CANADA
PROVINCE OF QUÉBEC
DISTRICT OF MONTRÉAL

S.C. No: 500-06-000724-142

COURT OF APPEAL

AIMIA CANADA INC., a legal person having its head office and principal place of business at 1000-525 Viger Avenue West, in the City and District of Montréal, Province of Québec, H2Z 0B2

-and-

AIMIA INC., a legal person having its head office and principal place of business at 1000-525 Viger Avenue West, in the City and District of Montréal, Province of Québec, H2Z 0B2

APPELLANTS - Respondents

-v-

CHANTALE TAILLON, domiciled and residing at 221 Dupernay Street, in the City of Boucherville, District of Longueil, Province of Québec, J4B 1G5

RESPONDENT – Petitioner

NOTICE OF APPEAL
(Article 352 *CCP*)
Appellants
Dated September 14, 2017

I. INTRODUCTION

1. The Appellants appeal from a judgment of the Superior Court of Québec, rendered on July 11, 2016, by the Honourable Kirkland Casgrain, District of Montréal, that grants, in part, the Respondent's Motion for authorization to institute a class action and to obtain the status of representative (the "**Application**");

2. The date of the notice of judgment is August 17, 2017;

3. The duration of the hearing of the Application was nineteen minutes;

4. The Appellants file with this notice of appeal a copy of the judgment in first instance in **Schedule 1**;

5. The judgment in first instance reflects on its face an apparent overriding error in respect of the criteria for authorization of the class action and the trial judge's assessment of facts relevant to these conditions;

6. Indeed, the trial judge committed an apparent and overriding error when he failed to conclude that the fact, apparent from the record before him, that the Respondent paid the impugned fees directly to Air Canada, and not the Appellants, not only meant that the fees were properly charged under the agreements between the Appellants and the Respondent, but also that an action in restitution against the Appellants could not be sustained;

7. The Application should not have been granted, as the condition set forth in the second paragraph of article 575 *CCP* is not met on the face of the record;

8. In essence, the trial judge has authorized a class action in restitution against parties who never received the sums for which restitution is being sought, an untenable proposition at law. Indeed, article 1699 *CCQ* specifically provides that restitution "takes place where a person is bound by law to return to another person the property **he has received**" (emphasis added);

9. By doing so, the trial judge has authorized the class action to proceed on an erroneous basis;

10. Moreover, in his management of the proceedings, the trial judge demonstrated that he had prejudged the outcome of the Application and undermined the Appellants' right to a full and equal, public and fair hearing by an impartial tribunal;

II. BACKGROUND

A. The Application

11. On December 12, 2014, the Respondent filed the Application, in which she seeks to represent a class of persons described as follows:

> "All natural persons in Canada who, since December 12, 2011, redeemed Aeroplan Miles, through the Aeroplan Progam owned and/or operated by Aimia Canada inc. and Aimia inc., to purchase airline tickets for domestic or US transborder flights operated by Air Canada, Air Canada Rouge or Air Canada Express and who paid a fuel surcharge for such flights."

12. In paragraph 2.6 of the Application, the Respondent alleges that she:

> "purchased the two Air Canada flight tickets from Respondents by redeeming the required number of Aeroplan Miles and by paying the Respondents various fees, taxes and surcharges totalling $158.50 for each flight ticket, the whole as appears from a flight confirmation dated March 7, 2013, produced herewith as **Exhibit R-3**"

13. Exhibit R-3 indeed shows that the Respondent paid $158.80 in taxes, surcharges and carrier-imposed fees, but it does not show that this amount was paid to the Respondents;

14. Knowing that this was quite simply not the case, the Appellants requested communication of the Respondent's credit card statement for the payment of the fees in question. This statement, filed in the record as Exhibit PJM-20, clearly shows that the fees alleged in paragraph 2.6 of the Application were paid by the Respondent to Air Canada, not to the Appellants;

15. The manifestly inaccurate allegation that the Respondent paid the impugned fees

to the Appellants, or was charged the impugned fees by the Appellants, is repeated in the Application at paragraphs 2.7, 2.8, 2.13, 2.14, 2.15, 2.16 and 5.2. Indeed, it forms the cornerstone of the Respondent's assertion that the proposed class action discloses a serious appearance of right;

