered by the Petitioner;
- e) He understands the nature of the action and has the capacity and interest to fairly and adequately protect and represent the interest of the Members of the Group;

¹¹ R.S.Q., ch. C-12.

¹² Par. 129 of the Motion.

- f) He is available to dedicate the time necessary for the present action before the Courts of Quebec and to collaborate with Class attorneys in this regard and Petitioner is ready and available to manage and direct the present action in the interest of the Members of the Group that Petitioner wishes to represent;
- g) Petitioner is determined to lead the present file until a final resolution of the matter, the whole for the benefit of the Class;
- h) His interests are not antagonistic to those of other members of the group;
- i) He 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;
- j) He, with the assistance of the undersigned attorneys, is ready and available to dedicate the time necessary for this action and to collaborate with other Members of the Group and to keep them informed;

[73] The Motion alleges various conversations between Petitioner and representatives of DaimlerChrysler¹³ and correspondence with such representatives¹⁴.

[74] Petitioner contacted *La Fracture* of the *Société Radio-Canada*; this is also a way to alert potential Group members¹⁵.

[75] The Supreme Court¹⁶ adopted Professor and author Pierre-Claude Lafond's position that adequate representation requires the consideration of three factors: interest in the suit, competence and absence of conflict with the group members.

[76] Mr Belley has, from the allegations of the Motion, taken a keen interest in this suit and nothing of what has been represented can lead the Court to conclude to the existence of a conflict of interest.

[77] While it is true that there are no allegations that Petitioner specifically attempted to identify other members of the proposed group who would have been victims of fraud or identity theft as a result of the loss of the Data Tape, he has proved to be a proactive claimant who, with the help of his attorney, has found people who might be members of the Group.

[78] The Court should not be requiring that the best possible person be chosen to act as representative; this would go against providing access to the exercise of class actions. This person needs to be able to provide adequate, proactive representation. Mr Belley can do this.

¹³ Par. 31-33 and 41 of the Motion.

¹⁴ Par. 51, 65 and 67 of the Motion.

¹⁵ Par. 70 and 71 of the Motion.

¹⁶ *Infineon Technologies*, supra, par. 41 of the judgment, par 149.

[79] Petitioner meets condition d) of article 1003 C.C.P.

v) National vs Provincial class

[80] Petitioner seeks approval of a multijurisdictional class action. Respondent argues that should the recourse be authorized, the Group should be restricted to Quebec members.

[81] The rules of private international law provided for at *Book Ten* of the *Civil Code of Québec* (C.C.Q.) apply to class actions as though they were individual proceedings; these rules complement those of the C.C.P.¹⁷

[82] To decide this question, it is therefore useful to reproduce article 3148 C.C.Q. :

3148. In personal actions of a patrimonial nature, Québec authorities have jurisdiction in the following cases:

- (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, injury 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 them the present or future disputes between themselves arising out of a specific legal relationship;
- (5) the defendant has submitted to their jurisdiction.

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.

[83] The members of the Group are dispersed across Canada, as is evidenced by the chart reproduced as Annex A of the Judgment.

[84] This in itself does not, of course, decide of the question of extraterritoriality.

[85] Petitioner claims that article 3148(2) and (3) C.C.Q. would confer jurisdiction to the Quebec Court.

¹⁷ *Spar Aerospace Ltée v. American Mobile Satellite Corp.*, [2002] 4 S.C.R. 205, par. 22.

[86] Petitioner argues that since TD Auto, while not domiciled in Quebec, has an establishment there and since the dispute relates to its activities in Quebec, the condition of article 3148(2) C.C.Q. is satisfied.

[87] Petitioner further argues that the Quebec Court has jurisdiction pursuant to article 3148 (3) C.C.Q. He states that TD Auto's fault was committed in Quebec and that the injurious act occurred in Quebec, the Data Tape loss having occurred while in transit from the State of Michigan to Quebec and likely in Quebec, since the empty UPS envelope was found in Quebec.

[88] TD Auto contests Petitioner's position and argues that, should the recourse be authorized, such authorization should be limited to the Province of Quebec.

[89] Neither TD Auto nor DaimlerChrysler were domiciled or resident in Quebec at the relevant time.

[90] DaimlerChrysler did have an establishment in Quebec at the time of the filing of the class action. TD Auto argues, however, that there is no allegation or evidence to the effect that that establishment has any connection with the dispute. It claims that the only establishment that can be said to have any connection with the dispute is the one located in the State of Michigan, where the personal information was stored and where the UPS packing slip originated.

[91] For the condition of article 3148 (2) CCQ to be satisfied, it is not enough that the defendant have an establishment in Quebec. The dispute has to relate to its activities in the Province.

[92] Does the dispute in this case relate to these activities in Quebec?

