

SUPERIOR COURT

(Class Action)

CANADA
PROVINCE OF QUEBEC
DISTRICT OF MONTREAL

No: 500-06-000750-154

DATE: October 27, 2016

IN THE PRESENCE OF: THE HONOURABLE PIERRE LABELLE, J.S.C.

SHAI MEDALSY

Petitioner

v.

THE TORONTO-DOMINION BANK

Respondent

JUDGMENT

Introduction

- [1] On July 17, 2015, Petitioner Shai Medalsy filed his original Motion to Authorize the Bringing of a Class Action and to Ascribe the Status of Representative (the "**Motion for Authorization**") against the Respondent, The Toronto-Dominion Bank, pursuant to Articles 1003 and following (now Articles 575 and following) of the Code of Civil Procedure (the "**C.C.P.**").
- [2] On July 21, 2016, with the authorization of this Court, the Motion for Authorization was amended for settlement purposes only, *inter alia* in order to modify the class action group definition to only include persons in the province of Quebec (the "**Amended Application for Authorization**"), the whole as appears from the Court Record.
- [3] Also on July 21, 2016, this Court authorized the bringing of the class action *pro forma* against the Respondent as per the Amended Application for

Authorization, for the purposes of settlement only, and also approved the content and dissemination plan of the Notice of approval hearing which has since been mailed by the Respondent to the address of any Eligible Account.

- [4] This class action was filed following the Respondent's June 2015 notices to TD Travel Cards cardholders regarding modifications to the TD Travel Rewards Program and to the Redemption Value of TD Points for certain travel purchases made with TD Travel Cards, which was to take effect as of August 16, 2015.
- [5] After numerous *without prejudice* discussions and exchanges of information between counsels for the Parties, the Petitioner and the Respondent reached a settlement agreement, to fully and finally settle all claims asserted in or related to the present class action.
- [6] On July 19 and 20, 2016 the Parties signed the Settlement Agreement, including its Preamble and Schedules (Exhibits R-7) (a French translation of same having been filed as Exhibit R-8) (the "**Transaction**").
- [7] The Transaction applies to the following class as was authorized by this Court's July 21, 2016 Judgment:

All persons in the Province of Quebec, who are a Primary Cardholder or Authorized User (Additional Cardholder) of a "TD Travel Card" (« *carte de crédit Voyages TD* ») offering the "TD Travel Rewards Programs" (« *Programme de Primes-voyages TD* »):

- the "TD First Class Travel Visa Infinite Card" (« *Carte Visa Infinite TD Class Ultime Voyages* »);
- the "TD Platinum Travel Visa Card" (« *Carte Visa TD Platine Voyages* »);
- the "TD Classic Travel Visa Card" (« *Carte Visa TD Classique Voyages* »);
and/or
- the "TD Business Travel Visa Card" (« *Carte Visa TD Voyages Affaires* »).

(hereinafter the "**Class Members**" or « *Membres du Groupe* »).

Settlement Agreement

- [8] The Petitioners and the Respondent 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 Respondent and for the sole purpose of resolving the dispute between the parties.

