

SUPERIOR COURT

(Class Action)

CANADA
PROVINCE OF QUEBEC
DISTRICT OF MONTREAL

No: 500-06-000615-126

DATE: December 11, 2013

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

MAXIME BELLEY

Petitioner

v.

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

Respondent

**TRANSCRIPT OF A JUDGMENT RENDERED ORALLY ON DECEMBER 5, 2013
ON A MOTION UNDER ARTICLE 1002 C.C.P.**

[1] **WHEREAS** Mr. Belley seeks to institute a class action against Respondent TD Auto Finance Service Inc. 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".

[2] **WHEREAS** Mr. Belley alleges in his motion that the loss of his personal information contained on the tape caused him to fall victim to fraud and identity theft;

[3] **WHEREAS** Mr. Belley alleges generally the following negligence on the part of the Respondent and alleges damages suffered by him and members of the group as a result:

- (a) that Respondent was negligent in the storage and/or transfer of the personal information of the Petitioner and of the members of the group;
- (b) that Respondent was negligent after it discovered the loss of the data tape, notably in the manner in which Petitioner and the members of the group were informed of said loss;
- (c) that Petitioner and the members of the group have already and will continue to experience anxiety, fear, inconvenience and/or loss of time due to the loss of their personal information;
- (d) that Petitioner and many members of the group have paid certain fees in order to protect themselves from identity theft, such as fees for the activation of a credit monitoring service;
- (e) that Petitioner and certain members of the group decided or were advised to completely change their bank account numbers and were therefore forced to pay certain fees and to suffer inconvenience in that regard;
- (f) that Petitioner and some class members fell victim to fraud or identity theft;
- (g) that, as a result of the above, Petitioner and the members of the group are entitled to claim compensatory, moral and punitive damages in an amount to be determined by the Court.

[4] **WHEREAS** the common issues of fact and law 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, what amount?

[5] **WHEREAS** the Respondent now seeks leave to cross-examine Mr. Belley on the following issues to determine whether he has a *prima facie* cause of action as per Article 1003 of the *Code of Civil Procedure* ("C.C.P.") and whether he can represent the members adequately:

- (a) his knowledge of the proposed class action;

- (b) the nature of the frauds/identity thefts to which Petitioner was allegedly the victim, including the facts leading him to conclude that they are related to the loss of the data tape;
- (c) the actions that Petitioner has taken since being informed of the loss of his personal information;
- (d) the damages allegedly suffered by Petitioner, including the nature of the fear and anxiety suffered, the costs incurred, the damages claimed in the May 2008 letter of demand (Exhibit R-8) and those that were suffered subsequently and/or persist, if any;
- (e) Petitioner's ability to act as representative, including his follow-up of the previous class action, his decision to seek the status of representative, as well as his inquiries and efforts to identify members of the group, to ascertain their individual situation and their support for the proposed class action.

[6] **WHEREAS** Mr. Belley alleges at paragraphs [70] to [72] of his motion that he contacted a news magazine, *La Facture*, for a program which was aired on November 25, 2008;

[7] **WHEREAS** Respondent alleges that a CD-Rom and transcript of this news magazine should be adduced as evidence;

[8] **WHEREAS** this is basically the context;

[9] **WHEREAS** the relevant article of the *Code of Civil Procedure* is 1002:

1002. A member cannot institute a class action except with the prior authorization of the court, obtained on a motion.

The motion states the facts giving rise thereto, indicates the nature of the recourses for which authorization is applied for, and describes the group on behalf of which the member intends to act. It is accompanied with a notice of at least 10 days of the date of presentation and is served on the person against whom the applicant intends to exercise the class action; the motion may only be contested orally and the judge may allow relevant evidence to be submitted.

[10] **WHEREAS** the law in matters of motions filed under Article 1002 C.C.P. has been circumscribed by the Court of Appeal in the case of *Allstate du Canada, compagnie d'assurance v. Frank Agostino*¹;

[11] **WHEREAS** the Court of Appeal reiterates therein the following principles:

¹ 2012 QCCA 678.

[35] Il ne faut pas lire dans ce passage de l'arrêt *Agropur* une répudiation du point de vue qu'exprime la Cour dans l'arrêt *Pharmascience* et le premier n'invite pas à rouvrir des vannes que le second a voulu fermer. Il s'agit plutôt, en définitive, de choisir une voie mitoyenne, qui, entre la rigidité et la permissivité, est celle de la prudence, une prudence qui s'accorde avec le caractère que le juge Crête explique dans *Option Consommateurs c. Brick Warehouse, I.p.*, qui explique par ailleurs les conditions présidant à l'autorisation d'une preuve appropriée, au sens de l'article 21002 C.p.c. selon les termes du jugement du juge Gascon dans *Option Consommateurs c. Banque Amex du Canada*;

[...]

