SUPERIOR COURT

CANADA
PROVINCE OF QUEBEC
DISTRICT OF MONTREAL

N°: 500-06-000900-189

DATE : September 17, 2018

PRESIDING: THE HONORABLE MICHELINE PERRAULT, J.S.C.

DANY LUSSIER
Applicant
v.

EXPEDIA, INC.
and
CORPORATION EXPEDIA CANADA
and
HOTELS.COM LP
and
TRAVELSCAPE LLC
and
TOUR EAST HOLIDAYS (CANADA) INC.
Respondents

JUDGMENT ON RESPONDENTS' APPLICATION FOR LEAVE TO ADDUCE EVIDENCE AND DEPOSE THE CLASS APPLICANT

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1. BACKGROUND

[1] On January 10, 2018, the Applicant, Dany Lussier, filed a *Demande pour permission d'intenter une action collective et pour obtention du statut de représentant* (the "**Class Action Application**") on behalf of the following **Proposed Class** :

> "Tous les consommateurs québécois qui ont effectué une réservation hôtelière par l'entremise de l'un des sites internet suivants, soit Expedia.ca, Hotels.com ou Travelocity.ca, et qui ont dû obligatoirement débourser, pour pouvoir bénéficier de leur réservation, un montant supplémentaire au prix total affiché au moment de la réservation (notamment pour les frais couramment appelés «frais hôteliers», «frais d'établissement» ou «resort fees»), depuis le 10 janvier 2015; "

JP2049

[2] On May 28, 2018, the Applicant modified the Class Action Application in order to add paragraph 2.4.1 and Exhibit R-34 (the "**Modified Application**").

[3] The Modified Application seeks leave to institute a class action under the *Consumer Protection Act*[1] and the *Regulation respecting travel agents*[2] based on Respondents' alleged failure to include the amount of "frais hôteliers", "frais d'établissement" or "resort fees" (**"the Hotel Fees"**) charged by third-party hotel providers as part of the total advertised price for rooms reserved through the Expedia.ca, Hotels.com and Travelocity.ca websites (the "**Websites**").

[4] Respondents are asking the Court for authorization to adduce additional evidence, i.e. the detailed sworn statement of Michael Marron, and to depose the Applicant, as part of their contestation of the authorization of the class action.

[5] The Applicant contests Respondents' Application.

2. THE LAW

[6] Unlike other civil actions, the legislator has imposed a preliminary authorization stage in class action proceedings. The purpose of this stage of the proceedings is to serve as a filtering and verification mechanism designed to dismiss frivolous and inappropriate claims[3].

[7] More specifically, the Court at the authorization stage is tasked with assessing whether the applicant has satisfied the four criteria set out in Article 575 of the *Code of Civil Procedure* ("**CCP**") which reads as follows:

> **575.** The court authorizes the class action and appoints the class member it designates as representative plaintiff if it is of the opinion that
>
> (1) the claims of the members of that class raise identical, similar or related issues of law or fact;
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> (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
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> (4) the class member appointed as representative plaintiff is in a position to properly represent the class members.

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[1] CQLR c. P-40.1.
[2] CQLR c. A-10, r.1.
[3] *Infineon Technologies AG* v. *Option Consommateurs,* 2013 SCC 59, par. 59, 61 ("**Infineon**").

[8] Failure to meet any of the criteria will result in the dismissal of the application for authorization of a class action.

[9] Given the summary nature of the authorization proceeding, the jurisprudence sets out that the evidentiary threshold for an applicant at this stage is not one of balance of probability, but merely that "*the applicant has an arguable case in light of the facts and the applicable law*"[4].

[10] In evaluating whether the criteria in Article 575 CCP are satisfied, the jurisprudence reveals the existence of a presumption that the allegations contained in the application for authorization of a class action are deemed to be true[5]. Notwithstanding this presumption, the legislator has provided the defendant the opportunity to contest an application for authorization, both orally and by seeking leave to submit relevant evidence[6].

[11] The jurisprudence confirms that the Court may, at its discretion, admit evidence where it serves to clarify the judge's inquiry into whether the four criteria of Article 575 CCP are satisfied[7]. In this regard, Mr. Justice François P. Duprat observed that:

> "[17] Bref, et afin de justifier une preuve additionnelle pertinente, les défendeurs doivent convaincre le Tribunal que cette preuve est utile et permettra de déterminer si les critères de l'article 575 *C.p.c.* sont rencontrés. Par exemple, on doit l'accepter si elle sert à contredire les allégations de la demande d'autorisation qui souffrent de faussetés, d'inexactitudes, ou d'invraisemblances[8]."

