SUPERIOR COURT

(Class Action)

CANADA
PROVINCE OF QUEBEC
DISTRICT OF MONTREAL

No: 500-06-000615-126

DATE: July 5, 2013

IN THE PRESENCE OF: THE HONOURABLE LOUIS LACOURSIERE, J.S.C.

MAXIME BELLEY
Petitioner
v.
TD AUTO FINANCE SERVICES INC./
SERVICES DE FINANCEMENT AUTO TD INC.
Respondent

JUDGMENT ON A MOTION TO DISMISS

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[1] The Respondent TD Auto Finance Services Inc./Services de financement Auto TD inc. ("**TD Auto**") argues that the Petitioner's Motion to Authorize the Bringing of a Class Action and to Ascribe the Status of Representative (the "**Belley Motion**") should be dismissed because a judgment rendered in "an essentially identical" class action has the authority of a final judgment, *i.e.* constitutes *res judicata* on the question of Mr. Belley's individual claim.

[2] Subsidiarily, TD Auto claims that the Belley Motion should be dismissed because it constitutes an abuse of process, Mr. Belley's individual claim having already been decided in an "essentially identical class action".

I THE CONTEXT

[3] On March 15, 2012, the Superior Court rendered a judgment dismissing Anna Mazzonna's Motion to Authorize the Bringing of a Class Action and to Ascribe the Status of Representative against TD Auto, Respondent in continuance of suit, the initial Respondent being DaimlerChrysler Financial Services Canada inc. (the "**Mazzonna Judgment**")**.**

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

[5] On May 22, 2012, Maxime Belley filed the Belley Motion against TD Auto in connection with the same data tape loss.

[6] As the undersigned had rendered the Mazzonna Judgment, TD Auto suggested on June 13, 2012 that the present file be heard by the same judge; Mr. Belley agreed with the suggestion.

[7] On August 30, 2012, the attorneys for TD Auto advised that it would file a Motion to Dismiss, the motion at hand, which was served in September of 2012.

[8] TD Auto is therefore seeking to have the Belley Motion dismissed for the reasons mentioned above.

[9] Scheduling challenges have delayed the hearing of the Motion to dismiss until May 27, 2013.

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

[11] The common questions raised by Mr. Belley 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?

[12] In the Belley 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 person information", *i.e*. between April 10 and May 13, 2008.

[13] The Belley Motion alleges that a VOID cheque from Mr. Belley's CIBC account bearing number 115, remitted to DaimlerChrysler, has been used to commit the fraud.

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

[15] 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 the Class Members, namely Mr. Maxime Belley, was the focus of the November 25, 2008 episode of "*La Facture*" which aired on Radio Canada, a copy of said episode on CD-ROM is being filed herewith, as EXHIBIT P-6;

[16] The undersigned rendered a judgment on the request to amend on October 27, 2010 (the "**October 27 Judgment**"), stating namely:

> [15] The Court will deal first with paragraph 15.4.
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> [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.
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> [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.
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> [18] The Court fails to see how adducing this evidence would meet the conditions of section 199 *C.C.P*.
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> [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.
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> [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.
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> [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.

[17] There was no appeal of the October 27 Judgment.[1]

II THE MOTION TO DISMISS

[18] TD Auto argues that, based on article 2848 of the *Civil Code of Quebec* ("***C.C.Q.***") and on the relevant case law,[2] the October 27 judgment constitutes *res judicata* on Mr. Belley's appearance of right, one of the conditions of article 1003 of the *Code of Civil Procedure* ("***C.C.P.***").[3]

[19] Article 2848 *C.C.Q.* reads as follows:

> **2848.** The authority of a final judgment (*res judicata*) is an absolute presumption; it applies only to the object of the judgment when the demand is based on the same cause and is between the same parties acting in the same qualities and the thing applied for is the same.
>
> However, a judgment deciding a class action has the authority of a final judgment in respect of the parties and the members of the group who have not excluded themselves therefrom.

[20] In *Roberge* v. *Bolduc*,[4] the Supreme Court stated that for the principle of *res judicata* to apply, the strict conditions set out in article 1241 of the *Civil Code of Lower Canada*[5] have to be met. Such conditions pertain first to the judgment itself and then to the action.[6]

[21] TD Auto argues that both the conditions pertaining to the October 27 Judgment and to the action itself are met.

[22] The conditions pertaining to the judgment are the following: the court must have jurisdiction over the matter, the judgment must be definitive and it must have been rendered in a contentious matter.[7]

[23] The conditions pertaining to the action, *i.e.* the "triple identity" set out in article 2848 *C.C.Q.*, are the following:

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1 Nota Bene : There is no *de plano* right of appeal of such judgments and leave to appeal will only be granted in exceptional circumstances: see section 1010 of the *Code of Civil Procedure*; see also *Ridley* v. *Bernèche*, 2006 QCCA 984, paras 17-22 and 25.

