

SUPERIOR COURT
(Class Action)

CANADA
PROVINCE OF QUÉBEC
DISTRICT OF MONTREAL

NO: 500-06-000431-086

DATE: March 15, 2012

IN THE PRESENCE OF THE HONOURABLE LOUIS LACOURSIÈRE, J.S.C.

ANNA MAZZONNA

Petitioner

v.

**DAIMLERCHRYSLER FINANCIAL SERVICES CANADA INC./
SERVICES FINANCIERS DAIMLERCHRYSLER INC.**

Respondent

and

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

Respondent in Continuance of Suit

JUDGMENT

[1] Petitioner wishes to institute a class action on behalf of a proposed group (the "Group"):

All persons (including their estates, executors, or personal representatives), consumers, corporations, firms, businesses, and other organizations in all of Canada, whose personal information was stored or saved on a data tape, which was lost by Defendant while in transit on or about March 12, 2008 or any other group to be determined by the Court.

[2] DaimlerChrysler Financial Services Canada Inc. / Services Financiers Daimler-Chrysler inc. ("DaimlerChrysler") was the original Respondent. TD Auto Finance Services Inc. / Services de Financement Auto TD inc. ("TD Auto") filed an Appearance in Continuation of Suit on January 19, 2012.

[3] The gist of the question in issue relates to the fault, if any, of DaimlerChrysler and the damages, if any, including fraud and identity theft, incurred by the members of the Group further to the loss of the data tape (the "Data Tape") and whether, given the allegations of the Fourth Amended Motion to Authorize the Bringing of a Class Action and to Ascribe the Status of Representative (the "Motion"), the conditions of Article 1003 of the *Code of Civil Procedure* ("CCP") have been met by the Petitioner.

THE FACTS ALLEGED IN THE MOTION

[4] The facts alleged in the Motion can be summarized as follows.

1) The loss of the Data Tape and its content

[5] On March 27, 2008,¹ DaimlerChrysler sent a letter, by regular mail, to the members of the Group (the "Notification Letter"), received on or about April 21, 2008, which stated, *inter alia*:

"Dear(...):

One of the highest priorities at Chrysler Financial is our focus on your privacy and the protection of your personal information. It is for this reason we are writing to you today to notify you of a recent incident we had with the transfer of certain customer information stored on a data tape to a licensed third party credit reporting agency. On March 12, 2008, we were notified by United Parcel Services ("UPS") that a data tape (the "Data Tape") sent by Chrysler Financial containing certain customer information was destroyed or lost in transit and never arrived at the agency. The Data Tape cannot be easily accessed and requires specialized software and equipment to read, but it did contain some personal information that Chrysler Financial had obtained from you (most importantly, name, address, and social insurance number).

Chrysler Financial, in co-ordination with UPS, is conducting a thorough investigation but at this point in time the Data Tape has not been located. Having said that, we also have no reason to suspect that an unauthorized individual has actually retrieved and is using the personal information contained on the Data Tape, which we reiterate is not readily accessible. Nonetheless, as a precautionary measure we are alerting you to this recent incident so that you may be watchful for signs of any possible misuse of your personal information by an unauthorized recipient.

¹ Exhibit P-3.

We apologize for any inconvenience or alarm this may cause you. Chrysler Financial can confirm that this has not happened before within our quality control processes and, since the incident, we have put into place additional measures with this and other third party agencies to ensure that this will not happen again. Chrysler Financial has also, on a voluntary basis, disclosed this incident to the federal Privacy Commissioner's Office and the applicable provincial privacy offices.

We appreciate your business and want to assure you that Chrysler Financial remains committed to providing exceptional customer service while enforcing the strictest of privacy measures.

If you require any additional information or clarification, please do not hesitate to contact us at 1-800-263-6920.

Yours truly,

Brian Chillman
General Counsel
Chrysler Financial"

(emphasis added)

[6] The Motion alleges that:

(a) in an Affidavit dated October 17, 2008, Lynnette M. Barker, Info-Technology Management Senior Manager - Portfolio Systems for Daimler-Chrysler Financial Services Americas LLP (the "Barker Affidavit"), stated that:

- the only personal data which would have been recorded on the data tape are the customer's name, address, phone number and in certain cases, the social insurance number as well as other information related to the status and history of the customer's credit with DCFSCI (DaimlerChrysler Financial Services Canada Inc.);²
- the tape did not contain any other personal or financial information concerning DCFSCI customers;³

(b) when cross-examined on June 23, 2009 on her affidavit, Ms. Barker conceded that there was a field, in the Data Tape,⁴ for a date of birth;⁵

² Paragraph 5 of the Barker affidavit.

³ Paragraph 6 of the Barker affidavit.

⁴ The Data Tape is described by Ms. Barker, in her deposition, as a black cartridge tape, only used on a mainframe, that can be taken off of the mainframe (Barker deposition, at 48); the information on the Data Tape was created monthly (Barker deposition, at 50).

⁵ Barker deposition, at 67.