16. In fact, the Respondent herself made allegations and filed evidence that demonstrates that Appellants are not responsible for setting, or for charging, the impugned fees. Indeed, at paragraphs 2.9 and 2.10 of the Application, the Respondent states:

> "A fuel surcharge imposed by the airline is indeed one of the restrictively listed charges that the Respondents are allowed to pass on to Aeroplan members, pursuant to paragraph 9 of the Aeroplan Terms and Conditions, since it is a "surcharge imposed by an airline";
>
> According to an extract from the Aeroplan Program's website, produced as **Exhibit R-5**, "all fuel surcharge amounts are applied by Aeroplan on behalf of the ticketing carrier and are passed through directly to the ticketing carrier. Fuel surcharge amounts are determined by each airline and may change from time to time. Aeroplan has applied fuel surcharges for flight rewards on Air Canada since 2004";

17. The above allegations, including Exhibit R-5 filed in support thereof, are consistent with the Respondent's credit card statement, Exhibit PJM-20, and her itinerary receipt, Exhibit R-3 – Aimia disclosed the existence of a fuel surcharge amount prior to the redemption by Respondent of Aeroplan miles for the flight tickets, which amount had been determined by Air Canada, and charged to the Respondent by Air Canada;

18. The problem, according to the Respondent's allegation at paragraph 2.12 of the Application, is that "Air Canada has ceased imposing fuel surcharges on its domestic and US transborder flights ("**North American flights**") since September 18, 2008", and she filed Exhibit R-6 in support of said allegation (the "**Air Canada Press Release**");

19. Respondent goes on to allege, at paragraph 2.13 of the Application, that:

> "since the Aeroplan Terms and Conditions only allow the Respondents

> to pass on fuel *surcharges imposed by an airline* ["*surtaxes exigées par tout transporteur aérien*"] and since Air Canada ceased to impose a fuel surcharge on its North American flights since September 18, 2008, the Respondents had no right to charge a fuel surcharge to Petitioner when she booked a domestic flight on Air Canada;"

20. Again, as discussed above, the allegation that it is the Appellants who charged a fuel surcharge to the Respondent is manifestly inaccurate in light of the record. Moreover, the Air Canada Press Release does not say that Air Canada will cease imposing fuel surcharges on Aeroplan flight rewards;

21. Rather, it shows that Air Canada is announcing that it will:

> "Incorporate into its advertised prices the one-way, add-on fuel surcharge that currently ranges between $20 and $60 on domestic and U.S. transborder flights. Starting September 18, 2008, Air Canada will adjust its published fares to include the total cost of fuel in its advertised base fares. This will provide customers simple, transparent and low fares always available at www.aircanada.com."

22. Clearly, this announcement has nothing to do with Air Canada's practice of imposing fuel surcharges on Aeroplan flight rewards, and is limited to a change in Air Canada's pricing practices for flight tickets purchased with cash. Any suggestion to the contrary by the Respondent constitute and inference or and un-verified hypothesis that should have been afforded no weight by the trial judge;

23. In fact, Exhibit R-5 explicitly states that "Aeroplan has applied fuel surcharges for flight rewards on Air Canada since 2004";

24. There is nothing in the contractual agreements between the Appellants and the Respondents[1] that provides that fuel surcharges imposed by airlines for Aeroplan flight rewards will be identical to those charged by airlines to customers who are purchasing flight tickets with cash;

---

[1] Including Exhibit R-1, where section 9 provides that "Members shall be responsible for any taxes, departure fees, security charges, levies or other charges imposed by or with the authority of any government or governmental authority in respect to any rewards or reward travel or benefit; any surcharge imposed by an airline; and any service fee imposed by Aeroplan."

B. Appellants' preliminary motions

25. On August 19, 2015, the Appellants filed a Motion for leave to submit relevant evidence along with a Motion for declinatory exception seeking to restrict the class to consumers residing in Québec.

