

SUPERIOR COURT

(Class actions)

CANADA
PROVINCE OF QUEBEC
DISTRICT OF MONTREAL

No: 500-06-000813-168

DATE: April 24th, 2019

IN THE PRESENCE OF: THE HONOURABLE FRANÇOIS P. DUPRAT J.S.C

JACLYN RABIN

Plaintiff

v.

HP CANADA CO.

And

HEWLETT PACKARD (CANADA) CO.

Defendants

JUDGMENT ON APPROVAL OF SETTLEMENT AND CLASS COUNSEL FEES

Introduction

[1] On September 26, 2016, Plaintiff Jaclyn Rabin filed an Application for Authorization to Institute a Class Action (*Application for Authorization*) against Defendants HP Canada Co and Hewlett Packard (Canada) Co. (hereinafter collectively *HP*) pursuant to Articles 574 and following of the Code of Civil Procedure.

[2] Plaintiff alleged in her proceedings that HP created Dynamic Security and installed it via firmware on the Class Printers and that because of Dynamic Security, some Class Printers with certain non-HP replacement cartridges stopped printing at different dates. Plaintiff claimed that HP used Dynamic Security to steer consumers to buy its own more expensive replacement products whereas HP has denied Plaintiff's claims and says that the purpose of Dynamic Security was to protect its intellectual

property, reduce cartridge counterfeiting, and protect the quality of the user experiences.

[3] The parties came to an agreement and the Court is now seized with the Application for Approval of a Settlement and for Approval of Class Counsel Fees.

[4] Indeed, on January 14, 2019, the parties and their counsels ultimately executed a settlement agreement (*Settlement Agreement* or the *Transaction*), subject to Court approval, as a full and final settlement of the class action, the whole as appears from the said Settlement Agreement, including its Preamble and Exhibits, Exhibit R-1.

[5] Firstly, and pursuant to Section 3 of the Settlement Agreement, the parties jointly request that the Settlement Agreement be approved by the Court.

I- Settlement Agreement

[6] The Plaintiff and the Defendants have agreed to the terms of the Transaction, the whole subject to the approval of this Court, and without any admission of liability whatsoever by the Defendants and for the sole purpose of resolving the dispute between the parties.

[7] The following is a summary of the key terms of the Transaction¹.

[8] The Settlement Agreement provides for two (2) types of monetary settlement relief: (1) the documented claims process for expenses incurred on presentation of documentation in support of the claim, and (2) the undocumented claims process for claims without supporting documentation;

[9] Under the documented claims process, HP shall reimburse all expenses incurred by Class Members as a result of the print interruption on presentation of documentation supporting the claim, these expenses may include the costs of a replacement cartridge, a replacement printer, or printing or printer repair services;

[10] Under the undocumented claims process, Class Members can submit claims for out-of-pocket losses, without providing any documentation (except the claim form), if they spent time or money in response to this print interruption;

[11] For both types of monetary settlement, Class Members have to submit a valid Claim Form.

[12] Documented claims for out-of-pocket losses resulting from such print interruptions will be paid first. If the sum of all documented claims does not exceed the Settlement CAP of \$700,000, then undocumented claims will be paid up to a maximum compensation of \$50 per claim.

¹ In the case of any discrepancy, the language of the Transaction itself prevails.

[13] However, if the sum of all undocumented claims at \$50 per claim, when added to the sum of all documented claims, exceeds the Settlement CAP, the undocumented claims will be proportionally reduced—i.e., the actual amount of each undocumented claim will be reduced according to the percentage by which the value of all such claims exceeds the Settlement CAP.

[14] Defendants agree to pay all publication costs, administration costs, Plaintiff's personal claim, and the Class Counsel Fees, the whole as specified in the Settlement Agreement and apart from payments to the Class Members (i.e. excluded from the Settlement CAP of \$700,000).

[15] Furthermore, HP will not at any time take any action to employ Dynamic Security on the Class Printers in the future.