- (c) the date of birth is an important element which would increase the risk of fraud and identity theft; and
- (d) the members of the Group were justified to assume that Daimler-Chrysler would take steps to safeguard their personal information, which it did not.

ii) The Fault

a) Before the loss of the Data Tape

[7] The Motion alleges that:

- (a) DaimlerChrysler was negligent in allowing personal information, entrusted to it in the sole context of the lease of an automobile or truck, to be stored in the USA, in the State of Michigan, when it conducted its business in Canada and knew that it would be making monthly credit reports to a credit agency located in Rouyn Noranda, Province of Quebec;
- (b) DaimlerChrysler was negligent in sending the personal information on a "physical" Data Tape, in a sealed envelope, through a regular delivery service by United Parcel Service of Canada Ltd ("UPS") rather than by using a more secure method of transferring information, the whole without even keeping a back-up of the information, so that the precise nature of the material lost cannot be ascertained;
- (c) DaimlerChrysler chose not to encrypt or otherwise "password protect" the personal information contained on the Data Tape, making it available to any person who may gain access to it, notably using a tape drive easily available or having it converted into regular DVD format;
- (d) DaimlerChrysler did not inform UPS of the content of the Data Tape, namely "sensitive personal information on approximately 240,000 of its customers" and declared a value of US \$5,⁶ thereby "attributing no value whatsoever (and no concern for) the sensitive personal information of its approximately 240,000 customers"; and
- (e) DaimlerChrysler decided to "favor the reduction of its own shipping costs instead of protecting the personal information collected from its customers".

b) After the loss of the Data Tape

[8] The Motion alleges that:

⁶ Exhibit P-4.

- (a) after the loss of the Data Tape, DaimlerChrysler was negligent in failing to offer credit monitoring services to its customers or to alert credit bureaus such as Equifax and TransUnion of the loss in order to have the appropriate "red flags" marked on the customers' credit files;
- (b) DaimlerChrysler was negligent in delaying the notification to its customers of the loss, which occurred on or about March 12, 2008;
- (c) an earlier notification would have helped in preventing further fraud; and
- (d) DaimlerChrysler failed to create an Internet webpage or similar service which would have helped its customers gain information as to the status of the lost Data Tape.

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[9] The Motion summarizes the position of the Group on the negligence of DaimlerChrysler as follows:

9.1 Basically, and as appears from all of the above, Defendant was negligent when it lost the Class Members' personal information and all it did thereafter was to send them the Notification Letter, by regular mail, simply admitting its mistake but offering no relief or assistance whatsoever to their Customers;

9.2 Defendant, in the Notification Letter, did not even offer to compensate the Class Members for any loss or damages stemming from the loss of their personal information contained in the Data Tape, which is the very least Defendant should have done under the circumstances;

iii) The damages

[10] The Motion describes the types of damages suffered by the Petitioner and "likely the other Class Members" as follows:

10. Petitioner and likely the other Class Members have already and will continue to experience anxiety, inconvenience, pain, suffering and/or fear due to the loss of their personal information, which has made Petitioner and other Class Members potential targets for fraud and/or identity theft;

[11] The Motion also refers to potential inconveniences and damages of the nature of delays in processing applications for credit, the obligation to monitor accounts for fraud activity and to be "even more attentive than normally necessary concerning the communication of their personal information" and the "obligation, in some cases, to inform their other financial institution of the loss of information" by DaimlerChrysler.

[12] The Court has reproduced as Annex A of the judgment the allegations of the Motion pertaining to potential damages to the Group.

[13] With regards to Petitioner herself, she describes what she has had to do in order to cope with the situation caused by the loss of the Data Tape in the following manner:

15.6 As a result of the loss of information by Defendant detailed herein, certain Class Members decided to completely change their bank account numbers. In the case of the Petitioner particularly, she chose to keep the old bank account open since her salary gets directly deposited into said account and her car lease payments with Defendant get directly debited from the account;

15.7 However, due to the loss of her personal information by Defendant herein, Petitioner was forced to monitor said account more frequently for fraudulent activity. Furthermore, every two weeks when Petitioner's salary is deposited into said bank account, she immediately writes herself a cheque and deposits said cheque into another bank account at a completely different bank, leaving in the old account only the minimum amount of funds required in order to cover her car lease payment with the Defendant. Petitioner never used to do any of this before the loss of her information by the Defendant;

[14] Finally, the Motion alleges the failure by DaimlerChrysler to refer complaints, inquiries, claims or requests for indemnification from members of the Group to the Petitioner's attorneys, thereby preventing them from contacting said members. Despite that alleged failure, the Petitioner, through her attorney's website, compiled a list, kept under seal, of approximately 140 "members", some of whom posted comments or concerns⁷ ("the Members' List").

[15] Following the service of the original motion in 2008, the Petitioner, through her attorneys, filed a complaint with the Office of the Privacy Commissioner of Canada (the "OPCC") regarding the loss of the Data Tape.⁸

DISCUSSION

1) General principles

[16] Article 1003 *CCP* states the conditions which have to be met for the institution of the class action to be authorized:

1003. The court authorizes the bringing of the class action and ascribes the status of representative to the member it designates if of opinion that:

(a) the recourses of the members raise identical, similar or related questions of law or fact;

(b) the facts alleged seem to justify the conclusions sought;

⁷ Exhibit P-5.

⁸ Exhibit P-6.

(c) the composition of the group makes the application of article 59 or 67 difficult or impracticable; and

(d) the member to whom the court intends to ascribe the status of representative is in a position to represent the members adequately.

[17] Failure to meet one of these conditions necessarily results in the dismissal of a Motion for authorization.⁹

[18] The authorization process has been referred to in the caselaw as a "filtering mechanism" (*mécanisme de filtrage*) which seeks to discard actions which are frivolous, obviously ill founded or with respect to which it would be clearly inappropriate to expand the resources associated with a class action.¹⁰

[19] The Court of Appeal¹¹ describes the principle behind this "filtering mechanism" in the following manner:

[38] Il faut toutefois garder en mémoire que le recours collectif n'est qu'un outil procédural. En principe, les tribunaux doivent en faciliter l'usage principalement en raison des vertus régulatrices qu'on lui attribue et dont la nature favorise un juste équilibre entre des intérêts dont la puissance respective serait autrement disproportionnée.