[12] Undoubtedly, the most challenging aspect of the Court's task in deciding whether to admit evidence relates to the determination of what constitutes "relevant evidence" as per the language of Article 574 CCP.

[13] Limiting the scope of admissible evidence to ensure that the authorization stage does not devolve into an assessment of the merits has been a core concern of the jurisprudence[9].

[14] Hence, determining whether evidence should be admitted under Article 574 CCP is appropriately achieved using a flexible, prudent, and contextual approach. Only evidence that aids in the assessment of whether the applicant satisfies the four criteria of Article

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4 *Id.*, par. 65.
5 *Pharmascience inc.* v. *Option Consommateurs*, 2005 QCCA 437 par. 29; see also *Sibiga* v. *Fido Solutions inc.*, 2016 QCCA 1299, par. 52 ("***Sibiga***").
6 Article 574 CCP.
7 *Allstate du Canada, compagnie d'assurances* v. *Agostino,* 2012 QCCA 678, par. 35 ("***Agostino*** ").
8 *Walter* v. *Quebec Major Junior Hockey League Inc.*, 2017 QCCS 3161, par.17.
9 *Pro-Sys Consultants Ltd.* v. *Microsoft Corporation*, 2013 SCC 57, par. 102; *Infineon,* supra note 3, par. 58.

575 CCP, rather than evidence going to the merit of the case itself, is admitted. Further guidance on undertaking the analysis is provided by Madam Justice Marie-France Bich in the *Agostino* case where she recommends caution and care. In assessing whether to admit evidence that refuted the applicant's allegations, she noted the need to:

> " choisir une voie mitoyenne, qui, entre la rigidité et la permissivité, est celle de la prudence, une prudence qui s'accorde avec le caractère sommaire de la procédure d'autorisation du recours collectif[10]. "

[15] The filing of additional evidence was restricted further with the Court of Appeal decision in *Asselin c. Desjardins Cabinet de services financiers inc.* [11], where Madam Justice Bich clarified the criteria applicable to an application under Article 574 CCP :

> " [38] Bien sûr, aux termes mêmes de l'art. 574 C.p.c. (autrefois 1002 a. C.p.c.), « le tribunal peut permettre la présentation d'une preuve appropriée/*the court may allow relevant evidence to be submitted* », accessoirement à la contestation de la demande d'autorisation, le demandeur étant pour sa part autorisé à déposer au soutien de sa procédure, sans permission préalable, certaines pièces qu'il estime de nature à donner du poids à ses allégations. Mais cela doit être fait avec modération et être réservé à l'essentiel et l'indispensable. Or, l'essentiel et l'indispensable, côté demandeur, devraient normalement être assez sobres vu la présomption rattachée aux allégations de fait qu'énonce sa procédure. Il devrait en aller de même du côté du défendeur, dont la preuve, vu la présomption attachée aux faits allégués, devrait être limitée à ce qui permet d'en établir sans conteste l'invraisemblance ou la fausseté. C'est là le « couloir étroit » dont parle la Cour dans Agostino. Car, ainsi que l'écrit succinctement le juge Chamberland, au stade de l'autorisation, « le fardeau [du requérant] en est un de logique et non de preuve ». Il faut conséquemment éviter de laisser les parties passer de la logique à la preuve (prépondérante) et de faire ainsi un pré-procès, ce qui n'est pas, répétons-le, l'objet de la démarche d'autorisation. "
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> (emphasis is ours, references were omitted)

[16] The Respondents agree that the filing of additional evidence at this stage has narrowed somewhat since the decision of the Court of Appeal in *Asselin* but argue that the Court of Appeal did not close the door on the filing of any and all evidence.

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[10] Supra note 7, par. 35; see also *Option Consommateurs* c. *Samsung Electronics Canada Inc.*, 2017 QCCS 1751, par. 11.

[11] 2017 QCCA 1673 ("***Asselin*** ").

3. ANALYSIS AND JUDGMENT

3.2. The detailed sworn statement of Michael Marron

[17] The Applicant is seeking leave to obtain authorization to institute a class action in respect of each of the named respondents on the basis that they form a single entity as regards to the operation of the Websites in Québec. Also, the Applicant alleges at paragraph 2.18 of the Modified Application that Hotels.com LP and Travelscape LLC respectively operate the Hotels.com and Travelocity.ca websites.