[16] Additionally, HP will implement and maintain internal customer service procedures to respond to Class Member inquiries regarding whether Dynamic Security has been disabled on their Class Printer and provide assistance as appropriate to the Class Members as to how to download the current firmware from the HP website, the whole in order to be able to use the less expensive non-HP ink cartridges in their Class Printers.

[17] Finally, pursuant to section 7.4 of the Settlement Agreement, Class Counsel agree to reimburse, from the approved Class Counsel Fees, any amount owed to the *Fonds d'aide aux actions collectives (FAAC)* relating to this file, although Class Counsel have confirmed that the FAAC has not funded the present matter in any way.

II- Class Notice

[18] In accordance with the Transaction and this Court's January 21, 2019 Judgment, the Court-approved Class Notice was disseminated to potential Settlement Class Members in accordance with the Court-approved Notice Program, the whole as confirmed by the detailed reports filed by the Settlement Administrator, Exhibit R-2 to the Application.

[19] All of the materials disseminated and made available to Class Members, as well as any and all future information to be disseminated are in both French and in English.

III- Settlement Approval

[20] The Court approves the Transaction as fair, reasonable and in the best interest of the Class Members based on its analysis of the following factors as set out by the relevant case law, namely:

les probabilités de succès du recours;

l'importance et la nature de la preuve administrée;

les termes et les conditions de la transaction;

la recommandation des procureurs et leur expérience;

le coût des dépenses futures et la durée probable du litige;

la recommandation d'une tierce personne neutre, le cas échéant;

le nombre et la nature des objections à la transaction;

la bonne foi des parties;

l'absence de collusion. 2

[21] These factors ought not be applied in a formulaic manner and not all nine (9) factors need to be satisfied. Instead, the Court should look at the totality of these factors in light of the specific circumstances involved³.

[22] In particular, the Court finds that:

- (i) The benefits offered in Transaction are fair and adequate and worthy of approval;
- (ii) The Transaction was reached by experienced, fully-informed counsel after arm's length negotiations and a Judicial Settlement Conference;
- (iii) It is beyond dispute that continued litigation in this Class Action would be complex, lengthy, and expensive, with no guarantee of recovery by the Class Members;
- (iv) A trial on the merits would entail considerable expense, including hundred more hours of attorney time and, given the right to appeal, trial would not necessarily end the litigation. Even if the Class could recover a larger

² 9085-4886 *Quebec Inc. c. Visa Canada Corporation*, 2015 QCCS 5921; *Vallée c. Hyundai Auto Canada Corp.*, 2014 QCCS 3778; *Option Consommateurs c. Union canadienne (L'), compagnie d'assurances*, 2013 QCCS 5505; *Markus c. Reebok Canada inc.*, 2012 QCCS 3562; *Conseil pour la protection des malades c. CHSLD Manoir Trinité*, 2014 QCCS 2280; *Richard c. Volkswagen Group Canada inc.*, 2012 QCCS 5534; *Bouchard c. Abitibi-Consolidated Inc.*, (C.S.) Chicoutimi, dossier 150-06-000001-966, 15 juin 2004.

³ *Zuckerman vs. Target Corporation*, 2018 QCCS 2276, par. 21.

judgment after a trial, the additional delay through the appellate process would introduce yet more risks and would, in light of the time value of money, make future recoveries less valuable than this current recovery;

- (v) Justice is best served with a fair settlement today as opposed to an uncertain future settlement or trial of the action;
- (vi) The settlement provides an immediate benefit to Class Members and avoids unnecessary expense and delay;
- (vii) The lack of objections or and the minute number of requests for exclusion (10) serves as evidence of the fairness of the Transaction;
- (viii) The parties engaged in sufficient investigation and information exchanged to intelligently negotiate the terms of the Transaction;
- (ix) The promises and commitments of the Parties under the terms of the Transaction constitute fair value and in fact provide significant compensation to the Class Members;
- (x) Class Counsel and the attorneys for Defendants, who have extensive expertise in the area of class actions and who are most closely acquainted with the facts of the underlying litigation, are recommending the Transaction.