[39] Mais cet outil ne comporte pas que des avantages et son usage est susceptible d'engendrer parfois des complications indues, voire même des injustices. De là la nécessité d'un filtrage judiciaire permettant de tester dans chaque cas l'opportunité d'y recourir. (references omitted)

[20] The Petitioner's burden at the authorization stage is one of demonstration, not of balance of probabilities.¹²

[21] At the authorization stage of the proceedings, although the facts of the Motion are taken as proved,¹³ the Court must disregard allegations which contain opinions, are argumentative or contain inferences or unverified hypotheses or which are clearly contradicted by trustworthy documentary evidence.¹⁴

⁹ *Durand v. Dermatech*, 2009 QCCS 3874 (S.C.), at paras. 13-14.

¹⁰ *Pharmascience inc. v. Option Consommateurs*, 2005 QCCA 437, at para. 34; *Gaudet v. P & B Entreprises ltée*, 2011 QCCS 5867, at para. 37.

¹¹ *Bouchard v. Agropur Coopérative et al*, 2006 QCCA 1342.

¹² *Harmegnies v. Toyota Canada Inc. et al*, 2008 QCCA 380, at para. 30.

¹³ *Idem*.

¹⁴ *Option Consommateurs v. Bell Mobilité*, 2008 QCCA 2201, at paras. 37-38.

[22] Finally, the Court cannot exclude from its analysis of each of the conditions of Article 1003 *CCP*, the principle of Articles 4.1 and 4.2 *CCP*:¹⁵

4.1. Subject to the rules of procedure and the time limits prescribed by this Code, the parties to a proceeding have control of their case and must refrain from acting with the intent of causing prejudice to another person or behaving in an excessive or unreasonable manner, contrary to the requirements of good faith.

The court sees to the orderly progress of the proceeding and intervenes to ensure proper management of the case.

4.2. In any proceeding, the parties must ensure that the proceedings they choose are proportionate, in terms of the costs and time required, to the nature and ultimate purpose of the action or application and to the complexity of the dispute; the same applies to proceedings authorized or ordered by the judge.

ii) *The appearance of right (Article 1003 (b) CCP)*

[23] The Court will deal first with the condition of Article 1003 (b) *CCP*. Do the facts alleged in the Motion seem to justify the conclusions sought?

[24] The legal syllogism proposed by the Petitioner in support of the appearance of right is the following. After entering into a contract of lease of a Chrysler vehicle, the Petitioner entrusted DaimlerChrysler with protected private information; this information was lost and the Notification Letter is clear not only as to the loss but also as to the fact that the loss may cause clients "inconvenience or alarm" in that the information can fall into the wrong hands. As to the damages, Petitioner argues that there is *prima facie* evidence that she suffered stress and she also claims that she is entitled to punitive damages.

[25] This is the legal syllogism and the Petitioner states that it is up to the judge at trial to determine the degree of stress and inconvenience she suffered and whether it is enough to warrant compensation.

[26] As conditions 1003 (a) and 1003 (b) *CCP* are somewhat interrelated, the Court states from the outset that the questions raised by the Petitioner to illustrate that she has met the condition of Article 1003 (a) *CCP* (identical, similar or related questions of law or fact) are coherent with the proposed legal syllogism:¹⁶

a) Was Defendant negligent in the handling of and subsequent loss of the personal information of the Group Members?

b) Is Defendant liable to pay damages to the Group Members as a result of the loss of said information, including actual monetary losses incurred as well as

¹⁵ *Marcotte v. Longueuil (Ville de)*, 2009 S.C.R. 43, at paras. 21,130.

¹⁶ Paragraph 25 of the Motion.

pain, suffering, inconvenience, anxiety and other moral and/or punitive damages caused by the loss of said information?

[27] First, the Court comes to the conclusion that there is a *prima facie* demonstration that negligence is involved in the loss of the Data Tape.

[28] DaimlerChrysler chose to transfer the Data Tape, which contained personal information on some 240,000 clients, through the services of UPS. The fact is that a sealed shipping package was picked up on March 10, 2008 by a UPS driver at DaimlerChrysler's facility in Sterling Heights, Michigan, for shipment to Rouyn-Noranda, Quebec.¹⁷

[29] A UPS clerk, in Montreal, inspected the package on March 11, 2008 and noted that the packaging was torn and the Data Tape not in the package. The fate of the Data Tape is unknown.¹⁸

[30] In summary, the Petitioner contracted with the Respondent, entrusted it with her information and the Respondent did not, *prima facie*, meet its obligations to store, keep and transfer the information safely.

[31] UPS was initially a Respondent and the Petitioner was authorized, by judgment dated April 28, 2009, to discontinue her motion against UPS. The discontinuance does not, *prima facie*, release DaimlerChrysler from its obligation towards the Petitioner under the rules of privity of contract.

[32] Second, DaimlerChrysler has argued that, even if there was a fault in losing the Data Tape, there is a major causal hurdle for the Petitioner to cross in that the information stored on the Data Tape was not at all easily accessible and, therefore, could not be used to the detriment of the members of the Group.