26. The Motion for leave to submit relevant evidence was heard by the trial judge on February 9, 2016. At the hearing of this motion, it was already clear to the Appellants that the trial judge had prejudged the outcome of the authorization hearing. For example:

(a) Seemingly accepting the fact that it is Air Canada, and not the Appellants, who imposed and charged the fuel surcharges to the Respondent, the trial judge repeatedly asked counsel for the Appellants why Air Canada was treating Aeroplan members differently than customers who purchased tickets with cash, and indicating that he wanted to get to the bottom of the issue, stating *inter alia* that:

> "La Cour : Je vais juste vous dire, ce n'est pas parce que je n'ai pas d'explication à la raison pour laquelle Air Canada ne traite pas les gens d'Aéroplan de la même façon que ses clients au niveau des prix que je suis satisfait, malgré le fait que vous ayez une clause qui dit : Bien là, si quelqu'un nous charge quelconque chose. Parce que vous pouvez très bien avoir consenti à faire ça pour X raisons et puis peut-être que vous ne devriez pas faire ça. Comprenez-vous ce que je vous dis? Il y a quelque chose qui me fatigue.
>
> Me Éric Préfontaine : O.K. Mais peut-être... peut-être sur la base de quoi? On a...
>
> La Cour: Je ne sais pas.
>
> Me Éric Préfontaine: Bien, Monsieur le Juge, à un moment donné, le...
>
> La Cour : Non... non...
>
> Me Éric Préfontaine: ... le syllogisme de la demanderesse...
>
> La Cour : Il faut que j'entende quelqu'un m'expliquer ça. [...]

> Me Éric Préfontaine: C'est que les "taxes fees and surcharges are imposed by the carrier authorities...".
>
> La Cour: Et vous avez compris ce que j'ai dit au tout début ce matin, je ne comprends pas comment ça fonctionne, il va falloir que quelqu'un vienne m'expliquer ça chez Air Canada et chez votre cliente, O.K.?" (Transcript of the February 9, 2016 hearing, pages 71-72 and 214; see also pages 61 to 68, 71-73, 77-85);

(b) Later, he demonstrated a misapprehension of the legal syllogism proposed by the Respondent, as he seemed to indicate that her position was that fuel surcharges could not be charged to her regardless of whether or not they were in fact imposed by Air Canada, which directly contradicts paragraph 2.9 of the Application:

> "La Cour: Qu'est-ce que ça va donner? Pas au niveau de l'autorisation. On dit que Air Canada n'est pas censée facturer ces montants-là. [...]
>
> Or, quand ils font la réservation, ils se ramassent à recevoir un montant qu'ils doivent payer directement peut-être à Air Canada, mais elle le paye quand même. [...]
>
> Mais elle n'a pas le choix de payer. Maintenant, que ce soit payé à Air Canada ou à Aéroplan, c'est la même affaire, elle paye, puis elle n'est pas censée payer." (Transcript of the February 9, 2016 hearing, pages 158-159; see also pages 156-166);

(c) The trial judge stated that "à date, je ne vois pas qu'on puisse l'éviter, là", speaking of a trial on the merits (Transcript of the February 9, 2016 hearing, page 166);

(d) Finally, when counsel for Appellants stated that an authorization of the class action would lead to an action in warranty by the Appellants against Air Canada, who imposed and collected the impugned fees, the trial judge responded "je ne sais pas pourquoi vous allez appeler Air Canada en garantie? [...] Je ne suis pas capable de voir là, là." (Transcript of the February 9, 2016 hearing, page 239; see also pages 238-243);

27. At the end of the February 9th hearing, the trial judge scheduled the authorization

would charge a fee to Aeroplan members that it does not charge to its customers who purchase tickets with cash, and odd that the Appellants did not object to Air Canada's doing so:

> "La Cour: Il y a anguille sous roche. [...] Je ne sais pas qu'est-ce qui se passe. Peut-être qu'il n'y a rien du tout, mais je veux en savoir plus. C'est bizarre. C'est étrange. Je ne comprends pas." (Transcript of the February 24, 2017 hearing, page 24; see also pages 20-28)

