SUPERIOR COURT

CANADA
PROVINCE OF QUEBEC
DISTRICT OF MONTRÉAL

No: 500-06-000756-151

DATE: January 30, 2017

IN THE PRESENCE OF: THE HONOURABLE PEPITA G. CAPRIOLO, S.C.J.

DAVID HURST
APPLICANT
v.
AIR CANADA
DEFENDANT

RECTIFIED JUDGMENT OF JUDGMENT RENDERED JANUARY 27, 2017

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[1] The applicant has applied to the Quebec Superior Court to obtain the authorization to institute a class action and to be appointed as representative plaintiff.

[2] The facts are simple.

[3] During a period of approximately 24 hours, from August 25, 2015 to the next day, Air Canada advertised on its website a Flight Pass for 10 executive (business) class flights anywhere in Western Canada and Western United States. The advertised price was approximately $800.

[4] The applicant saw a posting of this advertised price on the website RedFlagDeals.com. He then proceeded to the Air Canada website and purchased one

Flight Pass at $ 798. This purchase was confirmed by Air Canada in an email containing a receipt for the price of $ 798 plus tax ($837.90).

[5] On August 28, 2015, two days after the confirmation of the purchase, the Applicant received the following letter:

> "Dear DAVID HURST:
>
> We're in touch with you regarding the Western USA Plus Pass that you recently purchased from Air Canada that was, unfortunately, incorrectly priced and is now corrected. Let me first say that we're sorry for the inconvenience and misperception this error caused and outlined below are details of what happened and the steps we're taking to correct this error and a gesture of thank you for your understanding.
>
> On the evening of August 25th, a computer loading error resulted in a temporary mispricing of our Western USA Plus Pass product for Business Class travel. This product, good for 10 one-way flights, was mistakenly displayed at $800 instead of the correct price of $8,000. When we became aware of this error 24 hours later, the passes were withdrawn from sale and the booking of flights was inhibited.
>
> We understand your disappointment and trust you understand we cannot honour the Flight Passes mistakenly sold at 10% of their value. Therefore, any Flight Passes purchased at the incorrect $800 price will be cancelled and refunded. If you have already made any credit bookings with your incorrectly-priced Flight Pass, however, these flights WILL be honoured and the remaining credits cancelled and refunded on a prorated basis. We appreciate your understanding and to express our thanks, if you chose to re-purchase this Flight Pass at the correct price, we will add an 11th flight credit to the package for free. (Once you completed your purchase, simply eMail us at crflightpass@aircanada.ca with your Flight Pass number and we will process the extra credit.)
>
> Thank you for your support for Air Canada and, as always, we look forward to welcoming you onboard."

[6] As a result, the applicant's Flight Pass was removed from his Air Canada account and the entire purchase price, including tax, was reimbursed to him.

Application for authorization

[7] The applicant submits that he can properly represent a group of consumers who have similarly purchased the same Flight Pass on that day and have had it since removed from their account. He claims that Air Canada has breached articles 224 and 219 of the *Consumer Protection Act*[1] and that the consumers he wishes to represent are therefore entitled to compensatory and punitive damages. He asks that his class action on their behalf be authorized in virtue of article 575 CCP:

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[1] RLRQ, C.P.-40.1.

> **575.** The court authorizes the class action and appoints the class member it designates as representative plaintiff if it is of the opinion that
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> (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; and
>
> (4) the class member appointed as representative plaintiff is in a position to properly represent the class members.

[8] Air Canada strongly contests the granting of the authorization on several grounds relating primarily to paragraphs 2) 3) and 4) of article 575.

General principles

[9] The Court's role at the stage of the authorization of a class action is a limited one.[2] The Supreme Court of Canada has substantially lowered the bar for authorizing class actions in *Infineon Technologies AG v. Options Consommateurs*[3] and our Court of Appeal has reminded us that we must stay away from the merits of the proposed action in determining whether a *prima facie* case has been made:

> [50] Given the access to justice policy considerations upon which the law of class action rests, LeBel and Wagner JJ. wrote in *Infineon* that it would be unreasonable to require an applicant to establish anything more than an arguable case at the authorization stage. As some of the history traced in the Supreme Court opinion makes plain, this reflects the lightened evidentiary burden established by the Quebec legislature in 2003 when the requirement of affidavit evidence at the authorization stage was abolished. The purpose of those amendments, it has been usefully written, "was to ensure that the authorization stage be used to filter out only the most frivolous and unsubstantiated claims and to ensure that the authorization process was not being used by judges to render pre-emptive decisions on the merits."
>
> [51] Courts have recognized access to justice as a "social dimension" to class action law that is relevant to the kind of interpretative task before the judge here. This explains why courts should err on the side of caution and authorise the action where there is doubt as to whether the standard has been met. For the present case, it bears recalling that both consumer law and class action law share this overarching policy concern of access to justice.

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2 *Charles* c. *Boiron*, 2016 QCCA 1716.

3 *Ifineon Technologies AG v. Option* consommateurs, 2013 SCC 59 p. 1299.

> [52] The allegations in the motion are presumed to be true, as long as they are sufficiently precise. A motion judge should only weed out class actions that are frivolous or have no prospect of success. To meet this burden, the appellant did not need to prove the elements of the cause of action on the balance of probabilities.[4]

[10] Moreover, the authorization criteria must be interpreted and applied broadly and flexibly:

> [58] There is one common theme in the Quebec decisions, namely that the *C.C.P.*'s requirements for class actions are flexible.[5]

[11] It is in this context that the Court must determine solely whether the criteria of article 575 *CCP* have been met, however tempting it might be to analyse the factual content of the proposed action.

575 (1): the claims of the members of the class raise identical, similar or related issues of law or fact;

[12] The proposed group is the following:

> *All "consumers" within the meaning of the CPA, in Canada, who between August 25, 2015 and August 28, 2015:*
>
> *a) Purchased, received and/or acquired a flight pass from Air Canada's internet website, which consisted of credits for ten business-class one way flights in the Western USA and/or Canada (the "Flight Pass"); and*
>
> *b) Had their Flight Pass delivered to their Air Canada internet website account and subsequently removed from their internet website account by Air Canada.*

[13] It is quite evident that those "consumers" would have similar claims. This is not contested by Air Canada.

575(2): the facts alleged appear to justify the conclusions sought;

[14] The applicant claims that he had entered into a contract for the delivery of a Flight Pass and that Air Canada, by reneging on its confirmation of purchase, has in fact contravened article 224 of the *CPA* and violated its contractual obligations. The applicant would therefore be entitled to compensatory damages.

[15] He also claims that Air Canada has contravened article 219 of the *CPA* by making misleading representations that it had "*a 24 hour corridor to correct errors made on our fares posted online*". Moreover, the applicant submits that the behaviour of Air Canada

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4 *Sibiga* c. *Fido Solutions inc.*, 2016 QCCA 1299, paras. 50, 51 and 52.

5 *Vivendi Canada Inc. v. Dell'Aniello*, 2014 SCC 1, para. 58.

following the cancellation of the Flight Pass shows *"ignorance, carelessness or serious negligence"* [6] and therefore opens the way to an award for punitive damages.

[16] Air Canada has raised a battery of arguments against these propositions:

a) There was no contract between the applicant and Air Canada;

b) The *CPA* does not apply to the purchase of the Flight Pass;

c) There was no breach of the *CPA* by Air Canada;

d) There can be no award for compensatory or punitive damages.

[17] There is an arguable case for the existence of a contract between Air Canada and the applicant, as evidenced by the payment for the Flight Pass and its delivery to the applicant's account. Air Canada's arguments relating to the "excusable" error are best left to the merits. There is also an arguable case that the information given to the public after the sale of the discounted Flight Pass may constitute a false representation.

[18] Similarly, Air Canada's claim that the *CPA* does not apply in this case, cannot be resolved here. There is an arguable case that it does, insofar as the Air Canada website explicitly includes the following:

> The User Agreement shall be deemed to have been made in the province of Quebec, Canada, and shall be governed in all respects by the laws of the Province of Quebec, Canada, and the federal laws applicable therein, without regard to its conflicts of laws principles.

[19] Although it would be not necessary to decide this at this time, in order to avoid further argument on the issue of the interpretation of article 3117 *CCQ*, the Court wants to put an end to Air Canada's claim that this article has the effect of excluding the application of the *CPA* in the present instance.