2 See notably *Roberge* v. *Bolduc*, [1991] 1 S.C.R. 374.

3 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:
[…]
(b) the facts alleged seem to justify the conclusions sought;

4 *Supra*, note 2.

5 Now 2848 *C.c.Q.*

6 *Supra*, note 2, p. 404.

7 *Ibid*.

(a) identity of Parties;

(b) identity of Object;

(c) identity of Cause.

[24] In a recent judgment,[8] the Court of Appeal summarized the rules governing the exception of *lis pendens* (which are the same as the rules required for the principle of *res judicata* to apply but with different consequences) as follows:

> [32] Je rappelle qu'il y a litispendance lorsqu'il y a identité de cause, d'objet et de parties (Rocois construction inc. c. Québec Ready Mix inc., [1990] 2 R.C.S. 440). Dans le cas de recours collectifs concurrents, la condition de l'identité de parties a été tempérée pour comparer les représentants ès qualités de membres du même groupe putatif. On ne requiert pas alors l'identité physique, mais bien l'identité juridique. De plus, il n'est pas nécessaire que toutes les parties ou tous les membres du groupe se retrouvent dans chacun des recours pour conclure à l'identité des parties. De même, on retient qu'il y a apparence de litispendance dès qu'il y a un défendeur en commun. Finalement, c'est la date du dépôt qui est prise en considération et non pas la date de signification des requêtes pour établir la séquence temporelle.[9]
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> [References omitted]

III ANALYSIS

[25] The Court is of the opinion that the October 27 Judgment does not constitute *res judicata* on the question of Mr. Belley's individual claim.

[26] It is useful to assess both the nature of the issues dealt with by the October 27 Judgment and the matter of the legal standing of a class action petitioner prior to the judgment granting authorization.

[27] The Court will first deal with this last issue.

[28] The legal standing of the pre-authorization class action petitioner is not defined in the *Code of Civil Procedure.* The Court of Appeal has dealt with this issue, notably in ruling on a declinatory exception and in the *Servier*[10] case.

[29] In deciding, *inter alia*, whether a Superior Court judge had been justified in disposing of a declinatory motion *ratione loci* before the hearing on authorization, Mr. Justice Morissette, in *Gauthier v. Société d'habitation du Québec*,[11] reflected on a pre-

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8 *Schmidt* v. *Johnson & Johnson Inc. & al*, 2012 QCCA 2132.

9 The *Schmidt* judgment revisited the so called "first to file rule" established by the Court of Appeal in the matter of *Hotte* v. *Servier Canada inc.*, 1999 R.J.Q. 2598.

10 *Ibid.*

11 2008 QCCA 948.

authorization proceeding: was it to be decided as if the petitioner was a “stand alone” petitioner or was it to be decided as if he was already speaking on behalf of the members of the proposed group? Was the pre-authorization motion to be governed by the general rules of the *Code of Civil Procedure* or by the specific rules of *Book IX on Class Action*?

[30] After citing an extract of *Thompson* v. *Masson*,[12] which stated that the class action does not exist on a “collective basis” (“sur une base collective”) before the judgment on authorization, Mr. Justice Morissette wrote:

> [15] […]
>
> Cet énoncé, formulé dans un litige où l’appel formé par la partie défenderesse paraissait heurter de plein fouet la lettre de l’article 1010 *C.p.c.*, fut cependant nuancé à quelques reprises par la suite. Dans l’arrêt *Amex Bank of Canada* c. *Aberback-Ptack*, une formation de la Cour a ainsi pu écrire : « Il n’est pas exact qu’une procédure dans le cadre d’un recours collectif n’existe pas tant que le recours collectif n’a pas été autorisé ». Plus récemment encore, dans le dossier *Toyota Canada inc.* c. *Harmegnies*, M. le juge Dalpond, siégeant comme juge unique, ajoutait ceci :
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> > [9] En fait, s’il est vrai que le recours dans sa dimension collective n’existe pas avant l’autorisation, il demeure que le recours individuel du représentant est autonome (art. 1026 C.p.c.). Un jugement qui affecte cette dernière dimension demeure régi par les règles habituelles.

[31] Coherently with this statement, the Court of Appeal stated that the *ratione loci* jurisdiction to hear the motion for authorization was governed by the general rules, the pre-authorization petitioner being, at this stage, in an individual recourse.