[33] Indeed, while the Data Tape was not encrypted¹⁹ and therefore not formatted to make it unreadable to someone without a password or other similar security barrier,²⁰ DaimlerChrysler argues that:

- the information stored on the Data Tape consists of numerical and alphanumeric data which, depending on the field in which they are placed, are assigned a meaning which is used for credit report purposes;²¹
- to access this information would have been difficult in that it required special equipment including a compatible tape drive, special software and information contained in a credit reporting guide;

¹⁷ Affidavit of Mark Maliska, Security Manager UPS Canada, November 19, 2008.

¹⁸ *Idem.*

¹⁹ Written response of Ms. Barker, objection 16, question 105.

²⁰ Written response of Ms. Barker, objection 17, question 106.

²¹ Undertaking number 10, examination of Ms. Barker, at 102; Annex 1 to the Barker Affidavit.

- moreover, to be accessed, the files in the Data Tape have to be converted with specialized software.²²

[34] The Court is of the view that it is premature to decide on the question of whether the information contained on the Data Tape was accessible. Doing so would place too heavy a burden on the Petitioner, who cannot be expected, at this stage, to counter the somewhat technical evidence adduced by DaimlerChrysler on this question.

[35] The Court concludes that the mere fact that the Data Tape contained private information and could be accessed, given the right circumstances, allows the Petitioner to meet its burden of demonstration on causation.

[36] Third, the issue of damages raises other challenging questions.

[37] For the legal syllogism proposed by the Petitioner to be adopted by the Court, she has to demonstrate, *prima facie*, having suffered damages.

[38] The damages alleged in the Motion can essentially be broken down into three categories:

- the damages suffered by the Petitioner herself;²³
- the potential damages;²⁴ and
- the punitive damages.

[39] As a preamble to the discussion on the damages, it is relevant to place the issue into the following context: the loss of the Data Tape occurred in March of 2008 and, as of the date of the hearing of the Motion, in January of 2012, there was no allegation of identity theft or fraud with respect to the Petitioner. Approximately half of the "members" in the Members' List expressed comments. Two allege, in cryptic terms, having been the victims of identity theft and some others expressed fear of becoming a victim of identity theft.

The damages suffered by the Petitioner herself

[40] The Petitioner alleges that the "loss of personal information" resulted in her experiencing anxiety, inconvenience, pain, suffering and/or fear that she be the target of fraud or identity theft.

²² Written response of Ms. Barker, objection 33, question 203 : **Q.**- So we talked about the data tape being a black cartridge tape which are used on mainframe and which are portable. So what do you need specifically to read a data tape? **A.**- 3480 compatible tape drive is needed, and the files need to be converted from *ASCII code (American Standard Code for Information Interchange)* to *EBCDIC code (Extended Binary Coded Decimal Interchange Code)*, which is done with specialized software. Also, the applicable Metro II Credit Reporting Guide is needed.

²³ At paras. 10,15.6,15.7 of the Motion.

²⁴ See Annex A.

[41] More specifically, while keeping the old bank account from which her car lease payments were made, she was "forced to monitor said account more frequently for fraudulent activity". Moreover, every two weeks, she withdraws from the old bank account her salary payments so as to leave in it only the minimum amount required to cover her car lease payments.

[42] By judgment of October 30, 2008, the Court authorized the examination of the Petitioner, prior to the authorization hearing, on the following issues:

- what actions, if any, Petitioner has taken since being informed of the loss of her personal information;
- the nature of the fraud and/or identity theft of which she was the victim, if any;
- the nature of her anxiety, pain, suffering and/or fear due to the loss or destruction of her personal information; and
- the enquiries, if any, regarding the existence of a Group for the proposed class action and her efforts, if any, to identify the members of the Group and to verify their support for the proposed national class action.

[43] The Petitioner, who has been working for some 35 years and has been a legal secretary for some 20, described in her examination out of Court that it had been "*nerve-wracking*"²⁵ to read the Notification Letter and know about the loss of her personal information.

[44] Her husband mistakenly disposed of the Notification Letter the next day²⁶ and she did not seek another copy from DaimlerChrysler²⁷ nor did she communicate at any point with DaimlerChrysler²⁸ or sign up for any "*credit monitoring service*",²⁹ as she assumed that DaimlerChrysler would be doing that for her.

[45] The Petitioner describes as follows the concrete steps that she has taken and the inconveniences she has suffered since being informed of the loss of her personal information:³⁰

Q- So am I to understand from your testimony, Mrs. Mazzonna, that from the point in time that you consulted Maître Assor about the loss of the letter, that you have not done anything else with respect to that letter other than authorize him at a given point in time to bring you in as the Petitioner?

ME DAVID ASSOR :

I don't understand the question with regard to it... anything else with regard to the letter, you said. I don't understand.

²⁵ Petitioner's Examination out of Court, June 23, 2009, at 8,12.

²⁶ *Idem*, at 7.

²⁷ *Idem*, at 9.

²⁸ *Idem*, at 12.

²⁹ *Idem*, at 17.

³⁰ *Idem*, at 14-17.

ME ROBERT E. CHARBONNEAU :

Right, the question that I'm authorized to ask is :

"What actions, if any, has Petitioner taken since being informed of the loss of her personal information."

Q- So after having consulted David Assor, have you taken any other actions?

A- What I've done...

Q- Yes.

A- ... is I look at my account more carefully...

Q- Yes.

A- ... I look at it more often.

Q- Right.

A- And now I do not keep the amounts that I used to at the... that account, I take it out of that account, so I can... I always make a cheque and then bring it to the other bank or transfer it to another bank. So I do not keep the amount that I used to in that account anymore. It's at a minimum.