IV- Class Counsel Fees Approval

[23] The Court approves Class Counsel Lex Group Inc.'s fees and disbursements as fair and reasonable based on its analysis of the following factors as set out in sections 7, 101, and 102 of the *Code of Professional Conduct of Lawyers*⁴, particularly with a view to the objectives of class proceedings (i.e. access to justice, judicial economy, behavior modification) and the risks assumed by Class Counsel⁵.

[24] The Transaction calls for payment to Class Counsel of a fixed amount of 300 000 \$ CAD, plus applicable taxes. The amount includes all expenses and fees. This amount is above the docketed time of Counsel which surpasses 236 000 \$ in fees, exclusive of applicable taxes and expenses, but actually represents less than the terms of the mandate.

⁴ RLRQ, c B-1, r. 3.1.

⁵ 9085-4886 *Quebec Inc. c. Visa Canada Corporation*, 2015 QCCS 5921.

[25] Section 102 of the *Code of Professional Conduct of Lawyers* states:

“102. The fees are fair and reasonable if they are warranted by the circumstances and proportionate to the professional services rendered. In determining his fees, the lawyer must in particular take the following factors into account:

- (1) experience;
- (2) the time and effort required and devoted to the matter;
- (3) the difficulty of the matter;
- (4) the importance of the matter to the client;
- (5) the responsibility assumed;
- (6) the performance of unusual professional services or professional services requiring special skills or exceptional speed;
- (7) the result obtained;
- (8) the fees prescribed by statute or regulation; and
- (9) the disbursements, fees, commissions, rebates, extrajudicial costs or other benefits that are or will be paid by a third party with respect to the mandate the client gave him”.

[26] In particular, the Court finds that the amount of Class Counsel Fees provided for in the Transaction is fair and reasonable based on the following:

No Class Member has objected to the Class Counsel Fees;

The Class Counsel Fees is below what was provided for in the Mandate Agreement signed with the Plaintiff (namely the higher of 33% of the total amount recovered⁶ or a 3.5 multiplier of the straight docketed time by Class Counsels, plus disbursements and application taxes). This therefore reflects a compromise arrived at by the parties;

Class Counsel assumed all of the financial risks associated with initiating, financing, and maintaining the litigation;

Class Counsel invested a substantial amount of time and money to prosecute this case without any guarantee of compensation or even the recovery of its disbursements since it began and would have received no compensation or reimbursements of its expenses had this case not had a successful outcome;

⁶ The total amount recovered could be calculated by taking into account multiple factors including the presumption that every Class Member could potentially make a claim up to the maximum of the Settlement CAP, the Plaintiff's approved claim of \$5,000 under the Settlement, HP's undertaking not to take any action to employ Dynamic Security on the Class Printers in the future, the approved Class Counsel Fees, the Claims Administrators' costs and disbursement, and the notification costs.

The action involves complex legal issues and, in the absence of a settlement, would involve lengthy proceedings with an uncertain resolution and possible appeals;

Class Counsel, the law firm of Lex Group Inc., has proven the ability to adequately and competently prosecute this action and the successfully negotiated Transaction will provide substantial relief to Class Members;

- [27] The conclusion of the Court is based upon the foregoing findings of facts, which are supported by the evidence presented, coupled with the Defendants' consent to the granting of the Application according to its conclusions, all of which the Court has considered.

V- Percentage withheld by the Fonds d'aide aux actions collectives

- [28] Class counsel is of the view that the percentage to be withheld under the *Regulation respecting the percentage withheld by the Fonds d'aide aux actions collectives*⁷, applies only to Québec residents and not to members of the Class who reside in other provinces. On the contrary, counsel for the FAAC argues that the percentage needs to be applied to all Class members irrespective of their province of residence.

- [29] It was shown to the Court that, in the past, the FAAC agreed to settlement terms on national class actions, or on class actions taken in Québec for Canadian members, which called for the percentage to be levied only from Québec residents and not from residents of other provinces⁸.