[20] Article 3117 *CCQ* reads as follows:

> **3117.** The choice by the parties of the law applicable to a consumer contract *cannot result in depriving the consumer* of the protection afforded to him by the mandatory rules of the law of the State where he has his residence if the conclusion of the contract was preceded, in that State, by a specific offer or by advertising and the consumer took in that State all the steps necessary on his part for the conclusion of the contract, or if the order from the consumer was received in that State. (Emphasis added)

[21] The intention of the legislator is clearly to favour and protect consumers, wherever they may be situated. The words *"cannot result in depriving the consumer"* must be

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6 *Richard v. Time Inc.*, 2012 SCC 8.

given their literal meaning: the consumer cannot be forced to abandon the protection of his State, but nothing in this article forbids him from electing the law of Quebec if that is the law of the contract.

[22] The remaining issues, i.e., whether there was in fact a breach of the relevant articles of the *CPA* and the existence and extent of the damages ensuing from such a breach, must be dealt on the merits, an arguable case having been made by applicant.

[23] The Court wishes to underline again the difference between the burden of proof and the strength of the legal argument required at the authorization stage and those to be applied on the merits. The Court's decision that an arguable case has been made at this stage, in no way precludes the possibility of a negative result to the applicant's case on the merits.

575 (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 the consolidation of proceedings;

[24] Air Canada has contested the applicability of this criterion on a novel basis: the fact that the 249 known individuals who had purchased Flight Passes and had them later removed from their accounts are all residents of provinces other than Quebec.

[25] The argument may be appealing in terms of the use of Quebec judicial resources, but it cannot add an additional requirement to the legislative provisions of article 575 *CCP*.

[26] The criterion is one of impracticability: 249 individuals spread out over four provinces meet the criterion. No more needs to be said at this stage.

575 (4): the class member appointed as representative plaintiff is in a position to properly represent the class members.

[27] In *Infineon,* the Supreme Court of Canada established a broad criterion of acceptability for the representative in a class action:

> [149] Article 1003(d) of the C.C.P. provides that "the member to whom the court intends to ascribe the status of representative [must be] in a position to represent the members adequately". In Le recours collectif comme voie d'accès à la justice pour les consommateurs (1996), P.-C. Lafond posits that adequate representation requires the consideration of three factors: [TRANSLATION] ". . . interest in the suit . . ., competence . . . and absence of conflict with the group members . . ." (p. 419). In determining whether these criteria have been met for the purposes of art. 1003(d), the court should interpret them liberally. No proposed representative should be excluded unless his or her interest or competence is such that the case could not possibly proceed fairly.

> [150] Even if a conflict of interests can be established, the court should be reluctant to take the extreme action of denying authorization. As Lafond states, at p. 423, [TRANSLATION] "[i]n the event of a conflict, denying authorization is in our opinion an overly radical step that would harm the absent members, especially given that the judge sitting at the stage of the motion for authorization has the power to ascribe the status of representative to a member other than the applicant or the proposed member." Given that the purpose of the authorization stage is merely to screen out frivolous claims, it follows that the purpose of art. 1003(d) cannot be to deny authorization if there is only a possibility of conflict. This position is supported by the case law, as authorization appears to have been denied under art. 1003(d) on the basis of a conflict of interests only where prospective representative plaintiffs had failed to disclose material facts or were undertaking the legal proceedings purely for personal gain.[7]

[28] In this instance, Mr. Hurst has personally experienced the alleged breach of contract and is willing to represent the members of the proposed group. He has chosen not to present himself to the hearing on the authorization. This failure cannot suffice to exclude him from the role of representative. He was not required to testify, having already submitted to a deposition out of court.

[29] Air Canada raised the following issues:

a) Mr. Hurst and his counsel had never previously litigated in Quebec;

b) The constitutional "impossibility" to apply the *CPA* extra-territorially may cause a conflict between Quebec residents and an out-of-province representative;

c) The few Quebec residents may prefer a quick personal resolution to the issue rather than a protracted class action involving constitutional issues;

d) The Quebec members may be better served in French.