Q- You keep the minimum necessary?

A- That's all I do. And the rest is out.

Q- Okay. Other than doing that, have you since taken any other action after having been informed of the loss of the information, other than instructing your counsel to bring you into this class action?

A- Well, I just keep on looking at the account and I'm very careful with it. That's about it. And I take... I don't leave a lot of money, I leave very, very, very, very little.

Q- Now, prior to this loss, were you in the habit of monitoring your accounts and reading your statements and...

A- Not as often. Not as often as I'm doing now, because of the fact that when I received the letter, they advised me to look out.

Q- Well, what do you mean by "often"? I mean, when you get your statement... whether it was before...

A- Well, no...

Q- ... or after, you get your statement, you read it in detail? Didn't you do that before?

A- I do it more often. Yes, I do read it in detail...

Q- Yes.

A- ... but not as often as I do it now. I used to do it maybe once a month, but now it's every two (2) weeks, when I get a paycheque, everything comes out of there to make sure that I don't leave the amount that I used to. It's out of there.

Q- Okay. So you... what, do you access your banking account online and you check for balances...

A- Online...

Q- ... and then you...

A- ... and I check...

Q- ... act accordingly?

A- Yes, and then I act accordingly.

[46] While the Court is mindful that it cannot, at the authorization stage, judge as to the merits of the case, it deems it nevertheless necessary to refer to the following extract of the Petitioner's examination out of Court:³¹

Q- Have you replaced... have done anything such as replacing your... getting a new social insurance number?

A- No, I have not done that.

Q- Okay. New driver's license?

A- No.

Q- Have you changed anything as far as your personal data is concerned since the loss?

A- No, just habits.

Me DAVID ASSOR:

Well, also... aside from the bank account, is that what you mean?

³¹ *Idem*, at 17-19.

Me ROBERT CHARBONNEAU:

No, I'm talking about any personal data, whether driver's license, social insurance number, any other personal data that she might have with respect to any card or any other situation.

Q- No?

A- No.

Q- Okay. Have you communicated with any financial institution that you deal with, or credit card company, with respect to any suspicion you might have had that somebody is using your personal data?

A- No.

Q- You haven't been notified by... have you been notified by any financial institution that there is abnormal activity in your accounts?

A- No.

Q- So am I correct in stating that as of today, you have no knowledge of having been the victim of an identity theft or of any use of your personal information?

A- Up until now, no.

[47] The conclusion that the Court draws both from the allegations of the Motion and from these extracts of her examination out of Court is that the Petitioner has felt anxiety upon and after learning that her personal information had been lost and that, as a consequence, she modified some habits in the manner in which she managed her bank account.

[48] The attorney for Petitioner argues that the Court should not assess, at this stage of the proceedings, the weight of the evidence on damages and that this should be done at trial. He invites the Court to draw a comparison with the facts leading to a recent judgment where Madam Justice Beaugé authorized the institution of a Class action.³²

[49] In that case, an individual stole three computers, locked with a steel cable, owned by the National Bank, one of which contained the personal information on some 225,000 of its clients.

[50] The thief was tried but the computer never found.

³² *Larose and Paquette v. Banque Nationale du Canada*, S.C.Montreal n° 500-06-000452-082, November 4, 2010.

[51] The Bank took measures to protect the personal information and eliminate the possibilities of fraud. The Petitioners alleged the following prejudice and claimed for their loss a sum of \$250 per person in punitive damages:

[8] Par ailleurs, ils allèguent les préjudices et inconvénients suivants pour les membres du groupe :

- retard dans le traitement d'une demande de crédit future;
- obligation de surveiller de près leurs comptes bancaires;
- obligation de faire preuve d'une vigilance accrue dans la communication de leurs renseignements personnels;
- obligation d'aviser leurs autres institutions financières de la perte de leurs renseignements personnels;
- anxiété, douleur, souffrance, peur de se retrouver victimes de fraude ou de vol d'identité;
- débours, augmentation possible des frais bancaires, pénalités;
- perte de temps.

[52] The Court had the benefit of reading the Re-amended Motion to Authorize the Bringing of a Class Action in the *Larose* case.³³

[53] There is at least one very significant distinction between the facts alleged in the *Larose* case and those alleged in this instance: Mr. *Larose* was the victim of three subsequent attempts to defraud him, after being a victim of identity theft.

[54] This is not the case of Petitioner and this distinction has a crucial bearing on the question of damages.

[55] The Court has to decide whether the Petitioner herself meets the appearance of right condition on the basis of her own circumstances. In *Bouchard v. Agropur Cooperative et al*,³⁴ the Court of Appeal states:

[109] Il faut garder à l'esprit qu'avant le jugement d'autorisation, « le recours n'existe pas, du moins sur une base collective ». Le recours individuel du requérant, à lui seul, doit donc remplir les conditions de l'article 1003 C.p.c. dont celle de l'apparence de droit, puisque tout le reste ne relève encore que du domaine de l'hypothèse.

³³ It was filed by the Petitioner's attorney, who was the attorney of record for the Petitioners in the *Larose* case.

³⁴ *Supra*, note 11.

[56] In the Court's view, the Petitioner fails to meet the test that she has suffered damages.

[57] She did indeed suffer anxiety; she has had to change, minimally, some of her habits. However, these inconveniences were negligible, so much so that she never felt the need to take any steps to alleviate her anxiety. The most she did was to keep the minimum amount of money in the account from which her lease payments were made and to check, twice a month, rather than once a month, on the Internet, whether her account had been tampered with.