- [30] Here, the Class action was issued only in Québec and the Court is informed no other recourse is pending in Canada. The Class was defined as follow:

All persons in Canada who owned a Class Printer during the period between March 1, 2015 and December 31, 2017 inclusively. Excluded from the Class are HP, its officers, directors and affiliates at all relevant times, members of their immediate families and their legal representatives, heirs, successors or assigns, and any entity in which HP had or has a controlling interest;

- [31] The Code of civil procedure makes no distinction on the residence of members. Articles 591 and 592 address the description of the class and member's claims:

591. The judgment on a class action describes the class to which it applies, and is binding on all class members who have not opted out.

⁷ F-3.2.0.1.1, r. 2.

⁸ The Court was referred to various cases including *Licari v. Johnson & Johnson Inc.* 2018 QCCS 2033, *Petit v. New Balance Athletic Shoe Inc.* 2013 QCCS 3569, *Sonego v. Danone inc.* 2013 QCCS 2616.

Once the judgment has become final, the court of first instance orders the publication of a notice stating the substance of the judgment and notification of the notice to each known class member.

592. If the judgment awards damages or a monetary reimbursement, it specifies whether members' claims are to be recovered collectively or individually.

- [32] It is not contested the applicable legislation does not distinguish between a Québec resident or a resident of any other province. Section 5.2 of the Transaction calls for an individual recovery by members of the approved class. Article 42 of *An Act Respecting the Class Action*⁹ reads:

Art. 42: In the case of a collective recovery of the claims, the Fonds shall withhold a percentage fixed by regulation of the Government on the balance established under articles 596 and 597 of the Code of Civil Procedure (chapter C-25.01); in other cases, the Fonds shall withhold a percentage fixed by regulation of the Government on every liquidated claim.

- [33] Article 1 of the regulation provides for a percentage to be withheld in favor of the FAAC¹⁰:

1. For the purposes of section 42 of the Act respecting the Fonds d'aide aux actions collectives (chapter F-3.2.0.1.1), the percentage withheld by the Fonds d'aide aux actions collectives from the balance or from a liquidated claim shall be as follows:

(1) (...)

(2) (...)

(3) on any other liquidated claim under article 592 of the Code of Civil Procedure:

(a) 2% from any liquidated claim less than \$2,000;

(b) 5% from any liquidated claim exceeding \$2,000 but less than \$5,000;

(c) 10% from any liquidated claim exceeding \$5,000.

- [34] Counsel for the Class presents the argument that the Court should be wary that in the future residents of other provinces may be tempted to institute class actions outside of Québec in order to avoid a potential levy on their recovery. Such behavior would clearly provoke more litigation and goes against the guiding principle of proportionality.

⁹ CQLR c F-3.2.0.1.1.

¹⁰ Supra note 7.

[35] However, the opposite aspect of the situation is that Canadian residents of other provinces have benefited from the current litigation and its settlement. In the present matter, it is true the FAAC did not provide financial support to the proposed class action. As such, this finding does not preclude the FAAC from seeking a percentage as neither the *Act* nor the Regulation state that the funding of the recourse is a condition precedent to the percentage being applied.

[36] The Court is also mindful that *An Act Respecting the Class Action* is of public order¹¹. The FAAC was created with the purpose of facilitating access to justice and with the aim that the *Fonds* be financially self-sustaining. In *Conseil pour la protection des malades v. Fédération des médecins spécialistes du Québec*¹², Hallée J. wrote on the objectives of the *Act* :

51 Selon les articles 6 et 7 de la Loi, le Fonds est un organisme public qui a pour objet d'assurer le financement des actions collectives ainsi que de diffuser des informations relatives à l'exercice de ces actions.

52 Afin de permettre au Fonds de poursuivre sa mission et ainsi de jouer son rôle social de pourvoir au financement des actions collectives, le législateur a édicté l'article 42 de la Loi.

53 Cette dernière disposition est complétée par l'article 38 de la Loi qui confère au gouvernement le pouvoir d'adopter un règlement pour fixer le pourcentage que le Fonds peut prélever aux fins de l'application de l'article 42.