- [9] The following is a summary of the key terms of the Transaction. In the case of any discrepancy, the language of the Transaction itself prevails.
- [10] The nature of the Transaction negotiated between the Parties is based on providing approximately an additional year (until August 31, 2017) from the mailing of the Notice of approval hearing for the Class Members to accumulate and redeem TD Points at the former Redemption Value, plus the approximate year already provided and the cash credits already effected to certain Class Members' accounts as described in the Transaction.
- [11] The Class Members who had redeemed their TD Points at the New Redemption Value between August 16, 2015 and September 25, 2015 have already received a credit based on the existing Redemption Value, the whole as was provided for in the September Notice sent to Quebec TD Travel Cards cardholders and as is confirmed in the Transaction and in Respondent's affidavit.
- [12] As provided for in the Transaction, before effecting the change to the New Redemption Value, the Class Members will benefit from an additional period of time, up and until the end of the Eligible Period (August 31, 2017), ultimately resulting in Class Members receiving the current and existing Redemption Value for almost two (2) years since the September Notice and approximately one (1) year from the sending of the Notice of approval hearing which was sent in August 2016 pursuant to this Honorable Court's July 21, 2016 Judgment and pursuant to clause 9 of the Transaction.
- [13] The Transaction also provides that the Class Members will be informed of the Eligible Period ending on August 31, 2017 by way of an additional notice to be sent to the Class Members (a single notice to be sent to each Eligible Account) (the "**Notice of Settlement Agreement**").
- [14] At the end of this Eligible Period, the New Redemption Value will apply to all Class Members for any remaining outstanding TD Points.
- [15] Class Members are and will be able at all times to terminate their cardholder agreements and Program without any cost, penalty or termination fee save and except any balance owing on the TD Travel Card.
- [16] The Class Members will grant a full and final release and discharge to the Respondents for all events surrounding this issue, pursuant to clause 29 of the Transaction.

Class Notice

- [17] In accordance with the Transaction and this Court's July 21, 2016 Judgment approving the Notice of approval hearing as well as the method of its dissemination, notice was effected in the following manner:
- (a) In August 2016, a copy of both the Schedule "B" notice (in English) and the *Annexe "C"* notice (in French) were sent by the Respondent directly to the

address of any Eligible Account, as per the terms and conditions set out in the Transaction;

- (b) Copies of the said notices and of the Transaction itself, including its French translation, were posted on the Class Counsel's firm website at www.lexgroup.ca;
- (c) The applicable changes regarding the Eligible Period were also made by Respondent on its relevant websites.

[18] 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.

Settlement Approval

[19] 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. »¹

[20] 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 involved².

[21] In particular, the Court finds that:

¹ *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.

² *Focsa vs. Diamond Pet Foods Inc. et al.*, 500-06-000612-123, Superior Court, Honorable Justice Thomas M. Davis, J.S.C., January 28, 2016, par. 22

- 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;
- iii. It is beyond cavil 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 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 few objections or requests for exclusion 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 full compensation to the Class Members;
- x. Class Counsel and the attorneys for Respondent, 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.

Class Counsel Fees Approval

[22] 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*³, particularly with a view to the objectives of class proceedings (i.e. access to

³ RLRQ, c B-1, r. 3.1.

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justice, judicial economy, behaviour modification) and the risks assumed by Class Counsel⁴.

[23] 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".

[24] 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:

- i) The Respondent has agreed to pay Class Counsel Fees in the amount requested, as appears from the Transaction and from the Respondent's affidavit;
- ii) Said Class Counsel Fees will in no way affect the Class Members' accounts;
- iii) No Class Member has objected to the Class Counsel Fees;
- iv) At Clause 9 of the Transaction, the Parties confirm that the "ability of Putative Class Members to redeem their TD Points at the Redemption Value, with the Eligible Period, represents a value of approximately \$4,839,592.00 (...)" . Therefore, the Class Counsel Fees represent only approximately 10.5% of that amount in issue in this case, which is not only well below what applicable case law in other cases has approved but also well below that which is provided for in the Mandate Agreement signed with the Petitioner, therefore reflecting a compromise arrived at by the parties;
- v) Class Counsel assumed all of the financial risks associated with initiating, financing, and maintaining the litigation. Class Counsel invested a

⁴ *Lavoie c. Régie de l'assurance maladie du Québec*, 2013 QCCS 866.

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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;

- vi) The action involves complex legal issues and, in the absence of a settlement, would involve lengthy proceedings with an uncertain resolution and possible appeals;
- vii) Class Counsel Lex Group Inc. has proved its ability to adequately, vigorously, and competently prosecute this action and the favourable settlement is namely attributable to the hard work, determination, diligence, and reputation of Class Counsel, who developed, litigated, and successfully negotiated the Transaction to provide substantial relief to Class Members;
- viii) Both Parties, through their respective signed affidavits, have confirmed their belief and comprehension as to why said Class Counsel Fees are reasonable under the circumstances of this case.

