CANADA
PROVINCE OF QUÉBEC
DISTRICT OF MONTRÉAL

S.C. No: 500-06-000744-157

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-

ROBERT LAMONTAGNE, domiciled and residing at 38 d'Ambroise Street, in the City of Blainville, District of Terrebonne, Province of Québec, J7B 1Y1

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, 2017 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 21, 2017;

3. The duration of the hearing of the Application was nine 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 June 9, 2015, 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 June 9, 2012, redeemed Aeroplan Miles, through the Aeroplan Progam owned and/or operated by Aimia Canada inc. and Aimia inc., to purchase Air Canada flight tickets and who paid, with respect to such flights, Passenger Charges, and applicable taxes, as a result of departing from or transiting through the following airports [...]:
>
> a. The Heathrow airport in London, UK;
> b. The Charles de Gaulle airport in Paris, France;
> c. The Lyon airport in Lyon, France;
> d. The Frankfurt airport in Frankfurt, Germany;
> e. The Munich airport in Munich, Germany;
> f. The Copenhagen airport in Copenhagen, Denmark [...];
> g. The Narita airport in Tokyo, Japan;
> h. The Haneda airport in Tokyo, Japan [...]"

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

> "purchased the two flight tickets from Respondents by redeeming the required number of Aeroplan Miles and by being charged various fees, taxes and surcharges totalling $605.85 for each flight ticket, the whole as appears from a flight confirmation dated February 18, 2014, produced herewith as **Exhibit R-3**"

13. Exhibit R-3 indeed shows that the Respondent paid $605.85 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-11, 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. Despite the fact that it is clear that the Respondent paid these fees to Air Canada, and not to the Appellants, the Respondent states at paragraphs 2.9, 2.13, 2.15 and 3.2 that these fees were "charged" by the Appellants, which allegation forms the cornerstone of the Respondent's assertion that the proposed class action discloses a serious appearance of right;

16. In addition, the Appellants were permitted to file in the record Exhibit PJM-9, a screenshot of the booking process on www.aeroplan.com, where it is clearly stated that "Airport taxes, fees and surcharges will appear on your credit card statement as an Air Canada charge and will display your ticket number", which is consistent with the Respondent's credit card statement, Exhibit PJM-11, all of which makes it clear that the impugned fees are Air Canada charges, the existence of which was properly disclosed to Respondent by Appellants prior to the redemption by Respondent of Aeroplan miles for the flight tickets;

17. The problem, according to the Respondent's allegations at paragraphs 2.9 to 2.15 of the Application, is that Appellants would not, under section 9 of the Aeroplan Terms & Conditions (Exhibit R-1), be entitled to charge Passenger Charges to members of the Aeroplan program, as they are not a "surcharge imposed by an airline" or a charge "imposed by or with the authority of any government or governmental authority";

18. While the Respondent admits at paragraph 2.8 of the Application that Passenger Charges are "charged back by airlines, including Air Canada, to their passengers", he filed Exhibit R-5 which shows that Passenger Charges are disclosed separately by Air Canada on its own website from what Air Canada qualifies as "surcharges", or "carrier surchages" and that Passenger Charges are identified separately and are included by Air Canada in the "Taxes, Fees and

Charges" section of the fare breakdown provided by it on its own website;

19. Respondent therefore argues, at paragraphs 2.12 and 2.13 of the Application, that Air Canada does not consider Passenger Charges to constitute a "surcharge", such that the Passenger Charges cannot be considered a "surcharge imposed by an airline" for which Aeroplan members would be responsible under section 9 of the Aeroplan Terms & Conditions (Exhibit R-1) and therefore Appellants "had no right to charge the Petitioner the Passenger Charges";

20. Respondent also argues that the Passenger Charges are not "charges imposed by or with the authority of any government or governmental authority", in which case Aeroplan members would properly be responsible for their payment under section 9 of the Aeroplan Terms & Conditions (Exhibit R-1), "since they are imposed on passengers by Air Canada and not by a governmental authority";

21. However, as discussed above, the allegation that it is the Appellants who charged the Passenger Charges to the Respondent is manifestly inaccurate in light of the record, not to mention the fact that it is contradicted by admissions at paragraphs 2.8, 2.12, 3.3 and 3.5 of the Application that it is Air Canada that imposes the Passenger Charges;

22. As it is Air Canada who imposes and charges these fees to the Respondent and other Aeroplan members, they are properly considered a "surcharge imposed by an airline" and Aeroplan members are therefore responsible for paying them to Air Canada as per section 9 of the Aeroplan Terms and Conditions (Exhibit R-1);

23. The Respondent makes a distinction with respect to the Narita and Haneda airport in Japan at paragraphs 3.7 to 3.10 of the Application, as he states that the Passenger Charges for these airports are imposed by the airports, but collected by Air Canada on behalf of said airports, and since these airports are allegedly private corporations, the Passenger Charges do not qualify as "charges imposed by or with the authority of any government or governmental authority" under

section 9 of the Aeroplan Terms and Conditions (Exhibit R-1);

