

SUPERIOR COURT

CANADA
PROVINCE OF QUEBEC
DISTRICT OF MONTRÉAL

No: 500-06-000615-126

DATE: June 16, 2017

PRESIDED BY THE HONOURABLE LOUIS LACOURSIÈRE, J.S.C.

MAXIME BELLEY
Plaintiff

v.

TD AUTO FINANCE SERVICES INC./
SERVICES DE FINANCEMENT AUTO TD INC.
Defendant

JUDGMENT ON AN APPLICATION FOR THE DISCLOSURE OF DOCUMENTS

I. CONTEXT

[1] In 2008, a Class Action Application was filed with respect to the alleged negligent disclosure of personal information contained in a DaimlerChrysler Financial Services Inc. data tape which was lost on or about March 12, 2008 (the "**Data Tape Loss**").

[2] In 2012, the Application was dismissed, notably because the Applicant could not demonstrate a compensable loss and, hence, adequately represent the proposed group members.

[3] Later in 2012, a second Class Action Application was filed with respect to the Data Tape Loss.

[4] On January 19, 2015, the representative Plaintiff, Maxime Belley, was authorized to institute proceedings on behalf of the following class:

All persons (including their estates, executors, of 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");

[5] He alleged in his class action motion, *inter alia*, that a fraudster had used a void cheque issued by him on purchase of a Chrysler vehicle in May 2004 in order to steal his identity and buy four vehicles, hence the suggestion that the identity theft came from the Data Tape Loss; he also alleged that, as a result of the above, he had to take several steps to protect his identity and saw his credit rating plummet.

[6] In the judgment authorizing the class action, the Court wrote:

[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 speculative.

[63] Petitioner has filed a list of some 140 purported Group members, 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 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.

[7] Some 240,000 names were on the Data Tape. In the minutes of a case management telephone conference of February 1, 2016, the Court refused Class Counsel's request to be given the list of names by Defendant. The Court added the following:

Le Tribunal suggère plutôt que la liste lui soit envoyée; elle sera gardée confidentielle et l'avocat du requérant pourra, s'il le juge opportun, communiquer avec le soussigné ou son adjointe, sans avoir à mettre les avocats de l'intimée en copie, pour faire les vérifications requises quant à l'appartenance de personnes au groupe.

La décision du Tribunal ne saurait servir de précédent quant à toute demande qui pourrait être faite plus tard par une partie ou l'autre.

[8] By February 28, 2016, Notice of the class action authorization had been disseminated by press releases, Metro newspaper, the Globe and Mail, FaceBook ads and radio ads; the potential class members were given Class Counsel's website to seek information about the class action.

[9] There was no opt-outs.

[10] On December 23, 2016, the class action was served. It refers to 19 exhibits while the summons, attached to the application,¹ refers to an Exhibit P-20, "List of Class Members with certain comments". In correspondence dated February 1, 2017, Class Counsel referred to this as a "typo" and wrote that there was no Exhibit P-20 "for the time being".

¹ Art. 145 of the *Code of Civil Procedure (CCP)*.

II. PURPOSE OF THE APPLICATION

[11] The Defendant wishes to obtain “copies of class Plaintiff’s complete and updated list of registered members, their registration forms and of any claim supporting documentation which they have provided to Class Counsel”.

[12] The Application is based on article 169 of the CCP:

169. A party may apply to the court for any measure conducive to the orderly conduct of the proceeding.

A party may also apply to the court for an order directing another party to provide particulars as to the allegations made in the application or the defence, disclose a document to the party or strike immaterial allegations.

A judgment granting such an application may require a party to do something within a specified time under pain of the originating application or the defence being dismissed or the allegations in question being struck.

[13] Defendant claims that there is no doubt that the list exists, is properly described and, hence, that seeking it does not constitute a fishing expedition on its part.

[14] It also argues that the list is relevant in the context of the litigation as instituted, notably to ascertain whether it is appropriate to engage further resources to adjudicate this class action given the presumed post notice response of class members.

[15] Finally, it claims that there is no confidentiality or privilege issues involved.

[16] For his part, Plaintiff replies that the Defendant’s request is an attack on the professional secrecy to which the members who have registered on Class Counsel’s website are entitled. He claims that this step is only a prelude to what will come next, i.e. a possible application for leave to depose class members² or even to decertify.

[17] Plaintiff adds that, in any event, knowledge of the number of people who have registered on Class Counsel’s website to raise the suspicion that they have been defrauded further to the Data Tape Loss is irrelevant for at least two reasons.

[18] First, the damages claimed in the class action, as authorized, go well beyond fraud and may include damages such as the costs incurred to protect against identity theft and may include punitive damages.

[19] Second, it may very well be that the means used to disseminate the notice in February of 2016 were not efficient enough to reach a sufficient number of class members.

² Art. 587 CCP.

III. DISCUSSION

[20] Two preliminary notions.