[18] The Respondents wish to file the sworn statement of Michael Marron, Senior Vice President in the Legal and Corporate Affairs department of Expedia, Inc., in order to clarify certain facts regarding the ownership, operation and control of the Websites.

[19] They argue that the sworn statement of Michael Marron establishes that :

> "a) Expedia Canada is not in the business of selling, leasing or trading in goods or services or otherwise supplying goods or services;
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> (b) Neither Expedia Canada nor Travelscape LLC own or operate any of the Websites;
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> (c) Both the Expedia.ca and Travelocity.ca websites are in fact owned and operated by Expedia, Inc.; and
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> (d) Expedia Canada and Travelscape LLC are therefore not responsible for nor do they control the information contained on or the transactions processed through the Websites. [12]"

[20] Our Court has accepted relevant evidence which serves to complete or correct the facts alleged in a class action application.

[21] In the recent case of *Seigneur* c. *Netflix International*[13], Madam Justice Florence Lucas stated:

> " [24] Cela étant dit, les tribunaux retiennent que pour éviter que des recours manifestement voués à l'échec ne soient indûment autorisés et n'entraînent inutilement des coûts importants, il y a lieu de permettre un interrogatoire ou une preuve appropriée qui se destine à contredire des éléments que la partie défenderesse estime invraisemblables, faux ou inexacts, et donc à établir le défaut d'apparence de droit, sous le premier alinéa de 575 C.p.c.
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> [...]
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> [27] Avec égards, le Tribunal estime qu'en l'espèce, la demande d'autorisation présente une description partielle seulement des

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[12] *Respondents' Application for leave to adduce evidence and depose the class applicant*, par. 11.
[13] 2018 QCCS 1275, para. 24, 27-29.

> circonstances relatives à l'implantation des changements de tarification. Or, au moyen de courts affidavits et de quatre pièces, Netflix entend préciser ces éléments factuels et ainsi favoriser la compréhension de sa façon d'initier des changements pour compléter cette description, ce que le Tribunal estime nécessaire et utile dans les circonstances.
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> [28] En effet, il convient d'autoriser une preuve qui donne un portrait plus complet de la situation et favorise une meilleure compréhension du contexte factuel de la demande, permettant ainsi une vérification efficiente des critères de l'article 575 C.p.c.
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> [29] En l'occurrence, sans s'avancer dans le domaine de la preuve et du fond, les informations succinctes contenues dans les affidavits, ainsi que les bannières et courriels présentés sont intimement liées aux faits tenus pour avérés, et semblent *a priori* ne pas les contredire, mais plutôt les compléter, ce qui pourrait être pertinent dans la détermination des conditions d'application de l'article 575 C.p.c. ''

[22] Also in the case of *Benizri* c. *Canada Post Corporation*[14], Madam Justice Silvana Conte stated:

> '' [6] Les faits allégués dans la Demande sont tenus pour avérés. Cependant, le tribunal pourra permettre une preuve afin de compléter ou corriger des allégations imprécises, incomplètes, fausses ou_inexactes lorsque cette preuve permet au tribunal d'avoir une meilleure compréhension des faits dans son évaluation des critères de l'article 575 *C.p.c.*
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> [...]
>
> [17] La défenderesse demande également la production de la déclaration sous serment de Monsieur Robert et les pièces jointes. Elle plaide que la déclaration vise une compréhension adéquate du contexte particulier en autorisation ainsi que la correction des allégations fausses ou incomplètes de la Demande.
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> [...]
>
> [19] De façon générale, la vérification des critères sous l'article 575 C.p.c. ne se fait pas dans un vide factuel. La preuve visant à compléter, corriger ou contredire les allégations de la demande est appropriée et utile lorsqu'elle permet au tribunal d'avoir une meilleure compréhension du contexte factuel de la demande. ''

[14] 2016 QCCS 454, para. 6, 17 and 19.

[23] The Court does not have to decide, at this stage, whether the evidence authorized as "relevant evidence", will be a deciding factor on the decision to be rendered on the authorization of the class action.