Post Approval Class Notice

[25] The Court has reviewed and approves the content and disseminated plan of the of the "Notice of Settlement Agreement approval" to be sent to the Class Members further to the present Judgment, the whole in accordance with the terms of the Transaction and in both English and French (Schedules "D" and "E" to the Transaction).

[26] This Judgment is based upon the foregoing findings of fact and conclusions of law, which are supported by the substantial evidence presented by the Parties hereto, all of which the Court has considered and is in the Record.

POUR CES MOTIFS, LE TRIBUNAL :

FOR THESE REASONS, THE COURT :

[27] **ACCUEILLE** la demande du requérant pour approbation d'une transaction et approbation des honoraires des procureurs du groupe;

[27] **GRANTS** the Application by the Petitioner for Approval of a Transaction and Approval of Class Counsel Fees;

[28] **DÉCLARE** que l'entente de règlement, pièce R-7 (incluant son préambule et ses Annexes) (ci-après « l'Entente de règlement » - une traduction française ayant été produite comme pièce R-8) constitue une transaction au sens des

[28] **DECLARE** that the Settlement Agreement, Exhibit R-7 (including its Preamble and its Schedules) (hereinafter the "Settlement Agreement" - a French translation having been filed as Exhibit R-8)

articles 2631 et suivant du *Code civil du Québec*, obligeant toutes les parties et tous les Membres de l'action collective qui ne se sont pas exclus en temps opportun;

constitutes a transaction within the meaning of articles 2631 and following of the *Civil Code of Quebec*, binding all parties and all Class Members who have not excluded themselves in a timely manner;

[29] **DÉCLARE** que l'Entente de règlement est valide, équitable et raisonnable, et qu'elle est dans le meilleur intérêt des Membres du Groupe, du Requéran et de l'Intimée;

[29] **DECLARE** that the Settlement Agreement, is valid, fair, reasonable and in the best interest of the Class Members, the Petitioner, and the Respondent;

[30] **APPROUVE** l'Entente de règlement conformément à l'article 590 du *Code de procédure civile*;

[30] **APPROVE** the Settlement Agreement in accordance with article 590 of the *Code of Civil Procedure*;

[31] **DÉCLARE** que l'entente de règlement fait partie intégrante du présent jugement;

[31] **DECLARE** that the Settlement Agreement is an integral part of this judgment;

[32] **APPROUVE** le contenu de « l'avis d'approbation de l'entente de règlement » à être envoyé à tous les Membres du Groupe, en anglais et en français (Annexes « D » et « E »);

[32] **APPROVE** the content of the "Notice of Settlement Agreement approval" to be sent to the Putative Class Members, in English and French (Schedules "D" and "E");

[33] **ORDONNE** que « l'avis d'approbation de l'entente de règlement » (Annexes « D » et « E ») soit envoyé à chacun des Membres du Groupe, conformément aux termes et conditions de l'Entente de règlement;

[33] **ORDER** that the "Notice of Settlement Agreement approval" (Schedules "D" and "E") be sent and disseminated as per the conditions and terms set out in the Settlement Agreement, to each Putative Class Members;

[34] **ORDONNE** aux parties et aux Membres du Groupe, sauf ceux qui se sont exclus conformément à l'Entente de règlement et au présent jugement, de se conformer aux termes et conditions de l'Entente de règlement;

[34] **ORDER** 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 with this judgment, to abide by the terms and conditions of the Settlement Agreement;

[35] **APPROUVE** le versement aux Procureurs du Groupe, Lex Group Inc., des honoraires extrajudiciaires, tel que prévu à

[35] **APPROVE** the payment to Class Counsel, Lex Group Inc., of the extrajudicial fees as provided for at

la clause 28 de l'Entente de règlement;

clause 28 of the Settlement Agreement;

[36] **LE TOUT** sans frais.

[36] **THE WHOLE** without legal costs.



PIERRE LABELLE, J.S.C.

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Date of hearing: October 27, 2016



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