[21] First, the notion of a "registered" member does not exist in the CCP. It refers, generally, to the members whose names appear on the list of members of the group filed in support of the originating motion for authorization or to the members who have registered by Internet or otherwise with class counsel.³

[22] Second, the qualification of the juridical status of a class member after the authorization has been clarified, although it is somewhat vague. It is not clear from the CCP; for its part, the Court of Appeal has used different terms to qualify it.

[23] In *Société des Loteries du Québec v. Brochu*,⁴ the Court of Appeal states that these members are not "mere witnesses"⁵ and adds that if such members cannot, strictly speaking, be considered as parties, their status is close to it.⁶

[24] In *Imperial Tobacco Canada Ltd v. Létourneau*,⁷ Justice Wagner, then of the Court of Appeal, referred to the status of the post authorization class members as follows:

[33] Il s'ensuit que les représentants désignés, en l'occurrence Mme Cécilia Létourneau et M. Jean-Yves Blais, agissent pour tous les membres inscrits aux recours et je ne vois pas en quoi ces derniers perdraient le statut de partie, même s'il n'est que virtuel, présumé ou délégué en raison du mécanisme particulier adopté par le législateur. Les membres auront toujours l'opportunité de recevoir, le cas échéant, le bénéfice qui découle des procédures judiciaires tout comme s'ils étaient eux-mêmes partie à la procédure. Le seul fait que leur statut de créancier ou de *partie* ne se cristallise qu'au moment du dépôt du jugement ne leur fait pas perdre pour autant le statut de *partie* au sens du *Code de déontologie des avocats*.

(Emphasis added)

[25] In *Filion*,⁸ a majority of the Court of Appeal more recently described such status as follows :

[48] [...] Quant aux membres qui, d'une manière ou d'une autre, ont établi une relation avocat-client avec l'avocat agissant en demande, leur statut se

³ *Filion v. Québec (Procureure générale du)*, 2015 QCCA 352, par. 21.

⁴ 2006 QCCA 1117.

⁵ *Ibid.*, par. 16.

⁶ *Ibid.*, par. 21.

⁷ 2012 QCCA 2013.

⁸ *Supra*, note 3.

rapproche beaucoup de celui d'une partie protégée par les obligations déontologiques de l'avocat. [...]

[26] The notion of the qualification of the post authorization class members being clarified, the Court will now dispose of the request for the disclosure of documents.



[27] This application has to be analyzed in terms of the relevancy of the documents sought. Mr. Justice Granosik wrote this about the "document" of article 169 CCP:⁹

[27] [...] Le « document » n'est plus tributaire de la volonté de la partie de le produire ou non. Il doit répondre uniquement à l'exigence de la pertinence dans le débat. Cette interprétation se justifie tant selon la méthode littérale que selon la méthode moderne d'interprétation législative.

[28] The Court is in agreement with this proposition.

[29] The issue of relevancy has to be assessed taking into account the Preliminary Provision and articles 2 and 20 CCP. The fact that the procedural means in place is that of a class action does not relieve the parties of the obligations mentioned therein:

PRELIMINARY PROVISION

This Code establishes the principles of civil justice and, together with the Civil Code and in harmony with the Charter of human rights and freedoms (chapter C-12) and the general principles of law, governs procedure applicable to private dispute prevention and resolution processes when not otherwise determined by the parties, procedure before the courts as well as procedure for the execution of judgments and for judicial sales.

This Code is designed to provide, in the public interest, means to prevent and resolve disputes and avoid litigation through appropriate, efficient and fair-minded processes that encourage the persons involved to play an active role. It is also designed to ensure the accessibility, quality and promptness of civil justice, the fair, simple, proportionate and economical application of procedural rules, the exercise of the parties' rights in a spirit of co-operation and balance, and respect for those involved in the administration of justice.

This Code must be interpreted and applied as a whole, in keeping with civil law tradition. The rules it sets out are to be interpreted in the light of the specific provisions it contains or of those of the law, and in the matters it deals with, the Code compensates for the silence of the other laws if the context so admits.

⁹ *Envac Systèmes Canada inc. c. Montréal (Ville de)*, 2016 QCCS 1931.

[...]

2. Parties who enter into a private dispute prevention and resolution process do so voluntarily. They are required to participate in the process in good faith, to be transparent with each other, including as regards the information in their possession, and to co-operate actively in searching for a solution and, if applicable, in preparing and implementing a pre-court protocol; they are also required to share the costs of the process.

They must, as must any third person assisting them, ensure that any steps they take are proportionate, in terms of the cost and time involved, to the nature and complexity of the dispute.

In addition, they are required, in any steps they take and agreements they make, to uphold human rights and freedoms and observe other public order rules.

20. The parties are duty-bound to co-operate and, in particular, to keep one another informed at all times of the facts and particulars conducive to a fair debate and make sure that relevant evidence is preserved.

They must, among other things, at the time prescribed by this Code or determined in the case protocol, inform one another of the facts on which their contentions are based and of the evidence they intend to produce.