[24] In *Agostino*[15], the Court of Appeal observed :

> " [64] À mon avis, ces données sont de celles qui méritent d'être considérées par le juge autorisateur aux fins de l'article 1003, paragr. *c)*, *C.p.c.* (et peut-être même, accessoirement du paragr. *a)*). Il n'est pas dit qu'elles seront déterminantes, en fin de compte, mais elles peuvent certainement fournir un éclairage utile en permettant de mieux apprécier l'ampleur du groupe visé et la difficulté alléguée par l'intimé au paragraphe 4.3 de sa requête pour autorisation. Il s'agit en outre ici de mieux circonscrire le groupe, ce qui est pertinent non seulement aux fins de l'article 1003, paragr. *a)* et *c)*, mais aussi de l'article 1005 *C.p.c.* "

[25] Also, in the case of *Benoit* c. *Amira Entreprises Inc.*[16], Madam Justice Nicole-M. Gibeau stated

> " [30] À première vue, ces faits semblent relever du fond. Néanmoins, Amira soutient que le recours proposé soulève une lacune importante quant à l'apparence sérieuse de droit. Par ailleurs, à ce stade-ci du dossier, le Tribunal n'a pas à déterminer si la preuve présentée aura ou non un impact sur l'opportunité d'autoriser le recours collectif.
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> [31] En conséquence, le Tribunal autorise Amira à déposer l'affidavit de M. Guiseppe Pagano sauf en ce qui concerne le dernier paragraphe qui fait référence à une disposition légale; l'affiant n'étant pas le témoin qualifié pour introduire une telle preuve. Il permet également le dépôt de la pièce AB-1. "

[26] In the case of *A* c. *Frères du Sacré-Coeur*[17], the Court authorized the filing of documents which were helpful in understanding the corporate structure of the four respondents and the legal relationship between them.

[27] The Respondents do not deny that there is a relationship between them but argue that they are separate corporate entities and that Applicant did not contract with all of them.

[28] The evidence contained in the detailed sworn statement of Mr. Marron is precise and succinct. It will enable the Court, and indeed the Applicant and the members of the Proposed Class themselves, to determine whether there is a "lien de droit" with respect to

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[15] Supra note 7, par. 64.
[16] 2012 QCCS 351, par. 30-31.
[17] 2017 QCCS 34, par. 25-26, 32; see also *Walter* c. *Québec Major Junior Hockey League Inc.*, 2017 QCCS 3161, par. 19-21, 39.

all of the Respondents. This evidence is not only relevant, it is also essential in order to ensure that the Court is not called upon to authorize a class action that is obviously ill founded[18].

[29] The Court finds that the detailed sworn statement of Michael Marron provides evidence that is deemed both relevant and useful for the reasons above and will authorize Respondents to file said document.

2.3. The deposition of the Class Applicant

[30] Respondents allege that the deposition of the Applicant is necessary for the following reasons :

> a) The Class Applicant has provided no information whatsoever regarding his pre-litigation activities and verifications including whether he consulted and initiated contact with his counsel of record. The Class Applicant's ability to adequately represent the Proposed Class pursuant to Article 575(4) CCP cannot be assessed absent such evidence (par. 14 and 15 of Respondents' Application);
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> b) The Class Action Application is not clear and does not provide any indication as to whether consumers were in fact required to pay Hotel Fees when making hotel reservations through the Hotels.com or Travelocity.ca websites. In addition, the Class Applicant's examination is germane to assessing his credibility (par. 16 to 20 of Respondents' Application);
>
> c) The examination of the Class Applicant will also assist this Court in determining whether the Class Applicant has suffered harm in relation to the facts alleged in the Class Action Application (par. 21 of Respondents' Application).

[31] As with the admission of all evidence at this stage, the determination of whether the examination of an applicant should be allowed at the authorization stage centers on whether it would assist the Court in assessing the criteria in Article 575 CCP. The jurisprudence has been clear that such an examination should not be used to rebut or undermine the allegations advanced by an applicant, which are deemed to be true at this stage[19].

[32] As concerns subject a), Mr. Justice Stéphane Sansfaçon in the case of *Union des consommateurs* c. *Sirius XM Canada Holdings Inc.*[20], stated that the examination of an applicant in order to determine whether he has the capacity to adequately represent the members of a group should only be authorized in exceptional circumstances. No such circumstances exist in the present case. In addition, the Applicant's pre-litigation activities

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[18] *McMullen* c. *Air Canada*, 2018 QCCS 2020, par. 28.
[19] *Carrier* v. *Québec (Procureure générale)*, 2009 QCCS 5260, par. 30.
[20] 2017 QCCS 5867, par. 21.

and whether he is the one who initiated contact with the counsel of record is not relevant to the evaluation of the criteria of Article 575 CCP[21].