[30] These are all issues that do not raise a real concern of conflict between Mr. Hurst and the members of the proposed group:

a) If the Bar of Quebec has given permission to Mr. Hurst's counsel to appear before the Superior Court of Quebec, it is not the role of this Court to second-guess that decision. Moreover, Me Lin is accompanied by a member of the Quebec Bar.

b) The constitutional "impossibility" is a hypothetical claim that has not been debated; the attorneys-general have not been notified and the issue remains to be dealt with on the merits.

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7 *Infineon supra* note 3, paras. 149-150.

c) The preference of the Quebec members is doubly hypothetical: are there any Quebec members? How should this supposed "quick resolution" be obtained?

d) The choice of the French or the English language is not a factor before the Superior Court, where both official languages can be used.

[31] This last criterion of article 575 *CPA* is therefore also met.

[32] As a final remark, the Court would like to point out that the lengthy, and presumably expensive, written submissions made by both parties have unduly delayed the hearing on the authorization (originally scheduled for September and postponed because of a last-minute unwieldy reply by applicant) and have added an unnecessary complexity to a procedure which is meant to be only a filter and not a preliminary trial.

FOR THESE REASONS, THE COURT:

[33] **GRANTS** the present application for authorization;

[34] **ASCRIBES** the Petitioner the status of representative of the persons included in the Group herein described as:

All "consumers", within the meaning of the CPA, in Canada, who between August 25, 2015 and August 28, 2015:

a) purchased, received, and/or acquired a flight pass from Air Canada's internet website, which consisted of credits for ten business class one-way flights in the Western USA and/or Canada (the "Flight Pass"); and

b) *had their Flight Pass delivered to their Air Canada internet website account and subsequently removed from their internet website account by Air Canada;*

or any other group to be determined by the Court.

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

a) Did the Respondent contravene Article 224(c) of the CPA?

b) Does the Respondent's conduct described in paragraphs 29-35, contravene Article 219 of the CPA?

c) Did the Respondent fail to perform its obligations under the contract for Flight Pass(es) with each member of the Group?

d) Are the Group Members entitled to compensatory damages from the Respondent, consisting of:

i. a monetary amount estimated to be $7,200 plus taxes per Group Member which represents the difference between the Flight Pass purchase price agreed upon by the Respondent and a Group Member (as described in paragraphs 27-28) and the price that the Respondent claims the Flight Pass to be worth (Exhibit P-5);

ii. the amount of $500 in punitive damages per Group Member; and

iii. the interest and additional indemnity set out in the CCQ on the above amounts, from the date of initial date of purchase of the Flight Pass.

[36] **IDENTIFIES** the conclusions sought by the class action as being the following:

GRANT *the class action of the Petitioner and each of the Group Members;*

DECLARE *the Respondent liable for the damages suffered by the Petitioner and each of the members of the Group;*

CONDEMN *the Respondent to pay an amount in compensatory damages to each member of the Group, in an amount to be determined by the Court, plus interest as well as additional indemnity, under Article 1619 of the CCQ, since the date of purchase;*

CONDEMN *the Respondent to pay an amount in punitive and/or exemplary damages to each member of the Group, in an amount to be determined by the Court, with interest as well as the additional indemnity, under Article 1619 of the CCQ;*

CONDEMN *the Respondent to bear the costs of the present action including expert, expertise, and notice fees;*

ORDER *that the above three condemnations be subject to collective recovery;*

RENDER *any other order that this Honourable Court shall determine and that is in the interest of the Members of the Group;*

DECLARE *that all members of the Group that have not requested their exclusion from the Group in the prescribed delay to be bound by any judgment to be rendered on the class action to be instituted;*

FIX *the delay of exclusion at 30 days from the date of the publication of the notice to the Group Members;*

ORDER *the publication of a notice to the members of the Group in accordance with Article 579 CCP;*

THE WHOLE *with interest and additional indemnity provided for in the CCQ and with full costs and expenses including publication fees to advise members and expert fees, if any, including those required to establish the amount of the orders for collective recovery.*

[37] **ORDERS** applicant to communicate to defendant and to the Court a proposed text of the notice to be published in accordance with article 579 *CCP* within 45 days of the present judgment;

[38] **COSTS TO FOLLOW**.

THE HONOURABLE PEPITA G. CAPRIOLO, S.C.J.

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Date of Hearing: December 15, 2016