54 Conformément à la jurisprudence, ces dernières dispositions législatives doivent être interprétées de façon large et libérale visant à assurer la réalisation de l'objet de la loi¹².

55 Le Règlement qui a été adopté par le gouvernement en 1985, prévoit que le Fonds peut bénéficier de sommes d'argent prélevées selon un pourcentage qui est prévu, à partir de sommes allouées aux membres du groupe de l'action collective.

56 Ces prélèvements sont faits, selon le cas, sur le reliquat établi en vertu des articles 596 ou 597 C.p.c. ou sur les réclamations individuelles des membres selon l'article 592 C.p.c.

57 En l'espèce, en prévoyant qu'il pourrait y avoir un tel prélèvement en faveur du Fonds, le législateur visait à assurer son autofinancement.

58 Le but poursuivi est de favoriser l'accès à la justice en créant un organisme ayant pour mission d'assurer le financement des actions collectives était clair dès le départ et cela ressort d'ailleurs clairement des débats parlementaires. [Underlining by the Court]

¹¹ See *Option Consommateurs v. Banque Nationale du Canada* 2015 QCCS 4380, paragr.57.

¹² EYB 2018-295896, 2018 QCCS 2699.

[37] While the argument against the percentage being applied to non-Québec residents may have some logic, the Court is of the view it may not add into the language of the Code of civil procedure, the Act or Regulation. The distinction between Québec residents and residents of other provinces is not a factor to be considered. The true issue and, in the eyes of the Court, correct interpretation, is how the class is described and to whom a claim is paid. The Court concludes that the FAAC is correct in applying the percentage to all class members, as authorized, regardless of their residence. How the FAAC conducted itself previously in other cases does not create a right or a renunciation. The Court finds there is no ambiguity in the Act or Regulation.

[38] The Court fully agrees with the comments made by Hamilton j., as he then was, in *Zuckerman v. Target Corporation Inc.* when he wrote¹³:

44 The Court concludes that the Act and Regulations apply to all class actions instituted under the *Code of Civil Procedure*. Although that is not stated expressly in the Act or the Regulations, there are many references in the Act to the Code as well as two references in the Code to the Fonds. Further, nothing in the Act suggests that it does not apply to certain class actions instituted under the Code, and there is nothing in the Act that suggests that it applies to class actions instituted outside Québec.¹⁶

45 On the issue of which members are subject to the withholding, nothing in the Act or Regulations makes any distinction between members of the class resident in Québec and those resident outside the province. It therefore seems reasonable to conclude that all members of the class in a class action instituted in Québec are subject to the withholding. However, that is not the practice of the Fonds in national class actions instituted in Québec. In those cases, the practice of the Fonds is not to withhold anything from members resident outside Québec. It is not necessary for the Court to comment on that practice. For the purposes of the present matter, it is sufficient for the Court to hold that all Class Members are subject to the withholding, regardless of where they are resident now.

[Underlining by the Court]

[39] In closing, the Court therefore approves the settlement and class counsel fees with the provision that claims will be subject to the application of the *Regulation respecting the percentage withheld by the Fonds d'aide aux actions collectives*.

[40] POUR CES MOTIFS, LE TRIBUNAL:

FOR THESE REASONS, THE COURT:

¹³ 2018 QCCS 2276.

