

SUPERIOR COURT

(Class Action Chambers)

CANADA
PROVINCE OF QUEBEC
DISTRICT OF MONTREAL

No: 500-06-001164-215

DATE: May 16, 2023

PRESIDING: THE HONOURABLE LUKASZ GRANOSIK, J.S.C.

STEVEN HOLCMAN

Plaintiff

v.

**LIGHTSPEED COMMERCE INC.,
LIGHTSPEED POS INC.,
DAX DASILVA,
JEAN-PAUL CHAUVET,
MARIE-JOSÉE LAMONTHE,
PATRICK PICHETTE,
ROB WILLIAMS,
PAUL McFEETERS,
MERLINE SAINTIL,
DANIEL MICAŁ,
ASHA BAKSHANI,
and
PRICE WATERHOUSE COOPERS LLP**
Defendants

JUDGMENT

[1] Some Defendants¹ (“Lightspeed”) present an *Application for an order (i) compelling applicants’ lawyers to cease all contacts, directly or indirectly, with defendant*

¹ Except for defendant Price Waterhouse Coopers LLP.

Lightspeed commerce inc.'s current or former representatives, and (ii) compelling applicants' lawyers to communicate all relevant information concerning their improper contacts with Lightspeed commerce inc.'s current and former representatives.

[2] By this motion, Lightspeed seeks essentially to obtain an order barring Plaintiff from contacting any current or former Lightspeed representative and forcing Plaintiff to communicate documents and information that was gathered following such communications, including an unredacted report, of which a redacted version was notified by Plaintiff.

* * * * *

[3] On October 1, 2021, Plaintiff filed a hybrid *Application for authorization of a class action and for authorization to bring an action* pursuant to s. 225.4 of the *Securities Act*² against the Defendants.

[4] In the latest iteration of the *Application*, Plaintiff essentially alleges that Lightspeed misrepresented its growth, customer accounts, gross transaction volume and total addressable market before becoming public and until corrective disclosures were made. Among other exhibits in support of his *Application*, Plaintiff relies on a series of memoranda prepared by On Point Investigations LLC, a private investigators company retained by American lawyers for the plaintiffs in the context of the Nath et al. v. Lightspeed Commerce Inc. et al. proceeding, in the Southern District of New York under file number 1:21-cv-06365. These memoranda³ contain redacted notes of meetings that took place between private investigators and former Lightspeed employees in the U.S.

[5] In the present matter, Plaintiff's lawyers retained another investigator, Trak Group, which proceeded to contact employees or persons related to Lightspeed via the platform LinkedIn. Among these persons was Lory Ajamian, who was employed as Vice-President of Marketing at Lightspeed between February 2019 and March 2021, and Executive Vice-President of Marketing between March 2021 and May 2022. She received a LinkedIn message intitled: "*Lightspeed case – class action*" which basically invited Ajamian⁴ to reply if she was interested to speak with Plaintiff's lawyers as a "*witness*".

² RLRQ, c. V 1.1.

³ Exhibit P-71.

⁴ The use of last names in this judgment reflects how the parties were generally identified during the hearing and is meant solely to lighten the text. It should not be interpreted as a sign of lack of respect toward the persons concerned.

[6] Lightspeed contends that such a communication constituted an improper contact involving Plaintiff's lawyers and a Lightspeed representative, in violation of Article 120 of the *Code of Professional Conduct of Lawyers* (CPCL):

120. A lawyer must not communicate in a matter with a person whom he knows to be represented by a lawyer, except in the presence or with the consent of that lawyer or unless he is authorized to do so by law. In the event of an unsolicited or accidental communication, the lawyer must promptly inform the person's lawyer of the circumstances and content of the communication.

Subject to the first paragraph, a lawyer may seek information from any potential witness, but he must disclose the interests of the person for whom he is acting.⁵

[7] Lightspeed adds that all the information potentially gathered in violation of Article 120 must be disclosed.

[8] Plaintiff argues that the investigator's role was limited to reaching out to potential witnesses and passing along their contact details if they expressed an interest in being contacted by his lawyers. He denies that such contact has indeed taken place with Ajamian and offers in the future to first notify Lightspeed's counsel if his lawyers intend to speak with a Lightspeed representative, or any person who could potentially be considered a representative within the meaning of Article 120 CPCL. He opposes any conclusion with respect to the communication of information gathered in preparation for this litigation and regarding the file transmitted by the US counsel acting in a matter against Lightspeed in New York, as he deems these documents to be privileged.

* * * * *

[9] Article 120 of the CPCL serves three purposes: (1) protecting litigants; (2) preserving the integrity of the judicial process by ensuring that the party's strategy is not disclosed to the other party, and (3) protecting the professional relationship between counsel and their client.⁶ Justice Marcotte states the following with regard to the former equivalent of Article 120:

[27] To summarize, Quebec courts have generally extended the protections provided by 3.02.01(h) to an ex-employee where the ex-employee either (1) held a strategic position in the company (i.e possessed the power to make decisions on behalf of the company or bind the company) and actively participated in the

⁵ RLRQ, c. B-1, r 3.1.

