SUPERIOR COURT

CANADA
PROVINCE OF QUEBEC
DISTRICT OF MONTREAL

No.: 500-06-000891-172

Date: September 6, 2018

PRESIDED BY: THE HONOURABLE BENOÎT MOORE, J.S.C.

MARYSE NICOLAS
Plaintiff

v.

VIVID SEATS LLC
Defendant

JUDGMENT
(Application for authorization to institute a class action)

OVERVIEW

[1] Maryse Nicolas[1] is applying for authorization to institute a class action for the following group, of which she states she is a member:

> Class:
>
> All consumers within the meaning of the Quebec's Consumer Protection Act who purchased a ticket from Vivid Seats since November 16th, 2014;
>
> Tous les consommateurs au sens de la Loi sur la protection du consommateur du Québec qui ont acheté un billet de Vivid Seats depuis le 16 novembre 2014.
>
> (hereinafter referred to as the "Class")

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[1] First names and surnames are used in the present judgment in order to make its reading easier. No discourtesy is intended.

[2] Nicolas did a Google search in the hopes of attending a concert by the singer Pink. The website of the defendant, Vivid Seats LLC, appeared first in the list of results. She visited the site and was redirected to a page displaying a list of dates and locations, without any other details, including the price or availability of tickets.

[3] She then selected the "tickets" box for Pink's show, and the Bell Centre floorplan opened in a new page, showing tickets and a price. The currency, however, was not specified.

[4] Nicolas selected tickets, and was gradually redirected from one page to another until she arrived at the seventh page, where she was asked to agree to the terms and conditions and place the order. She alleges that she assumed that the price was in Canadian dollars since no currency had been mentioned throughout the entire process. She therefore expected to pay $929.90 for two tickets.

[5] Nicolas realized that the price was in US dollars when she received her bankcard statement. She was billed $1,250.37 in Canadian dollars.[2]

[6] In support of her class action, Nicolas submits that Vivid violated four provisions of the *Consumer Protection Act* ("**C.P.A.**").[3] First, under section 54.4(*h*) of Title 1 of the *Act* on distance contracts, merchants must disclose "the currency in which amounts owing under the contract are payable if not Canadian dollars", before a contract is entered into.

[7] She then cited three provisions of Title II on business practices:

> No merchant, manufacturer or advertiser may, by any means whatever, make false or misleading representations to a consumer.
>
> No merchant, manufacturer or advertiser may, by any means whatever,
>
> ...
>
> *(c) charge, for goods or services, a higher price than that advertised.*
>
> For the purposes of subparagraph c of the first paragraph, the price advertised must include the total amount the consumer must pay for the goods or services. However, the price advertised need not include the Québec sales tax or the Goods and Services Tax. More emphasis must be put on the price advertised than on the amounts of which the price is made up
>
> No merchant, manufacturer or advertiser may fail to mention an important fact in any representation made to a consumer.

[8] Nicolas asks the Court to condemn Vivid to pay damages equal to the difference between what the class members thought they had to pay and the additional amount they had to pay, that is, 29.3%, the exchange rate between the Canadian and US dollar. She also claims punitive damages of $100 for each group member.

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2 Exhibit P-4.
3 CQLR, c. P-40.1.

[9] Since the class action was served, Vivid has updated its website so that every step of the purchasing process states that prices are in US dollars, therefore Nicolas is no longer seeking an injunctive finding.

[10] Vivid asks the Court to deny authorization; it submits that none of the four criteria of art. 575 *C.C.P* have been met. In fact, the defence is based on two arguments, which touch upon the conditions of authorization as a whole:

- Vivid's relationship to ticket buyers is not subject to the *C.P.A*. since it is strictly a "marketplace" for other users who are the ticket vendors.
- In any event, Vivid complies with the *C.P.A* to the extent that the currency is indicated in bold above the order confirmation button.

ANALYSIS

[11] For the authorization, the representative must establish that he or she meets the criteria set out in art. 575 *C.C.P*.:

> **575.** The court authorizes the bringing of the class action and ascribes the status of representative to the member it designates if of opinion that:
>
> (1) the claims of the members of the class raise identical, similar or related issues of law or fact;
>
> (2) the facts alleged appear to justify the conclusions sought;
>
> (3) the composition of the class makes it difficult or impracticable to apply the rules for mandates to take part in judicial proceedings on behalf of others or for consolidation of proceedings;
>
> (4) the member to whom the court intends to ascribe the status of representative is in a position to represent the members adequately.