33. The trial judge also made clear that he had no issue authorizing a class action which seeks restitution from a party who never received the disputed payment, stating "Restitution, dommages, appelez ça comme vous voulez. [...] Ce n'est pas grave, le nom m'importe peu. [...] Je me fous... [...] ... du titre ou des mots utilisés" (Transcript of the February 24, 2017 hearing, pages 29-31; see also pages 29-32);

34. The trial judge concluded the authorization hearing by asking the Respondent to provide him with a draft judgment granting the Application;

35. On May 2, 2017, the Respondent provided the trial judge with a proposed draft judgment, and, on May 5, 2017, the Appellants indicated to the trial judge their objections regarding the mechanism for the publication of the notices to the class and the communication of information pertaining to the class members. On the latter point, the Appellants reiterated that the information requested by the Respondent was in large measure not in the possession of the Appellants, as they have no role in the determination of the impugned fees and did not collect them;

36. On May 10, 2017 the Respondent reiterated the request for communication of information on class members, but consented to the mechanism for the publication of the notices to the class proposed by the Respondent, on the condition that an additional newspaper be added to the list proposed by the Appellants;

37. The trial judge ignored these submissions, including the alternative mechanism for the publication of the notices that the parties agreed to, and rendered

judgment on July 11, 2017 by simply signing the draft provided to him by the Respondent on May 2, 2017, a draft which contains no reasons for judgment beyond a bare statement that the conditions of article 575 *CCP* are met;

III. ERRORS OF LAW OF THE TRIAL JUDGE

38. First Error of law :

(a) The trial judge erred in law by failing to conclude that the fact that Air Canada imposes the impugned fees on Aeroplan flight reward redemptions makes said fees "a surcharge imposed by an airline" within the meaning of Section 9 of Exhibit R-1;

(b) The Appellants will establish that the record before the trial judge is clear that the impugned fees are "a surcharge imposed by an airline", and that the trial judge even accepted this fact, but failed to appreciate the legal implications of same;

(c) This error of law is determinative given that had it not been made, the trial judge could not have concluded that the condition set forth in paragraph 2 of article 575 *CCP* was met, and thus could not have granted the Application;

39. Second Error of law:

(a) The trial judge erred in law by failing to conclude that an action in restitution directed against persons who did not receive the sums for which restitution is sought has no reasonable chance of success;

(b) The Appellants will establish that the record shows on its face that the Appellants did not receive the sums for which restitution is sought, that the trial judge accepted that the Appellants did not receive said sums, and that an action in restitution against them therefore has no reasonable chance of success;

(c) This error of law is determinative given that had it not been made, the trial judge could not have concluded that the condition set forth in paragraph 2 of article 575 *CCP* was met, and thus could not have granted the Application;

40. Third error of law:

(a) The trial judge erred in law by failing to ensure that the Appellants' right to a full and equal, public and fair hearing by an impartial tribunal was respected;

(b) The Appellants will establish that the trial judge's management of the proceedings were neither full or fair, and that the trial judge prejudged the outcome of the Application;

(c) This error of law is determinative as the Application was granted in violation of the Appellants' rights enshrined in section 23 of the *Charter of Human Rights and Freedoms*, CQLF c C-12;

41. The Appellants will request that the Court of Appeal:

(a) **ALLOW** the appeal;

(b) **SET ASIDE** the judgment in first instance;

(c) **DISMISS** the Application;

(d) **CONDEMN** the Respondent to pay the appellant the legal cost both in first instance and on appeal;

Notice of this notice of appeal is given to Chantale Taillon, to Me Michel Savonitto and Me Emmanuel Laurin-Légaré, and to the Office of the Superior Court of Québec, District of Montréal.

Montréal, September 14, 2017

Osler, Hoskin & Harcourt.