[58] This is not enough to meet the threshold, however *prima facie*, of the existence of "compensable" damages.

[59] The Supreme Court of Canada has provided guidance on the distinction between minor and transient upsets on the one hand and compensable injury on the other. In the case of *Mustapha v. Culligan of Canada Ltd.*,³⁵ Mr. Mustapha, upset at the sight of a dead fly in an unopened bottle of water, sued the supplier of the bottle.

[60] In its analysis of the damages, the Court wrote:

[9] This said, psychological disturbance that rises to the level of personal injury must be distinguished from psychological upset. Personal injury at law connotes serious trauma or illness; see *Hinz v. Berry*, [1970] 2 Q.B. 40 (C.A.) at p. 42; *Page v. Smith*, at p. 189; *Linden and Feldthusen*, at pp. 425-27. The law does not recognize upset, disgust, anxiety, agitation or other mental states that fall short of injury. I would not purport to define compensable injury exhaustively, except to say that it must be serious and prolonged and rise above the ordinary annoyances, anxieties and fears that people living in society routinely, if sometimes reluctantly, accept. The need to accept such upsets rather than seek redress in tort is what I take the Court of Appeal to be expressing in its quote from *Vanek v. Great Atlantic & Pacific Co. of Canada* (1999), 48 O.R. (3d) 228 (C.A.): "Life goes on" (para. 60). Quite simply, minor and transient upsets do not constitute personal injury, and hence do not amount to damage.

(emphasis added)

[61] While the appeal in *Mustapha* was from a judgment of the Ontario Court of Appeal and while there may be differences in the contractual and delictual (*tort*) rules of both jurisdictions, the Court finds no reason to conclude that the distinction between a compensable damage as opposed to an ordinary "annoyance" of life should not apply in Quebec Law.

[62] In the Court's view, the damages alleged by the Petitioner are *prima facie* of the nature of ordinary annoyances and anxieties and do not constitute "compensable" damages.

³⁵ 2008 S.C.R. 114.

[63] In these circumstances, the Petitioner has not satisfied her burden to show that she suffered damages. The Court cannot, in view of the particular allegations of the Motion and of the evidence adduced, subscribe to Petitioner's argument that the Motion should be granted and that the judge, at trial, should decide of the seriousness of the damages. In granting the Motion in these circumstances, the Court would not be serving its role to discard an action that is obviously ill founded and would inappropriately initiate a class action that is not supported, at least by Petitioner's own circumstances.

[64] This being decided, the Motion also alleges other types of damages that the Court has labeled "potential" damages.

The potential damages

[65] The Court has reproduced as Annex A of the judgment the allegations of the Motion that deal with potential damages.

[66] The very wording of these allegations (Class Members may suffer...; should Class Members choose to sign up for monitoring services...; should Class Members take precautionary steps...; Class Members can fall victim to fraud....; if Class Members indeed fall victim to fraud... etc), falls squarely within the field of "speculation" and "unverified hypotheses"³⁶ and ought not be considered in assessing whether there is a *prima facie* existence of damages.

The punitive damages

[67] Petitioner seeks punitive damages.

[68] In the *Larose*³⁷ judgment, Madam Justice Beaugé summarizes the state of the law on the granting of punitive damages:

[29] Pour se voir accueillie, une réclamation pour dommages-intérêts exemplaires requiert la démonstration d'une violation intentionnelle d'un droit fondamental¹⁶ ou d'une obligation édictée à une loi habilitante, ou encore d'un désir de causer les conséquences d'une conduite fautive¹⁷. Si les requérants n'allèguent pas une violation intentionnelle de leurs droits, ils n'en évoquent pas moins une faute lourde.

¹⁶ *Charte des droits et libertés de la personne*, L.R.Q. c. C-12, art. 49.

¹⁷ *Québec (Curateur public) c. Syndicat national des employés de l'hôpital St-Ferdinand*, (1996) 3 R.C.S. 211.

[69] The paragraphs of the Motion do not refer to the grounds that would justify granting punitive damages. Reference to punitive damages is only made in the

³⁶ See *Option Consommateur*, note 14.

³⁷ *Supra*, note 32.

Conclusions, seeking the payment of \$250 per person as "punitive, exemplary and/or moral damages".

[70] It is not sufficient to claim punitive damages; the Motion should specify, through specific allegations,³⁸ what would constitute an illicit and intentional violation of a right protected by the *Charter of Human Rights and Freedom*.³⁹

[71] In *Biondi v. Syndicat des cols bleus regroupés de Montréal*,⁴⁰ Madam Justice Grenier describes as follows the standard to be applied for punitive damages to be awarded:

[167] Dans l'arrêt *St-Ferdinand*, la Cour suprême a considéré que ni une faute lourde ni la simple négligence ne constituait, en l'espèce, une atteinte intentionnelle. Les auteurs Baudouin et Deslauriers résument la position de la Cour suprême comme suit:

«Pour qu'il y ait atteinte intentionnelle, il faut que l'auteur ait un état d'esprit qui dénote une volonté de causer les conséquences de sa conduite fautive ou encore qu'il ait agi en toute connaissance des conséquences négatives, immédiates et naturelles, ou au moins extrêmement probables».

[168] Par ailleurs, dans l'arrêt *St-Ferdinand*, la Cour suprême a jugé qu'un inconfort passager ne constitue pas une atteinte à l'intégrité des personnes et que «l'atteinte doit affecter de façon plus que passagère l'équilibre physique, psychologique ou émotif de la victime».