24. The fact remains, however, that vis-à-vis an Aeroplan member, such charges are imposed and collected by Air Canada, such that they are also properly considered a "surcharge imposed by an airline" and Aeroplan members are therefore responsible for paying them to Air Canada as per section 9 of the Aeroplan Terms and Conditions (Exhibit R-1);

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 impugned fees to the Respondent, the trial judge repeatedly stated that he did not understand how the Aeroplan program functioned, and indicated that he wanted to get to the bottom of the issue, stating *inter alia* that:

> "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, page 214);

(b) Later, he demonstrated a misapprehension of the legal syllogism proposed by the Respondent, as he seemed to indicate that her position was that the impugned fees could not be charged to her regardless of whether or not they were in fact imposed by Air Canada, which directly contradicts paragraph 2.3 of the Application, where the Respondent relies upon section 9 of the Aeroplan Terms and Conditions (Exhibit R-1), which

provision explicitly provides that Aeroplan members are responsible for surcharges imposed by an airline:

> "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 hearing for June 22nd and 23rd, 2016, reluctantly agreeing to set aside two days despite his view that "il me semble qu'au bout de trois quarts d'heure (3/4) vous avez fait le tour, non?" (Transcript of the February 9, 2016 hearing, page 255; see also pages 247-257);

28. However, on June 22nd, the trial judge refused to hear the authorization, preferring to proceed only with the hearing of the Motion for declinatory exception (seeking to limit the action to consumers residing in Québec), which he granted by way of judgment dated October 18, 2016;

C. The hearing of the Application

29. On January 12, 2017, the trial judge scheduled a case management conference for January 19, 2017, during which he set the authorization hearing for February 24, 2017. The authorization hearing lasted nine minutes;

30. Again, despite the fact that the syllogism proposed by the Respondent was fatally undermined by the fact that it is Air Canada, and not the Appellants, who imposed and charged the impugned fees, the trial judge indicated that this was of no moment to him, that he found the situation suspect and wanted to get to the bottom of it, regardless of how the Respondent had framed the proposed class action;

31. He even suggested that Appellants somehow had an obligation to object to Air Canada regarding the Passenger Charges, failing which it could be found to have committed a fault, which is not even alleged by the Respondent in the Application:

> "... si Aimia accepte des choses qu'elle ne devrait pas accepter pour ses clients, bien, là, il y a une responsabilité. Ça ne fonctionne pas. Il y a un problème." (Transcript of the February 24, 2017 hearing, page 55);

32. 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);

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

34. 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;

35. 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;

36. 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

37. 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;

38. 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;

39. 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;

40. The Appellant 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 Robert Lamontagne, 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

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COUR SUPÉRIEURE

CANADA
PROVINCE DE QUÉBEC
DISTRICT DE MONTRÉAL

N°: 500-06-000744-157

DATE : 11 JUILLET 2017

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

ROBERT LAMONTAGNE

Demandeur

c.

AIMIA CANADA INC.

-et-

AIMIA INC.

Défenderesses

JUGEMENT

JS 1061

500-00-010681-178

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

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

[8] **ORDERS** Defendants to provide Plaintiff's attorneys, in an electronic format, a list of (i) all Class members who purchased flight tickets through the Aeroplan Program during the Class period and who were required to pay Passenger Charges, (ii) the details of all such flights taken during the Class period by such Aeroplan members, (iii) the amounts of Passenger Charges 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 Robert Lamontagne 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 Québec who, since June 9, 2012, redeemed Aeroplan Miles, through the Aeroplan Program owned and/or operated by Aimia Canada inc. and Aimia inc., to purchase Air Canada flight tickets and who paid, with respect to such flights, Passenger Charges, and applicable taxes, as a result of departing from or transiting through the following airports (collectively the "Foreign Airports"):
>
> a. the Heathrow airport in London, UK;
> b. the Charles de Gaulle airport in Paris, France;
> c. the Lyon airport in Lyon, France;
> d. the Frankfurt airport in Frankfurt, Germany;
> e. the Munich airport in Munich, Germany;
> f. the Copenhagen airport in Copenhagen, Denmark;
> g. the Narita airport in Tokyo, Japan;
> h. the Haneda airport in Tokyo, Japan.»

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

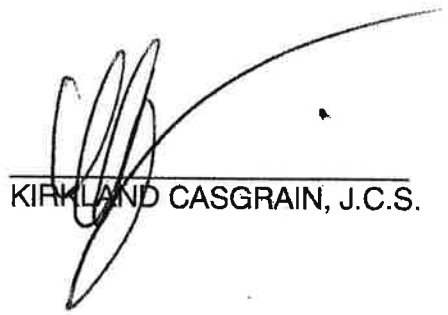
1. Were the Passenger Charges imposed by Defendants on the Class members charged illegally and contrary to the Aeroplan Terms and Conditions?

[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.

N°: S.C.M. : 500-06-000744-157

QUEBEC COURT OF APPEAL
DISTRICT OF MONTRÉAL

AIMIA CANADA INC.
AIMIA INC.

APPELLANTS – Respondents

v.

ROBERT LAMONTAGNE

RESPONDENT - Petitioner

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

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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.).

À signifier
Étude Paquette & Associés
Huissiers de justice

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