OSLER, HOSKIN & HARCOURT LLP
1000 de La Gauchetière Street West, # 2100
Montréal, Québec H3B 4W5
Telephone: (514) 904-5282/(514) 904-5809
Telecopier: (514) 904-8101
Lawyers for Appellants/Respondents
AIMIA CANADA INC and AIMIA INC
c/o Mtres Éric Préfontaine/Alexandre Fallon
eprefontaine@osler.com/afallon@osler.com
Our file: 1163056

TRUE COPY

Osler, Hoskin & Harcourt

Osler, Hoskin & Harcourt LLP

COUR SUPÉRIEURE

CANADA
PROVINCE DE QUÉBEC
DISTRICT DE MONTRÉAL

N°: 500-06-000724-142

DATE : 11 JUILLET 2017

SOUS LA PRÉSIDENCE DE : L'HONORABLE KIRKLAND CASGRAIN, J.C.S.

CHANTALE TAILLON

Demanderesse

c.

AIMIA CANADA INC.

-et-

AIMIA INC.

Défenderesses

JUGEMENT

JS 1061

[1] **Le tribunal**, après avoir pris connaissance des notes et autorités soumises de part et d'autre par les parties et après avoir entendu les arguments avancés par les défenderesses à l'audition au mérite de la demande pour autorisation d'intenter une action collective et être nommée représentante du groupe (ci-après nommée la « Demande »);

[2] **Considérant** que la Demande requiert l'autorisation d'intenter une action collective au nom du groupe suivant:

> « All natural persons in Canada who, since December 12, 2011, redeemed Aeroplan Miles, through the Aeroplan Program owned and/or operated by Aimia Canada inc. and Aimia inc., to purchase airline tickets for domestic or US transborder flights operated by Air Canada, Air Canada Rouge or Air Canada Express and who paid a fuel surcharge for such flights.»

[3] **Considérant** le jugement de cette cour en date du 18 octobre 2016 accueillant la demande en exception déclinatoire des défenderesses, et par le fait même, limitant la définition du groupe aux consommateurs domiciliés et résidant dans la province de Québec;

[4] **Considérant** que les critères d'autorisations de l'article 575 sont rencontrés;

[5] **Considérant** par ailleurs que le tribunal est d'accord avec les conclusions identifiées à la Demande, sauf quant à la modification du groupe qui devra refléter son jugement précité du 18 octobre 2016 et qu'en conséquence, il les reproduira dans le présent jugement dans leurs formes originales anglaises (sauf quant à certains ajustements de forme);

[6] **PAR CES MOTIFS, LE TRIBUNAL :**

[7] **GRANTS** the present Motion in part;

[8] **ORDERS** Defendants to provide Plaintiff's attorneys, in an electronic format, a list of (i) all Class members who purchased an Air Canada North American flight ticket through the Aeroplan Program during the Class period, (ii) the details of all Air Canada North American flights taken during the Class period by such Aeroplan members, (iii) the amounts of fuel surcharges charged to such Aeroplan members for such flights.

[9] **AUTHORIZES** the institution of a class action as follows:

"An action in restitution and punitive damages against Defendants."

[10] **ASCRIBES** to Plaintiff Chantale Taillon the status of representative for the purpose of instituting the said class action for the benefit of the following group of persons, namely:

> « All consumers domiciled and residing in Quebec who, since December 12, 2011, redeemed Aeroplan Miles, through the Aeroplan Program owned and/or operated by Aimia Canada inc. and Aimia inc., to purchase airline tickets for domestic or US transborder flights operated by Air Canada, Air Canada Rouge or Air Canada Express and who paid a fuel surcharge for such flights.»

[11] **IDENTIFIES** the principal questions of law and of fact to be dealt with collectively as follows:

1. Were the fuel surcharges imposed by Defendants on the Class members charged illegally and contrary to the Aeroplan Terms and Conditions?