[12] Authorization seeks to ensure that manifestly unfounded claims are filtered out. In *Infineon*, the Supreme Court described the applicable principles: [4]

> [61] At this stage, the court's role is merely to filter out frivolous motions and grant those that meet the evidentiary and legal threshold requirements of art. 1003. The objective is not to impose an onerous burden on the applicant, but merely to ensure that parties are not being subjected unnecessarily to litigation in which they must defend against untenable claims. The Court of Appeal described the threshold requirement as follows: "le fardeau en est un de démonstration et non de preuve" or, in English, [translation] "the burden is one of demonstration and not of proof" (Pharmascience Inc. v. Option Consommateurs, 2005 QCCA 437 (CanLII), at para. 25; see also Martin v. Telus Communications Co., 2010 QCCA 2376 (CanLII), at para. 32).
>
> [62] More specifically, in the context of the application of s.1003(b), this Court and the Court of Appeal have used varying vocabulary, both in English and in French, to describe and characterize the filtering function of a court hearing a motion for authorization to institute a class action. In 1981, Chouinard J. wrote

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4 *Infineon Technologies AG v. Option Consommateurs*, 2013 SCC 59.

> that, at the authorization stage, the issue is "whether ... the allegations support the conclusions prima facie or disclose a colour of right" (Comité régional des usagers, at p. 426). In his opinion, the court is "to reject entirely any frivolous or manifestly improper action, and authorize only those in which the facts alleged disclose a good colour of right" (p. 429).

[13] At the authorization stage, the representative's burden is therefore one of demonstration and not of proof.[5] The representative must convince the Court not of the actual existence of the representative's right, or the success of the proceeding,[6] but of a colour of right, of a *prima facie* right. That is not to say that the authorization process is futile or trivial, as a class action can be rejected at this stage if it is based on mere speculation or hypotheses,[7] on untenable syllogism[8] or unless it is underpinned by "...some evidence to form an arguable case."[9]

[14] Authorization, therefore, must respect proportionality, the governing principle of procedural law, in order to avoid engaging judicial resources for a class action that has no chance of success. Proportionality is not, however, a separate criterion in addition to those listed in art. 575 *C.C.P.*[10] For that reason, the principle of proportionality cannot make the representative's burden more onerous at the authorization stage any more than it can allow the Court to pre-emptively rule on issues that should only be decided on the merits.

[15] Let us now analyze the conditions of art. 575 *C.C.P.*, beginning with the condition concerning colour of right.

1) Has the representative established colour of right?

[16] Nicolas argues that the defendant infringes four provisions of the *C.P.A.* Let us see if she has convinced the Court that each one of them has a colour of right.

- Violation of s. 54.4(*h*)

[17] Under s. 54.4 (*h*), the merchant, before a distance contract is entered into, must disclose to the consumer the currency in which amounts owing are payable if not Canadian dollars. Again according to that provision, the merchant "must present the information prominently and in a comprehensible manner and bring it expressly to the consumer's attention."

[18] Nicolas alleges that she did not see that information and that she assumed throughout the process that prices were in Canadian dollars.

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5 *Pharmascience inc. v. Option Consommateurs,* 2005 QCCA 437 at para 25. See also, recently : *Baratto* c. *Merck Canada inc.*, 2018 QCCA 1240.
6 *Macduff c. Vacances Sunwing inc.*, 2018 QCCS 1510 at para 11.
7 *Option consommateur c. Bell Mobilité,* 2008 QCCA 2201 at para 37.
8 *Asselin c. Desjardins Cabinet de services financiers inc.*, 2017 QCCA 1673 at para 34.
9 *Infineon, supra* note 4 at para 134.
10 *Vivendi Canada Inc. v. Dell'Aniello*, 2014 SCC 1 at para 66.

[19] Regardless of whether or not she saw a currency specified, Nicolas submits that the disclosure does not respect the transparency required by s. 54.4 because it occurs late in the decision-making process, and therefore Vivid infringes s. 54.4.

[20] Vivid contends that, absent any colour of right, the Court must refuse to authorize the class action. It makes two arguments.

[21] First, Vivid argues that s. 54.4 does not apply in the present case since it does not act as a ticket vendor, but simply as a "marketplace". Vivid is a platform that allows persons to sell tickets through its website. It notes that this is stated in the sales terms and conditions.[11]

[22] It should be noted that this first argument varied over the course of arguments. First, Vivid appeared to submit that it is only contractually bound to the ticket vendor. If, as part of that relationship, it is a merchant providing a service, there is still no contract between Vivid and the ticket purchaser, and the *C.P.A* cannot therefore apply between them.[12]

[23] This first version of the argument is not very convincing as the evidence appears to clearly establish some kind of contract between the ticket purchaser and Vivid, because it manages the sales platform, sets the sales terms and conditions and invoices purchasers.[13] It can also be described as a mandate, as submitted by counsel for the representative. In any event, the exact characterization of the relationships between the parties and their effects belongs to the hearing on the merits. But, *a priori,* a contractual relationship does appear to exist.