[93] The meaning of "its activities in Quebec" and whether such relate to the activities of the establishment or to the activities of the defendant have been the subject of some dispute. In *Interinvest (Bermuda) Limited v. Herzog et al.*¹⁸, the Court of Appeal, after summarizing the arguments, concluded as follows:

[41] En conclusion, une personne morale étrangère ayant un établissement au Québec peut y être poursuivie si le litige est relatif à son activité au Québec, même si les décisions relatives à cette activité n'ont pas été prises par l'établissement au Québec. Il y a alors présence des deux éléments requis pour créer un lien de rattachement suffisant avec le Québec au sens de 3148(2) C.c.Q., qui dépasse la simple présence de biens au Québec puisque le litige doit aussi découler d'activités au Québec, comme le soulignait le juge Lévesque dans *Perez c. Bank of Nova Scotia*, B.E. 2004BE-542 (C.S.), conf. par SOQUIJ AZ-04019613, 2004-05-07 (C.A.)

¹⁸ 2009 QCCA 1428 (Robert, Dalphond, Hilton JJ.).

[94] The dispute in this instance relates to the activities of DaimlerChrysler in Quebec, where it did have an establishment. It may be that, as TD Auto argues, there remain questions about the type of connection between the Quebec establishment and the dispute. This being said, the Court of Appeal advocates a liberal interpretation of article 3148 C.C.Q., which is more compatible with the reality of modern era business decision making¹⁹.

[95] The liberal interpretation suggested by the higher court is all the more appropriate in matters such as this one where, based on the allegations of the Motion, personal information was used for Canada-wide business purposes and where the membership in the proposed group is spread around the country.

[96] The Court finds that section 3148(2) applies to the facts as alleged in the Motion. This is sufficient to dispose of the issue of jurisdiction.

[97] Finally, TD Auto argues that the Motion is "mostly based" on Quebec privacy legislation, that the only federal legislation mentioned in the Motion is the *Personal Information Protection and Electronic Documents Act*²⁰, which does not apply in some provinces of Canada, and that, as a consequence, there is no "real and substantive connection" of the claims of non-residents of the Province of Quebec with those of Quebec residents.

[98] It may be that there are differences in the applicable provincial legislations. It does appear, however, that *prima facie*, given the nature of the claim, the differences between the applicable legal schemes should not cause the action to lose its collective nature.

FOR THESE REASONS, THE COURT :

[99] **GRANTS** the Corrected Motion to Authorize the Bringing of the Class Action and to Ascribe the Status of Representative;

[100] **AUTHORIZES** the bringing of a class action in the form of a motion to institute proceedings in damages;

[101] **ASCIBES** the Petitioner the status of representative of the persons included in the group described as:

All persons (including their estates, executors, or personal representatives), consumers, corporations, firms, businesses, and other organisations, in all of Canada, whose personal information was stored or saved on a data tape, which was lost by Respondent while in transit on or about March 12, 2008;

(the "Group");

¹⁹ Idem, par. 38 to 40.

²⁰ S.C. 2000, c.5.

[102] **IDENTIFIES** the principal questions of fact and law to be treated collectively as the following:

Was Respondent negligent in the handling of and subsequent loss of the personal information of the Group members?

Is Respondent liable to pay damages to the Group members as a result of the loss of said information, including actual monetary losses incurred, lost time, inconvenience, anxiety and other moral and/or punitive damages caused by the loss of said information, and if so in what amount?

[103] **IDENTIFIES** the conclusions sought by the class action to be instituted as being the following:

GRANT Plaintiffs' action against Defendant;

CONDEMN Defendant to pay to the members of the Group compensatory damages for all monetary losses caused as a result of Defendant's loss of the members' personal information;

CONDEMN Defendant to pay to the members of the Group compensatory and/or moral damages in the amount to be determined by the Court as a result of Defendant's loss of said members' personal information;

CONDEMN Defendant to pay an amount in punitive / exemplary damages to every Group member, in the amount to be determined by the Court, with interest as well as the additional indemnity;

GRANT the class action of Petitioner on behalf of all the members of the Group;

ORDER the treatment of individual claims of each member of the Group in accordance with articles 1037 to 1040 C.C.P.;

THE WHOLE with interest and additional indemnity provided for in the Civil Code of Quebec and with full costs and expenses including expert's fees and publication fees to advise members;

[104] **DECLARES** that all members of the Group that have not requested their exclusion from the Group in the prescribed delay be bound by any judgment to be rendered on the class action to be instituted;

[105] **FIXES** the delay of exclusion at 30 days from the date of the publication of the notice to the members;

[106] **ORDERS** the publication of a notice to the members of the Group in accordance with article 1006 C.C.P. and convenes the parties to a hearing at a date to be fixed with them to discuss the issues of the notice to the members of the Group and the costs relating to said notice;

[107] **THE WHOLE** with costs.



LOUIS LACOURSIÈRE, J.S.C.

Me David Assor
Me Sabrina Kidouchim
LEX GROUP INC.
Attorneys for Petitioner

Me Robert Charbonneau
Me Christine Lebrun
BORDEN LADNER GERVAIS
Attorneys for Respondent

Dates of hearing : October 27 and 28, 2014.

ANNEX A

<u>Province / State</u>	<u>Number of Customers</u>
British Columbia	19,609
Alberta	34,696
Saskatchewan	5,989
Manitoba	5,879
Ontario	95,250
Quebec	62,235
New Brunswick	5,516
Newfoundland & Labrador	3,505
Nova Scotia	5,101
Prince Edward Island	800
Northwest Territories	542
Nunavut	4
Yukon	148
Washington (USA)	1
Texas (USA)	1
Kansas (USA)	1