2. If so, are the Class members entitled to the full restitution of the fuel surcharges paid to the Defendants?

3. Are the Class members entitled to punitive damages under the CPA?

4. If so, what is the amount of punitive damages that each Class member should obtain?

[12] **IDENTIFIES** the conclusions sought by the Plaintiff in relation to such questions as follows:

1. **GRANTS** Plaintiff's class action on behalf of every Class member she represents;

2. **CONDEMNS** Defendants, solidarily, to reimburse the totality of the fuel surcharges paid by the Class members, together with interest at the legal rate and the additional indemnity provided by law, as of the date of service of the Motion for authorization to institute a class action;

3. **CONDEMNS** Defendants, solidarily, to pay punitive damages to the Class members in the amount of $100 each, together

with interest at the legal rate and the additional indemnity provided by law, as of the date of service of the Motion for authorization to institute a class action;

4. **ORDERS** the collective recovery of the Class members' claims;

5. **THE WHOLE**, with costs, including expert costs and the cost of notices;

[13] **DECLARES** that any member of the Class who has not requested his/her exclusion from the Class be bound by any judgment to be rendered on the class action, in accordance with law;

[14] **FIXES** the delay for exclusion from the Class at sixty (60) days from the date of notice to the members, and **DECLARES** that at the expiry of such delay, the members of the Class who have not requested exclusion be bound by any such judgment;

[15] **ORDERS** that a notice to the members of the Class be drafted in accordance with the terms and conditions determined by the undersigned, the whole pursuant to articles 576 and 579 *CCP* and that it be made public in the following manner:

1. By publication of a notice to members of the Class in newspapers, the details of which to be decided at a date to be fixed between the Tribunal and the Parties' attorneys;

2. By publication of the notice to members of the Class on the internet site of the Defendants and the internet site of the attorneys for Plaintiff with a hypertext entitled "Avis aux membres de recours collectif, Notice to all Class Action Members" prominently displayed on Defendants' internet site and to be maintained thereon until the Court orders publication of another notice to members by final judgment in this instance or otherwise;

[16] **THE WHOLE** with legal costs against Defendants, including the costs of all publications of notices.

KIRKLAND CASGRAIN, J.C.S.

Me Michel Savonitto
Me Emmanuel Légaré
SAVONITTO
Procureurs de la partie demanderesse
ell@savonitto.com

Me Éric Préfontaine
OSLER HOSKIN et HARCOURT
Procureurs des parties défenderesses
eprefontaine@osler.com

N°: S.C.M. : 500-06-000724-142

QUEBEC COURT OF APPEAL
DISTRICT OF MONTRÉAL

Within 10 days after notification, the respondent, the intervenors and the impleaded parties must file a representation statement giving the name and contact information of the lawyer representing them or, if they are not represented, a statement indicating as much. If an application for leave to appeal is attached to the notice of appeal, the intervenors and the impleaded parties are only required to file such a statement within 10 days after the judgment granting leave or after the date the judge takes note of the filing of the notice of appeal. (Article 358, al. 2 C.C.P.).

AIMIA CANADA INC.
AIMIA INC.

APPELLANTS – Respondents

v.

CHANTALE TAILLON

RESPONDENT - Petitioner

NOTICE OF APPEAL
(Article 352 CCP)
Appellants
Dated September 14, 2017

Copy for:

Me Michel Savonitto
Me Emmanuel Laurin-Légaré
Savonitto & Ass. Inc.
468 St-Jean Street, Suite 400
Montréal, Québec H2Y 2S1

À signifier
Étude Paquette & Associés
Huissiers de justice

Osler, Hoskin & Harcourt LLP
1000, De La Gauchetière Street West, Suite 2100
Montréal (Québec) H3B 4W5
Telephone : (514) 904-8100
Telecopier : (514) 904-8101
Lawyers for Appellants-Respondents
Aimia Canada Inc. and Aimia Inc.
c/o Me Éric Préfontaine and Me Alexandre Fallon
eprefontaine@osler.com; afallon@osler.com
notificationsosler@osler.com
Our file : 1163083

The parties shall notify their proceedings, including briefs and memoranda) to the appellant and to the other parties who have produced a representation or non-representation statement. (Article 25, al. 1 of the Civil Practice Regulation).

If a party fails to produce a representation or a non-representation statement, it shall be precluded from filing any other pleading in the file. The appeal shall be conducted in the absence of such party. The Clerk is not obliged to notify any notice to such party. (Article 30 of the Civil Practice Regulation).

GIANNA AQUILINO
CHJQ
1044
HUISSIER DE JUSTICE

SIGNIFIÉ LE
15/9/17 10 hrs
Gianna Aquilino