[30] Is the disclosure of the documents requested by the Defendant relevant? The Defendant explains the relevancy as follows. Before authorization and, obviously, before the publication and issuance of the notices to members, the Plaintiff had filed a list of some 140 purported group members, including a small number of them having alleged identity theft.¹⁰ The Defendant therefore deems relevant to have an up to date list, notably to see the size of the group and whether a class action is still justified in the circumstances.

[31] The Defendant states that it has reasons to believe that there has been no damage of the nature of identity theft further to the Data Tape Loss. It alleges three:

- The very list submitted by the Plaintiff in support of his original application¹¹ contained very few people, with a very small number alleging identity theft;
- It alleges that it had no evidence of identity theft in reply to its mass correspondence to 240,000 clients; and
- It alleges that it is far from obvious that even the Plaintiff's own allegation of damages, arising from the theft of a cheque, was related to the Data Tape Loss.

¹⁰ See par. 63 of the Authorization judgment of January 19, 2015, 2015 QCCS 168.

¹¹ Exhibit R-20.

[32] The Plaintiff himself has indeed filed a list of purported class members in support of his original application. This list includes the names, city and home province of the members, together with some comments from some members. The Court fails to see how the communication of such a list is relevant at the authorization stage but would not be once the action has been authorized.

[33] There is indeed an issue of proportionality here. The class proceeding announces a group of some 240,000 members. Without this being the only determining factor, there is a significant relevance to knowing how many people have registered on the website after a campaign to publicise the class action, through several serious means, including radio ads and a notice in the *Globe and Mail*, at a cost of approximately \$100,000.

[34] In the Court's view, the number of people who registered as a result of the Court authorized notices is relevant to assess the scope of the litigation. The Defendant, to prepare its defence, and the Court, as case management judge, are entitled to have this information.

[35] The issue of professional secrecy raised by Plaintiff's counsel is a serious one. In the Court's view, it can be resolved as follows.

[36] Justice Chamberland, in *Filion*,¹² raised the question as follows:

[34] En passant, si le juge de première instance a raison de dire qu'une certaine forme de relation avocat-client est à la base de cette notion de membre « inscrit » – la liste comprenant même la liste de ceux qui ont déjà personnellement consulté les avocats agissant en demande –, on peut s'interroger sur le problème que pose la divulgation de ces noms par rapport au droit au secret professionnel de l'avocat. Le fait même pour un citoyen de consulter un avocat n'est-il pas protégé par le secret professionnel?

[37] He briefly answered his own question as follows :

[48] [...] Quant aux membres qui, d'une manière ou d'une autre, ont établi une relation avocat-client avec l'avocat agissant en demande, leur statut se rapproche beaucoup de celui d'une partie protégée par les obligations déontologiques de l'avocat. [...]

[38] What is to be protected? It is unlikely that the name and addresses of people who registered on Class Counsel's website are protected. These people have obviously agreed, when they registered, to come out of anonymity and become "virtual parties". On this particular issue, the Court agrees with Justice Bélanger, dissenting in *Filion*, who wrote:

¹² *Supra*, note 3.

[65] [...] Par ailleurs, deux propositions me semblent en contradiction. D'un côté, les membres sont des quasi-parties (ils auront droit, comme l'affirme le juge Vézina, de recevoir un chèque), et de l'autre côté, ils auraient droit à l'anonymat et à la quiétude. À mon avis, ces deux propositions sont difficilement conciliables. En principe, un défendeur a le droit de connaître le nom des personnes qui le poursuivent et lui réclament de l'argent.

[39] The Court does not understand from *Filion* that the majority, Justices Chamberland and Hilton, and Justice Bélanger, disagreed on the fact that once the members have registered with Class Counsel, they cannot expect complete anonymity.¹³ The Court rather understands that the majority declined to grant the Defendant's request to disclose the names because the Defendant was planning to meet privately with said members.

[40] This is not the case in this instance and the Defendant's counsel has even undertaken at the hearing not to communicate with any such members unless duly authorized by the Court.

[41] The Court will not, however, allow the disclosure of the registration forms and claim supporting documentation provided to Class Counsel. It may be that these documents eventually become subject to disclosure; it would not be appropriate, however, at this stage, to order the communication of data that the members sent to "their" lawyer, with an expectation that it be protected by professional secrecy.

FOR THESE REASONS, THE COURT:

[42] **GRANTS** in part the Defendant's application;

[43] **ORDERS** the Class Plaintiff to disclose to the Defendant copy of Class Plaintiff's complete and updated list of registered members, together with their province of residence;

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


LOUIS LACOURSIÈRE, J.S.C.

Mtre David Assor
LEX GROUP INC.
For the Plaintiff

¹³ Justice Chamberland refers at par. 32 to members enjoying relative anonymity.

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Mtre Margaret Weltrowska
DENTONS CANADA LLP
For the Defendant

Date of hearing: June 9, 2017