[24] Second, Vivid argues that there is a contract between the parties, but that it is not a contract of sale but covers instead the delivery and a guarantee of validity of the tickets.[14]

[25] Even if it admits that the characterization of the contract proposed by Vivid is correct, the Court fails to see how it is a bar to the application of s. 54.4(h) *C.P.A.*, which applies to any distance contract for goods and services entered into between a consumer and a merchant.[15] The contract binding the purchaser and Vivid remains subject to the provision even if it is a contract for services or of guarantee rather than a contract of sale.

[26] Next, Vivid alleges that it is complying with s. 54.4 *C.P.A*, which requires that a merchant disclose foreign currency prominently before the contract is entered into. The evidence itself[16] confirms that the price is specified a few lines above the order button, in bold letters. According to Vivid, this respects the anteriority and prominence

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11 Exhibit P-5.
12 *Richard v. Time Inc.,* 2012 SCC 8 at paras 100ff.
13 Exhibit P-5.
14 Exhibit P-2.
15 Sections 2, 54.1 *C.P.A.*
16 Exhibit P-2.

requirements of s. 54.4(*h*). It argues that, unlike other laws, the legislator did not set specific norms for the font size or placement of disclosure.

[27] According to Vivid, although the Court, at the authorization stage, must take the allegations as proved, that principle must be set aside in cases such as this when the falsity of the allegations [TRANSLATION] "is flagrant".[17]

[28] The Court disagrees. Nicolas' allegations are sufficient at this stage to support a syllogism showing a colour of right. It is up to the judge on the merits to determine whether the information at issue[18] is sufficient to satisfy the requirement of "expressly" in s. 54.4 *C.P.A.*

[29] To that end, it is relevant to assess the impact of the time when the information is disclosed, if that impact is exacerbated in the case of a contract entered into on a computer, which generally accelerates the pace at which a contract is entered into. It is also useful to consider whether some of the principles outlined in *Time* with respect to business practices colour the interpretation of s. 54.4. All such issues must be decided on the merits. At this stage, therefore, it cannot be concluded that the application is ill founded on the face of the record.

[30] The Court therefore concludes that at this stage the representative has shown a colour of right pursuant to s. 54.4 (*h*) *C.P.A.*

- **Violation of s. 224(*c*).**

[31] The provision prohibits a merchant from charging consumers a higher price than the one advertised.

[32] The plaintiff argues that, as recognized by the Court of Appeal, the practice in s. 224(*c*) must be analyzed objectively, was a higher price charged or not, regardless of what the consumer may have understood.[19]

[33] Every violation of any prohibited business practice under Title II is subject to sanction regardless of the existence of a prejudice to a specific consumer. The Supreme Court wrote the following in *Time*: [20]

> [50] This approach is consistent with the spirit of the *C.P.A.*, whose main objective is to protect consumers. The courts must therefore be able to sanction any representation that, from an objective standpoint, constitutes a prohibited practice. Whether a commercial representation did or did not cause prejudice to one or more consumers is not relevant to the determination of whether a merchant engaged in a prohibited practice within the meaning of Title II of the *C.P.A.* The *C.P.A.* is concerned not only with remedying the harm caused to consumers by false or misleading representations, but also with preventing the distribution of advertisements that could mislead consumers and possibly cause them various types of prejudice.

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17 *Asselin, supra* note 4 at para. 91.
18 *Abicidan c. Bell Canada,* 2017 QCCS 1198 at para. 33ff; *Macduff*, *supra* note 6 at para. 23.
19 *Union des consommateurs c. Air Canada,* 2014 QCCA 523.
20 *Time, supra* note 12 at para 50.

[34] According to the plaintiff, there was obviously a violation since the correct price, $1250.37 Canadian, was never displayed.

[35] The defendant argues that the provision is not applicable in the present case, firstly, because the price indicated was correct, and secondly, the provision only applies in the case of a price that is fragmented.

[36] The Court cannot accept these arguments at the authorization stage.

[37] Although a violation of section, 224(*c*) must be analysed objectively, in the present case its scope must be determined when the price is indicated in a different currency, which may involve examining the sufficiency of the information already raised by s. 54.4(*h*). To that end, the text, the size, the simplicity and the context, including the time of disclosure,[21] may eventually be taken into account.