⁶ *Churchill Falls (Labrador) Corporation Ltd. v. Hydro-Québec*, 2015 QCCA 782.

facts that led to the dispute or (2) was involved in the litigation or occupied a top-ranking position when the litigation unfolded.⁷

(Citations omitted)

[10] It is admitted that Plaintiff's lawyers mandated Group Trak to reach out to former employees of Lightspeed to put these potential witnesses in direct contact with them, with the intention to obtain information relevant to the dispute in this case.

[11] On the date the *Application for authorization of class action* was filed, Ajamian held the position of Executive Vice-President of Marketing of Lightspeed. Lightspeed adds that not only did Ajamian hold a strategic position and actively participate in the facts that led to the dispute, but she was also involved in Lightspeed's response to these Court proceedings. This is not really being disputed by Plaintiff and therefore, I am convinced that Ajamian satisfies both alternative prongs of the test, as set out by Justice Marcotte, and is clearly a representative of Lightspeed in the context of Article 120 CPCL.

[12] Groupe Trak knew or ought to have known that Ajamian was Lightspeed's representative when it attempted to contact her to obtain evidence relevant to the dispute. Indeed, Ajamian's experience and the senior position she occupied at Lightspeed, including when the *Application* was filed, is publicly available on her LinkedIn profile and was hence accessible to Groupe Trak when it communicated with her. Therefore, Group Trak acted in violation of article 120 CPCL. They should have made sure that the person they contacted was not covered by the Article 120 CPCL before reaching out to her.

[13] Plaintiff's lawyers allege that they have made no decision as to whether they will contact any former Lightspeed employees. This falls short of their obligations. The "*due diligence*" process as referred to by Plaintiff's lawyers, should have been conducted prior to reaching out to the potential witness, rather than after such witness replied positively to the invitation. Therefore, an order will be issued to compel the communication of the identity of all past or current Lightspeed employees that Group Trak or Plaintiff's lawyers reached out to, in order to allow Lightspeed to verify whether its rights may have been violated.

[14] In short, Plaintiff's lawyers should modify their practice and comply with the law. Instead of waiting for the contacted person to respond and then only, to determine if this person is in fact protected by Article 120 CDCL, they should do the verification upstream.

⁷ *Idem.*

Accordingly, the offer they present to first notify Lightspeed's counsel is valid and will be confirmed by this judgment.

[15] This being said, no actual communication has taken place and no information was gathered or received by Plaintiff's lawyers from Ajamian. Consequently, nothing justifies currently that the one-way LinkedIn communication should lead to or require the production of all written communications exchanged with current or former representatives of Lightspeed. The same is true of the production of any mandate letter signed between Plaintiff's lawyers and third-party representatives tasked with communicating with Lightspeed's present and past employees, including Group Trak and On Point Investigations LLC.

[16] It is premature to order such communication of any information gathered. It should first be determined if any violation of Article 120 has occurred and then only see if any remedies should be ordered at all. It does not appear advisable at the present stage to issue any "blanket order" compelling the disclosure such as the one Lightspeed is requesting.

[17] With respect to the memoranda prepared by On Point Investigations LLC, an additional reason applies. Although Plaintiff's counsel acknowledges having received the memoranda created by On Point Investigations from U.S. counsel acting in the Nath et al. v. Lightspeed Commerce Inc. et al. proceeding, Plaintiff's counsel has not asked On Point Investigations to perform any work in this matter and has not been in contact with any of the former Lightspeed employees contacted by this investigator. This document is protected by the litigation privilege.

[18] The Supreme Court of Canada has held that litigation privilege is an important class privilege and that it should only be set aside in clearly defined and exceptional circumstances⁸. Moreover, Lightspeed has the burden of proof since « [l] y a d'abord lieu de rappeler la règle générale selon laquelle en principe les témoins de fait n'appartiennent à personne, et ce, même si ceux-ci sont des employés ou anciens employés de la personne morale partie à l'instance ».⁹

[19] In the case at hand, there is no abuse of process or similar blameworthy conduct that would justify setting aside litigation privilege and Lightspeed fails to demonstrate that the memoranda violate either the letter or the principles underlying Article 120 CPCL.

⁸ *Lizotte v. Aviva Insurance Company of Canada*, 2016 SCC 52.

⁹ *Ville de Montréal v. 3286916 Canada inc. (Excavation Gricon)*, 2022 QCCA 893, par. 20.

WHEREFORE, THE COURT:

[20] **ORDERS** Plaintiff, within 30 days, to communicate to Lightspeed's counsel the identity of the current or former representatives and employees of Lightspeed that were contacted, relating directly or indirectly to this matter, by Group Trak or by Plaintiff's lawyers;

[21] **PRAYS ACT** of Plaintiff's offer to first notify Lightspeed's counsel if Plaintiff's lawyers intend to reach out to a Lightspeed representative or employee, who could potentially be considered a representative within the meaning of Article 120 CPCL;

[22] **RESERVES** Lightspeed's rights to seek all appropriate relief and remedies in case of violation of Article 120 CPCL;

[23] **THE WHOLE** with legal costs to follow.



LUKASZ GRANOSIK, J.S.C.

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Date of hearing: February 22, 2023.

Last written representations received on March 31, 2023.