[...]

[170] Selon la Cour suprême, pour satisfaire au critère d'atteinte intentionnelle, il suffit que la personne agisse en toute connaissance des conséquences immédiates ou naturelles ou au moins extrêmement probables de son comportement:

«[120] À la lumière de la jurisprudence et de la doctrine au Québec et en common law sur la question et, plus important encore, conformément aux principes d'interprétation large et libérale des lois sur les droits et libertés de la personne ainsi qu'à l'objectif punitive et dissuasive du redressement de nature exemplaire, j'estime qu'une approche relativement permissive devrait être favorisée en droit civil québécois lorsqu'il s'agit de donner effet à l'expression «atteinte illicite et intentionnelle» aux fins des dommages exemplaires prévus par la Charte.

³⁸ *Labelle et al c. Agence de développement de réseaux locaux de services de santé et de services sociaux – Région de Montréal*, 2011 QCCA 334, at para. 86.

³⁹ R.S.Q. c. C-12.

⁴⁰ 2010 QCCS 4073 (in appeal 500-09-021060-108).

[121] En conséquence, il y aura atteinte illicite et intentionnelle au sens du second alinéa de l'art. 49 de la Charte lorsque l'auteur de l'atteinte illicite a un état d'esprit qui dénote un désir, une volonté de causer les conséquences de sa conduite fautive ou encore s'il agit en toute connaissance des conséquences, immédiates et naturelles ou au moins extrêmement probables, que cette conduite engendrera. Ce critère est moins strict que l'intention particulière, mais dépasse, toutefois, la simple négligence. Ainsi, l'insouciance dont fait preuve un individu quant aux conséquences de ses actes fautifs, si déréglée et téméraire soit-elle, ne satisfera pas, à elle seule, à ce critère.» (references omises)

[72] The facts alleged in the Motion do not give rise to a *prima facie* right to punitive damages.

[73] In the circumstances, the Petitioner has not met the *prima facie* test of an appearance of right in that the legal syllogism fails to demonstrate damages. She does not satisfy the condition of Article 1003 (b) CCP.

iii) The common issues (Article 1003 (a) CCP)

[74] Do the recourses of the members raise identical, similar or related questions of law or fact?

[75] The Respondent argues that the definition of the Group suggested by the Petitioner is too broad because the only objective criterion for membership is the fact that one's personal information was on the lost Data Tape.

[76] As a general rule, the Court must determine whether the claims of the members of the Group have a common denominator in order to assess whether the recourse of the members raises identical, similar or related questions of fact or law. The Court has to be satisfied that the class action will enure to the benefit of all of the members of the group.⁴¹

[77] There is one basic common denominator for the members of the Group: they have all had their personal information lost on or about March 12, 2008.

[78] Is this sufficient for the condition of Article 1003 (a) CCP to be met?

⁴¹ *Vermette v. General Motors du Canada Ltée*, 2008 QCCA 1793, at para. 59.

[79] In a recent judgment,⁴² the Court of Appeal seemed to adopt a somewhat flexible approach to the interpretation of the condition of 1003 (a) CCP:

[17] Les objectifs du recours collectif sont: l'économie de ressources judiciaires, l'accès à la justice et la modification des comportements. Présument que les allégations de la requête sont vraies, les deux derniers objectifs, de toute évidence, sont ici satisfaits. Quant au premier, il le sera si la détermination des questions communes au groupe est susceptible d'avancer de façon significative les recours individuels des membres.

[22] Or, la seule présence d'une question de droit commune, connexe ou similaire est suffisante pour satisfaire la condition à l'article 1003 a) C.p.c. si elle n'est pas insignifiante sur le sort du recours; elle n'a cependant pas à être déterminante pour la solution du litige: *Comité d'environnement de la Baie inc. c. Société de l'électrolyse et de chimie de l'Alcan ltée*, [1990] R.J.Q. 655 (C.A.), paragr. 22 et 23. Il suffit en fait qu'elle permette l'avancement des réclamations sans une répétition de l'analyse juridique.

[23] Il est fort possible que la détermination des questions communes ne constitue pas une résolution complète du litige, mais qu'elle donne plutôt lieu à des petits procès à l'étape du règlement individuel des réclamations. Cela ne fait pas obstacle à un recours collectif.

[80] The fact that personal information belonging to all the members of the Group was lost in the same circumstances would raise similar questions of fact or law that would not be insignificant on the fate of the recourse. The question is: would this circumstance, common to all members, allow for the advancement of the claims "sans une répétition de l'analyse juridique"?

[81] The answer is yes.

[82] Had the Court come to the conclusion that Petitioner had an appearance of right, i.e. that she met the test of section 1003 (b) CCP, the claims of the members, had they suffered damages, could have been advanced "sans répétition de l'analyse juridique".

[83] In the current state of the jurisprudence, the fact that several "little trials" (or, the Court adds, groups of trials) might be necessary for an individual resolution of the members' claims is not an impediment to the condition of Article 1003 (a) CCP being met.

[84] The Court therefore comes to the conclusion that the condition of Article 1003 (a) CCP is satisfied.

⁴² *Collectif de défense des droits de la Montérégie (CDDM) v. Centre hospitalier régional du Suroît du Centre de santé et de services sociaux du Suroît*, 2011 QCCA 826.

iv) The condition of 1003 (c) CCP

[85] There is no debate on this issue: the composition of the Group makes the application of articles 59 or 67 *CCP* difficult or impracticable.

v) The adequate representation of the members (Article 1003 (d) CCP)

[86] Article 1003 (d) *CCP* states that "the members to whom the Court intends to ascribe the status of representative" must be "in a position to represent the members adequately".