[31] Dans l'affaire *Option Consommateurs c. Banque Amex du Canada*, [renvoi omis] l'honorable juge Clément Gascon résumait ainsi les critères dont un tribunal devait tenir compte face à une requête pour la présentation d'une preuve appropriée:

[20] Cela dit, au chapitre du mérite maintenant, le Tribunal retient de la jurisprudence pertinente les sept (7) propositions suivantes comme devant servir de guide dans l'analyse des requêtes formulées par les Banques:

- 1) puisque, dans le cadre du mécanisme de filtrage et de vérification qui caractérise la requête en autorisation, le juge doit, si les allégations de faits paraissent donner ouverture au droit réclamé, accueillir la requête et autoriser le recours, il n'y aura pas, dans tous les cas, la nécessité d'une preuve;
- 2) en vertu du nouvel article 1002 C.p.c., le retrait de l'obligation d'un affidavit et la limitation des interrogatoires à ceux qui sont autorisés assouplissent et accélèrent le processus sans pour cela stériliser le rôle du juge, car la loi lui reconnaît la discrétion d'autoriser une preuve pertinente et appropriée dans le cadre du processus d'autorisation;
- 3) c'est en utilisant sa discrétion, qu'il doit bien sûr exercer judiciairement, que le juge doit apprécier s'il est approprié ou utile d'accorder, dans les circonstances, le droit de présenter une preuve ou de tenir un interrogatoire. Idéalement et en principe, cette preuve et ces interrogatoires se font à l'audience sur la requête en autorisation et non hors cour;
- 4) pour apprécier s'il est approprié ou utile d'accorder la demande faite, le juge doit s'assurer que la preuve recherchée ou l'interrogatoire demandé permettent de vérifier si les critères de l'article 1003 C.p.c. sont remplis;
- 5) dans l'évaluation du caractère approprié de cette preuve, le juge doit agir en accord avec les règles de la conduite raisonnable et de la proportionnalité posées aux articles 4.1 et 4.2 C.p.c., de même qu'en accord avec la règle de la pertinence eu égard aux critères de l'article 1003 C.p.c.;
- 6) le juge doit faire preuve de prudence et ne pas autoriser des moyens de preuve pertinents au mérite puisque, à l'étape de l'autorisation du recours, il doit tenir les allégations de la requête pour avérées sans en vérifier la véracité, ce qui relève du fond. À cette

étape de l'autorisation, le fardeau en est un de démonstration et non de preuve;

7) Le fardeau de démontrer le caractère approprié ou utile de la preuve recherchée repose sur les intimés. Aussi, il leur appartient de préciser exactement la teneur et l'objet recherchés par la preuve qu'ils revendentiquent et les interrogatoires qu'ils désirent, en reliant leurs demandes aux objectifs de caractère approprié, de pertinence et de prudence déjà décrits.

L'objectif recherché n'est pas de permettre des interrogatoires ou une preuve tous azimuts et sans encadrement, mais plutôt d'autoriser uniquement une preuve et/ou des interrogatoires limités sur des sujets précis bien circonscrits.

[32] La « preuve appropriée » est donc celle qui permettra au tribunal non pas d'évaluer le bien-fondé de l'action au fond, mais plutôt de « vérifier sommairement si les conditions de l'article 1003 C.p.c. sont remplies ». [renvoi omis]

Cela dit, une preuve est appropriée si elle se destine à contredire des éléments que la partie défenderesse estime invraisemblables, faux ou inexacts, et donc à établir le défaut d'apparence de droit. [renvoi omis]

[12] **WHEREAS** Madam Justice Bich added:

[36] C'est en cela qu'une preuve visée par l'article 1002 C.p.c. est pertinente et peut être autorisée. Le couloir demeure donc, on en conviendra, assez étroit. [renvoi omis]

[13] **WHEREAS**, in the Court's view, the Court of Appeal invites the trial judge to exercise a certain degree of caution in matters of "relevant evidence" under Article 1002 C.C.P., which caution is compatible with the summary nature of class action proceedings;

[14] **WHEREAS** Mr. Belley's Motion to authorize the bringing of a class action alleges in sufficient details the facts which lead him to believe that he was a victim of identity theft, that he suffered damages and how he can fulfill his role as an adequate representative of the proposed group;

[15] **WHEREAS** the examination of Mr. Belley would basically seek to test the veracity or truthfulness or accuracy of his allegations which, at this stage, have to be taken for granted;

[16] **WHEREAS** the Court is mindful that the burden of Mr. Belley at this stage is one of showing that he has an arguable case² in light of the facts alleged and of the applicable law;

² *Infineon Technologies AG c. Option consommateurs*, 2013 SCC 59.

[17] **WHEREAS**, in the circumstances, the Court is of the view that to allow the examination of Mr. Belley would go beyond the scope of what is useful to assess the conditions of Article 1003 C.C.P.;

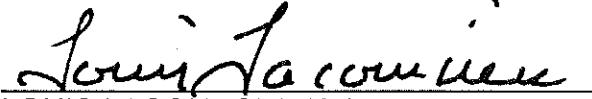
[18] **WHEREAS**, inasmuch as *La Facture* is concerned, sections [70] to [72] of Mr. Belley's Motion to institute a class action refer to this news magazine and it is only appropriate that a CD-Rom and transcript of the program be adduced as evidence;

FOR THESE REASONS, THE COURT:

[19] **GRANTS** in part the Respondent's motion;

[20] **GRANTS** the Respondent leave to adduce a CD-Rom and a transcript of *La Facture*, episode of November 25, 2008;

[21] **COSTS** to follow suit.



Louis Lacoursiere
LOUIS LACOURSIERE, j.s.c.

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Date of hearing: December 5, 2013