[33] With respect to subject b), it is alleged, and these facts are deemed to be true, that the members of the Proposed Class who reserved through the websites Hotels.com and Travelocity.ca had to pay Hotel Fees, as did those who reserved through the Expedia.ca website[22]. Our courts have also decided that the examination of an applicant in order to assess his credibility should not be permitted.

[34] As concerns subject c), i.e. the examination of the Applicant in order to determine whether he has suffered harm, the Applicant is claiming the reimbursement of Hotel Fees that were not included in the total advertised price, in violation of Article 224 c) of the *Consumer Protection Act.*

[35] Respondents submit that the Supreme Court of Canada in the case of *Richard c. Time inc. ("**Time**")*[23] stated that four conditions needed to be satisfied in order to determine whether the presumption of Article 272 of the *Consumer Protection Act* applied and that the allegations of the Class Action Application are insufficient to determine whether Applicant has fulfilled these four conditions. The examination of Applicant is therefore useful.

[36] Applicant argues that if Article 224 c) of the *Consumer Protection Act* was violated, there is a presumption of prejudice. What Applicant is claiming are the Hotel Fees that were not included in the total price advertised[24]. Furthermore, the prejudice must be evaluated objectively[25].

[37] The Court finds that the allegations contained in paragraphs 2.31 and 2.32 of the Modified Application are sufficient at this stage in order for the Court to determine whether there exists an appearance of right ("*apparence de droit*") with respect to Applicant's personal recourse.

[38] As stated by Mr. Justice Donald Bisson in the case of *Li* c. *Equifax*[26]:

> " [84] D'une manière générale, le Tribunal est d'avis que tous les sujets de questions des défenderesses et toutes leurs justifications ne sont pas de la nature de l'essentiel et de l'indispensable. Les défenderesses argumentent que les allégations de la Demande d'autorisation québécoise sont soit insuffisantes, incomplètes, non supportées par une preuve ou sont de la nature de l'opinion. Le Tribunal se demande donc alors pourquoi les défenderesses veulent interroger le demandeur, ce qui donnerait une chance à ce dernier de venir

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21 *Sibiga,* supra note 5, par. 102; see also *Li* c. *Equifax inc.*, 2018 QCCS 1892, par. 94; *Charles* c. *Boiron Canada inc.,* EYB 2016-271842, par. 55.

22 Par. 2.4 and 2.4.1, 3.23 to 3.43, and 3.44 to 3.62.

23 [2012] 1 R.C.S. 265, par. 124.

24 Par. 2.31 and 2.32 of the Modified Application.

25 *Union des consommateurs* c. *Air Canada,* 2014 QCCA 523, par. 73.

26 2018 QCCS 1892, par. 84-87.

> bonifier ses allégations ou ajouter des éléments de preuve jusqu'alors manquants selon les défenderesses.
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> [85] Ce que veulent les défenderesses est essentiellement de tester la version des faits du demandeur sur l'apparence de droit et d'obtenir des faits supplémentaires sur la représentation et sur le groupe proposé. De l'avis du Tribunal, les défenderesses n'ont pas besoin de ces éléments et n'ont pas droit à ces éléments, qui ne sont ni essentiels ni indispensables.
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> [86] Le demandeur vivra ou périra avec sa procédure telle que rédigée. Il n'appartient pas aux défenderesses de venir la compléter avec un interrogatoire. Si le demandeur a choisi de rédiger des allégations laconiques, ou vagues, ou incomplètes ou de la nature de l'opinion, alors il en subira les conséquences à l'autorisation.
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> [87] Il existe, certes, des précédents autorisant des interrogatoires afin de compléter ou préciser des allégations de demandes d'autorisation, mais c'était avant l'arrêt Asselin c. Desjardins Cabinet de services financiers Inc."

[39] Therefore, Respondents have not relieved their burden of convincing the Court that an examination on subjects a), b) and c) constitutes "*relevant evidence*" as understood by Article 574 C.P.P. and the examination of the Applicant will not be allowed.

FOR THESE REASONS, THE COURT:

[40] **GRANTS** the Respondents' Application for leave to adduce evidence, in part;

[41] **AUTHORIZES** the Respondents to file into the Court record the detailed sworn statement of Michael Marron dated April 13, 2018;

[42] **DISMISSES** Respondents' demand to depose the Applicant, Dany Lussier;

[43] **THE WHOLE WITH LEGAL COSTS TO FOLLOW**.

Micheline Perrault

MICHELINE PERRAULT, J.S.C.

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Hearing Date: August 27, 2018