[87] The Petitioner's personal claim having been found not to meet the condition of Article 1003 (b) *CCP*, she cannot adequately represent the members of the Group.

[88] The Court of Appeal expressed this principle clearly in *Contat v. General Motors du Canada Limitée*.⁴³

[33] Even though it is not necessary to have the "best possible representative",¹¹ appellant, having a non-existent or extremely weak personal claim, could not adequately represent the whole group. On one hand, it is his claim which would normally be the basis for the Court to analyse and decide the case. On the other hand, the procedural vehicle of the class action was not designed to be a method of circumventing principles of civil law. Thus, it must be shown in a class action, just as in any other action for damages, that there has been a fault, a damage and that there is a causal relationship between the two.

[34] In similar circumstances, our Court in *Option Consommateurs c. Bell Mobilité*,¹² decided that the applicant cannot provide adequate representation to members of the group. Rochon J.A., writing for the Court, states:

54. Bref, une personne désignée qui n'a pas de recours personnel valable ne peut certes pas se qualifier à titre de représentant des membres dans le cadre d'un recours collectif [...].

¹¹ *Western Canadian Shopping Centres Inc. v. Dutton* [2001] 2 S.C.R. 534 at para. 41.

¹² [2008] J.Q. no 11736 (C.A.).

[89] The Petitioner does not satisfy the condition of Article 1003 (d) *CCP*.

⁴³ 2009 QCCA 1699 (Nuss, Morissette, Côté, J.J.A.).

vi) The national class

[90] The parties argued at the hearing the opportunity for the Court to authorize a national class.

[91] Because of the conclusion reached on the conditions of Article 1003 CCP, it is not necessary to dispose of this question.

FOR THESE REASONS, THE COURT:

[92] **DISMISSES** the Petitioner's Motion to Authorize the Bringing of a Class Action and to Ascribe the Status of Representative;

[93] **WITH COSTS.**


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Dates of hearing: January 19 and 20, 2012

ANNEX A

11. Class Members may suffer certain inconveniences including, but not limited to:
 - a) Delays in the processing of any future requests or applications for credit in the future, for those Class Members who had an alert posted on their credit or banking files;
 - b) The obligation Petitioner and the other notified Class Members will have to closely monitor their accounts looking for possible fraud from now on and for all periods subsequent to the loss of information of March 12, 2008 (the exact date of which is still undetermined);
 - c) The obligation to be even more attentive than normally necessary concerning the communication of their personal information, due to the higher possibility of fraudulent activity caused by Defendant's loss of the information;
 - d) The obligation in some cases to inform their other financial institutions of the loss of the information by the Defendant;
12. Should Class Members choose to sign up for credit monitoring services, following the loss of their personal information by Defendant which is described above, Class Members will not only be inconvenienced by the safety measures that said credit monitoring services will put into place, but will also likely have to pay certain fees or costs in order to activate such a service and/or in order to replace their personal identification such as social insurance numbers, driver's licence numbers, etc. Defendant is solely responsible and liable for these costs or fees to be paid by Class Members and for the inconvenience caused to Class Members in this regard;
13. Furthermore, should Class Members actually take these precautionary steps in order to prevent further fraud exposure, such as signing up for credit monitoring, having an alert posted on their accounts or credit file, purchasing insurance, or changing their personal information, these steps cannot guarantee that the Class Members' credit is safe from now, after the loss of information by Defendant;
14. Class Members can clearly fall victim to fraud or identity theft, in the future, due to Defendant's negligence in the safekeeping of their personal information;
15. If Class Members indeed fall victim to fraud or identity theft, they will be inconvenienced by the loss of funds and loss of time, which again Defendant is solely responsible and liable to compensate;

- 15.4 That being said, the following paragraphs detail the types of damages, losses and inconveniences typically suffered by victims of personal information loss but not by the Petitioner *per se*;
- 15.5 Certain Class Members likely paid certain fees or costs in order to replace their personal identification such as social insurance numbers, driver's licence numbers, etc. Defendant is responsible and liable for these costs or fees paid by Class Members and for the inconvenience caused to Class Members in this regard;
- 15.8 In the case of the Class Members who chose to change their bank account number, said Class Members may have been forced to pay certain extra fees or charges in this regard, such as but not limited to the charges associated with ordering of replacements cheques bearing the new account numbers;
- 15.9 Furthermore, and as a result of being forced to change their bank account numbers in this regard, said Class Members may have been also inconvenienced (including loss of time) by being obliged to inform certain third parties of the change in bank account number, for example but not limited to informing their employer if automatic deposits are being made, and informing other financial institutions or corporations if automatic debits are being made on the existing account (which usually involves sending a VOID cheque to the organization in order to effect the change in bank account number to be automatically debited);
- 15.10 Moreover, said Class Members may have been forced to pay service charges, interest, or penalties when dealing with issues of returned cheques and/or NSF cheques and/or failed automatic debits or credits during the transition period following the change of bank account numbers;
- 15.11 Some Class Members may have purchased title insurance on their properties, or other insurance, solely as a result of the loss of information by Defendant described hereinabove, the whole in an attempt to further protect themselves from fraud. Defendant is liable to reimburse the total price of the insurance policies purchases by these Class Members;