[38] As the sufficiency of the price disclosure must be decided on the merits, it is therefore premature to rule on this issue at the authorization stage.[22]

[39] With regard to the argument on the scope of section 224(*c*), that is, whether or not it is limited to the practice of fragmenting prices alone, although the Court of Appeal wrote that the purpose of that provision is to counter the practice of breaking down prices,[23] it did not go so far as to limit the scope of paragraph (*c*) to that practice alone. Indeed, the paragraph predates the paragraph *in fine* on fragmentation, and covers any situation in which the price charged is higher than the advertised price.

[40] The Court concludes that the representative has shown a colour of right under s. 224(*c*).

- **Violation of ss. 219 and 228 *C.P.A.***

[41] These two provisions prohibit a merchant from making false or misleading representations and failing to mention an important fact respectively. Nicolas submits that she was misled by the failure to disclose the currency clearly during the entire sales process.

[42] The defendant argues that it clearly disclosed the information by indicating the price in the right currency above the order button.

[43] Clearly, specifying the currency constitutes an important fact when it accounts for a 30% price difference. What needs to be established is whether, pursuant to s. 228 *C.P.A.*, that fact was properly disclosed. As concerns s. 219 *C.P.A.*, the Court must assess whether the information on the price was false or misleading.

[44] According to s. 218 *C.P.A.* and the teachings of the Supreme Court in *Times,*[24] that assessment is based on the general impression conveyed by the information.

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21 *Ibid at* para55.
22 *Abicidan, supra* note 18 at para33ff.
23 *Air Canada, supra* note 19 at para53.
24 *Times, supra* note 12.

[45] The answer, once again, requires evidence to be submitted. It must therefore be determined on the merits.[25]

[46] The Court concludes that the representative has shown a colour of right under ss. 219 and 228 *C.P.A.*

[47] With respect to sanctions, the plaintiff claims the price difference as compensatory damages, and punitive damages. According to s. 272 *C.P.A.*, which covers both a violation of Title I and Title II of the *Act,*[26] both sanctions may apply once it has been established that one of the four provisions raised has been violated. The remainder of the issue must also be decided on the merits.[27]

2) Do the claims of the members raise identical, similar or related issues of law or fact?

[48] The purpose of class actions is to improve access to justice and to spare judicial resources by avoiding a duplication of proceedings. Thus, the case law has interpreted the second criterion liberally, and considers that is has been met if the identity, the similarity, or the relatedness of the issues of law or of fact allow a claim to move forward significantly.[28]

[49] Thus, one common issue is sufficient,[29] even if some issues, namely the assessment of damages, may need to be decided individually.

[50] Here again, Vivid contends that the condition is not met on the ground that it does not act as a ticket vendor. Vivid therefore argues the absence of a common issue, since each class member must first establish that he or she was unaware that the purchase agreement was not entered into with Vivid.

[51] For the reasons explained above, even if it is admitted that no contract of sale binds Vivid and the class members, another type of contract may bind them and be subject to the *C.P.A*. The characterization of the various contractual relationships between them must be analysed in a discussion on the merits.

[52] The Court identifies the following common issues of the class action:

(a) Did Vivid violate s. 54.4(*h*) *C.P.A.*?

(b) Did Vivid violate ss. 219, 224 and 228 *C.P.A.*?

(c) If there has been a violation of one or more of these provisions, can the members of the class action claim compensatory and punitive damages from Vivid? If so, in what amount?

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25 *Air Canada, supra* note 19 at para 33ff; Macduff, *supra* note 6 at para 23.
26 *Times, supra* note 12 at para 100.
27 *Bell Mobilité, supra* note 7 at para42.
28 *Collectif de défense des droits de la Montérégie (CDDM) c. Centre hospitalier régional du Suroît du Centre de santé et de services sociaux du Suroît,* 2011 QCCA 826 at para22.
29 *Montréal (Ville de) c. Biondi,* 2013 QCCA 404.

3) Does the composition of the class make it difficult or impracticable to apply the rules for mandates to take part in judicial proceedings on behalf of others or for consolidation of proceedings?

[53] In paragraph 10 of her application for authorization, Nicolas describes the class as follows :

> **Class**:
>
> All consumers within the meaning of the Quebec's Consumer Protection Act who purchased a ticket from Vivid Seats since November 16th, 2014;
>
> Tous les consommateurs au sens de la Loi sur la protection du consommateur du Québec qui ont acheté un billet de Vivid Seats depuis le 16 novembre 2014.
>
> (hereinafter referred to as the "Class")

[54] At the authorization stage, the need to clearly identify the members or indicate their number varies according to the nature of the action. When [TRANSLATION] " ...it is obvious that a large number of consumers are in the same position, it becomes less useful to identify them".[30]

[55] Once again, Vivid submits that since it is not a ticket vendor, the class as described is marginal, even non-existent, given that consumers knew the sales contract did not bind them to Vivid.