[32] This being said, the Court of Appeal in *Servier*,[13] in 1999, stated that, in the particular context of determining whether “*lis pendens*” applied, this exception had to be analysed, in matters of class action, taking into account the special rules of said proceedings:

> **La litispendance**
>
> L’exception de litispendance obéit aux principes applicables à la chose jugée. Pour qu’il y ait litispendance, il doit y avoir identité de parties, d’objet et de cause (art. 2848 du *Code civil du Québec*). La litispendance, si elle existe en l’espèce, doit être analysée en fonction des règles particulières au recours collectif. Ce recours se scinde en plusieurs phases, dont la première est celle dite d’autorisation d’exercice.
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> [References omitted]

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12 [1993] R.J.Q. 69 (C.A.).

13 *Supra,* note 9, p. 2601.

[33] The Court of Appeal then went on to state that the pre-authorization petitioner, while not having the status of group representative, derived his juridical identity ("identité juridique") from being a member of the group:

> À cette étape de la demande d'autorisation, les requérants n'ont pas le statut de représentant du groupe. C'est précisément cette reconnaissance qu'ils recherchent. C'est cependant en leur qualité de membre d'un groupe qu'ils formulent leur requête (art. 1002 et 999 C.P.). Cette qualité de « membre d'un groupe » constitue leur véritable identité juridique. Conclure autrement permettrait à chaque membre d'un groupe de présenter sa propre requête sans qu'on puisse lui opposer la litispendance ou la chose jugée pour les requêtes ou les jugements obtenus par les autres membres du groupe. Je conclus donc à l'identité des parties.[14]

[34] The Supreme Court in *Canada Post Corp.*v. *Lepine*[15] and the Court of Appeal in *Schmidt*[16] reiterate that, when dealing with the issue of *lis pendens*, the petitioner or applicant, at the authorization stage, is acting for the proposed group.

[35] These extracts illustrate that determining whether a pre-authorization class action petitioner addresses the Court for himself or for the group he seeks to represent will depend on the nature of the proceeding.

[36] At this stage, considering the nature of the motion at hand, which seeks to confer to the judgment on a motion to amend the attributes of *res judicata*, the Court is of the view that its role of protector of the interests of the absent members should prevent it from ruling that *res judicata* is a bar to Mr. Belley's motion.

[37] In this context, the Court goes back to the issues dealt with by the October 27 Judgment.

[38] Said judgment disposed of a motion by Ms. Mazzonna to amend her motion to institute a class action by adding some 50 new or modified paragraphs to what was already a re-re-amended motion.

[39] Paragraph 15.4 was but one of those paragraphs. 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.

[40] Mr. Belley was not a party to the Mazzonna litigation. What Ms. Mazzonna sought to do was to bring Mr. Belley's own circumstances, indirectly, into the Mazzonna Motion in order to substantiate her own damage claim.

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14 *Ibid.*
15 [2009] 1 S.C.R. 549, para 55.
16 See para 24 of the judgment.

[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.[17]

[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 Facture, would not be useful to Ms. Mazzonna in her motion.

[43] Under those circumstances, the Court cannot conclude that the October 27 Judgment is "definitive". In *Roberge* v. *Bolduc*,[18] the Supreme Court refers to Nadeau and Ducharme's definition of a definitive judgment:

> [Translation] They [definitive judgments] decide the issue joined, in whole or in part, by ruling in favour of one or other of the parties. [References omitted]

[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.*

[46] The Court will deal briefly with the "abuse of process" argument.

[47] TD Auto pleads essentially that the Court should use its inherent jurisdiction to dismiss the Belley Motion which, in the absence of new facts, constitutes, in its view, an attempt to circumvent the Mazzonna Judgment and merely a means to have a second chance at authorization.

[48] The Court does not agree with this proposition.

[49] It is worth stating that the Mazzonna Motion was dismissed, *inter alia*, because the Court found that Ms. Mazzonna had no "compensable" damages and, as a consequence, was not an adequate representative of the proposed group.

[50] It may or may not be that Mr. Belley suffered compensable damages which are attributable to the loss of the data tape. However, serious damages are alleged. Proceeding to hear the Belley Motion would not be an abuse of process for at least two reasons. First, some of the evidence adduced in the Mazzonna matter may be introduced, should the parties so decide, in the case at hand; second, and more

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17 See para 15 of the judgment.
18 *Supra,* note 2.

importantly, the inconvenience for TD Auto of hearing a motion for authorization of a class action related to the loss of the same data tape has to be weighed against the fact that there may be members of the proposed group whose rights have been affected by said loss and who are entitled to avail themselves of the class action proceedings.

FOR THESE REASONS, THE COURT:

[51] **DISMISSES** the Motion to Dismiss;

[52] **WITH COSTS.**

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LOUIS LACOURSIERE, j.s.c.

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