[28] ACCUEILLE la demande pour approbation d'une transaction et pour approbation des honoraires des procureurs du groupe;	GRANTS the Application for Approval of a Settlement Agreement and for Approval of Class Counsel Fees;
[29] DÉCLARE que l'Entente de règlement à la pièce R-1 (incluant son préambule et ses annexes) (ci-après « l'Entente de règlement ») constitue une transaction au sens des articles 2631 et suivant du <i>Code civil du Québec</i> , obligeant toutes les parties et tous les Membres de l'action collective qui ne se sont pas exclus en temps opportun;	DECLARES that the Settlement Agreement at Exhibit R-1 (including its Preamble and its Schedules) (hereinafter the "Settlement Agreement") constitutes a transaction within the meaning of Articles 2631 and following of the <i>Civil Code of Quebec</i> , binding all parties and all Class Members who have not excluded themselves in a timely manner;
[30] DÉCLARE que l'Entente de règlement est valide, équitable et raisonnable, et qu'elle est dans le meilleur intérêt des Membres du Groupe, de la demanderesse et des défenderesses;	DECLARES that the Settlement Agreement is valid, fair, reasonable and in the best interest of the Class Members, the Plaintiff, and the Defendants;
[31] APPROUVE l'Entente de règlement et toute pièces jointes s'y rapportant, conformément à l'article 590 du <i>Code de procédure civile</i> ;	APPROVES the Settlement Agreement and all Exhibits thereto in accordance with Article 590 of the <i>Code of Civil Procedure</i> ;
[32] DÉCLARE que l'Entente de règlement fait partie intégrante du présent jugement;	DECLARES that the Settlement Agreement is an integral part of the present judgment;
[33] ORDONNE que tous les Dépenses Administratives de l'Administrateur des réclamations soient payées par les défenderesses, conformément aux clauses 4.2 et 5.4 de l'Entente de règlement;	ORDERS that all Administration Expenses of the Claims Administrator shall be paid by Defendants pursuant to Sections of Sections 4.2 and 5.4 of the Settlement Agreement;
[34] ORDONNE aux parties et aux Membres du Groupe, sauf ceux qui se sont exclus conformément à l'Entente de règlement et au jugement de cette Cour du 21 janvier, 2019, de se conformer aux termes et conditions de l'Entente de règlement;	ORDERS the parties and the Class Members, with the exception of those who are excluded in accordance with the terms and conditions of the Settlement Agreement and this Court's January 21, 2019 Judgment, to abide by the terms and conditions of the Settlement Agreement;

[35] FIXE la fin de la Période de réclamation au 28 juin 2019;	SETS the end of the Claim Period at June 28, 2019;
[36] APPROUVE ET ORDONNE le paiement par les défenderesses aux Procureurs du Groupe, Lex Group Inc., des Honoraires des Avocats du Groupe tel que prévu à la clause 7.1 de l'Entente de règlement;	APPROVES AND ORDERS the payment to Class Counsel, Lex Group Inc., of the Class Counsel's Fees as provided for at Section 7.1 of the Settlement Agreement;
[37] APPROUVE ET ORDONNE le paiement par les défenderesses à la demanderesse de la somme de 5 000\$, tel que prévu à la clause 5.3 de l'Entente de règlement, sujette au prélèvement par le Fonds d'aide aux actions collectives du pourcentage déterminé par le Règlement sur le pourcentage prélevé par le Fonds d'aide aux actions collectives, chapitre F-3.2.0.1.1, r. 2;	APPROVES AND ORDERS the payment by Defendants to Plaintiff of the total sum of CAD \$5,000, as provided for at Section 5.3 of the Settlement Agreement, subject to the percentage payable to the <i>Fonds d'aide aux actions collectives</i> in accordance with the Regulation respecting the percentage withheld by the Fonds d'aide aux actions collectives, c. F-3.2.0.1.1, r. 2;
[38] DÉCLARE que toute réclamation soumise par un(e) Réclamant(e) sera sujette au prélèvement par le Fonds d'aide aux actions collectives du pourcentage déterminé par le Règlement sur le pourcentage prélevé par le Fonds d'aide aux actions collectives, chapitre F-3.2.0.1.1, r. 2;	DECLARES that any claims made by Claimants will be subject to the percentage payable to the <i>Fonds d'aide aux actions collectives</i> in accordance with the Regulation respecting the percentage withheld by the Fonds d'aide aux actions collectives, c. F-3.2.0.1.1, r. 2;
[39] LE TOUT sans frais de justice.	THE WHOLE without legal costs.


FRANÇOIS P. DUPRAT, J.S.C..

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Date of hearing: April 17, 2019