[56] For the reasons already set out, the Court rejects that argument. For the rest, the nature of Vivid's business and the steps taken by the representative to document the existence of other clients[31] are sufficient at this stage to convince the Court that the size of the group warrants a class action.

[57] To avoid prejudging the characterization of the contractual relationships between the various stakeholders, which will be decided on the merits, the Court slightly amends the description of the class as follows :

> All consumers within the meaning of the Quebec's Consumer Protection Act who purchased a ticket from Vivid Seats web site or application since November 16th, 2014;
>
> Tous les consommateurs au sens de la Loi sur la protection des consommateurs qui ont acheté un billet à partir du site ou de l'application portable de Vivid Seats depuis le 16 novembre 2014;

4) Is Nicolas in a position to properly represent the class members as a representative?

[58] Vivid argues that the sale does not bind it to the representative and therefore, she lacks standing, a prerequisite for any representative.

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30 *Martel c. Kia Canada inc.*, 2015 QCCA 1033 at para 29.

31 Exhibits P-11 and P-12.

[59] Again, that argument depends on the legal nature of the relationships between i) Nicolas and Vivid, and ii) Vivid and those that, according to Vivid, make up the ticket vendors.

[60] Once again, this issue, should it have a bearing on the status of representative of a class, will be decided on the merits.

[61] For the rest, Nicolas is in a position to properly represent the members and has the energy and the will to devote the necessary time to the task, as demonstrated by the steps taken up until now, including the fact that she contacted counsel herself to institute the action.

[62] The criterion is therefore met.

FOR THESE REASONS, THE COURT:

[63] **AUTHORIZE** the bringing of a class action in the form of an originating application in damages;

[64] **APPOINT** the Applicant the status of representative plaintiff of the persons included in the Class herein described as:

> Class:
>
> All consumers within the meaning of the Quebec's Consumer Protection Act who purchased a ticket from Vivid Seats web site or application since November 16th, 2014;
>
> Tous les consommateurs au sens de la Loi sur la protection des consommateurs qui ont acheté un billet à partir du site ou de l'application portable de Vivid Seats depuis le 16 novembre 2014;
>
> (hereinafter referred to as the "Class")

[65] **IDENTIFIES** the principle questions of fact and law to be treated collectively as the following:

> (a) Did Vivid violate s. 54.4(*h*) *C.P.A.*?
>
> (b) Did Vivid violate ss. 219, 224 and 228 *C.P.A.*?
>
> (c) If there has been a violation of one or more of these provisions, can the members of the class action claim compensatory and punitive damages from Vivid? If so, in what amount?

[66] **IDENTIFIES** the conclusions sought by the class action to be instituted as being the following:

> **GRANT** the Representative Plaintiff's action against Defendant on behalf of all the Class members;
>
> **CONDEMN** the Defendant to pay the Representative Plaintiff and Class members compensatory damages in the aggregate overcharged amount being 29.3% of Defendant's gross sales to Class members;

ORDER the collective recovery of all damages owed to the Class members for the amounts overcharged by the Defendant;

CONDEMN the Defendant to pay to each Class member the sum of $100.00 on account of punitive damages, and **ORDER** collective recovery of these sums;

CONDEMN the Defendant to pay interest and the additional indemnity on the above sums according to law from the date of service of the Application to authorize a class action;

ORDER the Defendant to deposit in the office of this Court the totality of the sums which forms part of the collective recovery, with interest and costs;

ORDER that the claims of individual Class members be the object of collective liquidation if the proof permits and alternately, by individual liquidation;

CONDEMN the Defendant to bear the costs of the present action at all levels, including the cost of all exhibits, notices, the cost of management of claims and the costs of experts , if any, including the costs of experts required to establish the amount of the collective recovery orders;

RENDER any other order that this Honourable Court shall determine;

[67] **DECLARES** that unless excluded, the members of the group will be bound by any judgment to be rendered on the class action, as provided by law;

[68] **POSTPONES** the debate on the authorization notice and the opting-out period;

[69] **REFERS** the case to the Chief Justice to determine the district in which the class action should be instituted and to designate the judge to hear it;

[70] **ORDERS** the clerk, should the class action be instituted in another district, to forward the record to the clerk in that other district, once a decision has been made by the Chief Justice.

[71] Legal costs to follow.

BENOÎT MOORE, J.S.C.

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Date of hearing: July 6, 2018