SUPERIOR COURT
(Class Actions)

CANADA
PROVINCE OF QUÉBEC
DISTRICT OF MONTREAL

No: 500-06-000874-178

DATE: May 9, 2019

BY THE HONOURABLE CHANTAL TREMBLAY, J.S.C.

PATRICK EHOUZOU
and
CARMEN HODONOU
Plaintiffs
v.
MANUFACTURERS LIFE INSURANCE COMPANY
and
MANULIFE FINANCIAL CORPORATION
and
BENESURE CANADA INC.
and
BROKER SUPPORT CENTRE INC.
and
CREDIT SECURITY INSURANCE AGENCY INC.
and
TOCAMOR HOLDINGS INC.
and
DAVIS + HENDERSON CORPORATION
and
JOHN F. LORRIMAN
and
MARK SMITH
Defendants

JUDGMENT ON AUTHORIZATION TO INSTITUTE A CLASS ACTION

JT1698

[1] Plaintiffs filed an *Application for Authorization to Institute a Class Action and to Obtain the Status of Representative* (**Authorization Application**), wishing to represent individuals residing in Canada who were approached in view of purchasing or have purchased life and disability insurance through mortgage creditor insurance products referred to as Mortgage Protection Plan (**MPP**) and Credit Security Plan (**CSP**) (collectively the "**Products**").

[2] These Products were distributed through Benesure Canada Inc. (**Benesure**) and its subsidiaries and were insured by Manufacturers Life Insurance Company (**Manulife**). They offer protection to consumers with mortgages and home equity lines of credit from potential loss of their homes in the event of death and/or disability. The MPP product is presented to consumers principally by mortgage brokers, whereas the CSP product is distributed through lenders.

[3] In July 2014, Plaintiffs applied for a mortgage through a mortgage broker and were presented with a referral form for the MPP product but did not purchase it.

[4] In essence, Plaintiffs allege that Defendants breached Class members' privacy and engaged in various unlicensed and otherwise unlawful activities related to the sale and distribution of the Products, causing damages to the Class members.

[5] The Authorization Application largely mirrors the proposed class actions instituted in British Columbia (**BC**), Ontario and Québec in 2013 and the proposed class action launched in Saskatchewan in 2015.

1. GENERAL CONTEXT[1]

[6] Benesure was founded in 1989 as Lorriman & Long Management Inc. It was originally a small consulting firm which has grown over the years, administrating insurance solutions for the customers of mortgage brokers and lenders.

[7] John F. Lorriman is the founder and former Director and Officer of Benesure. Mark Smith is a former employee of Benesure. He acted as a Sales Director for the brokers, Senior Manager and Regional Vice-President.

[8] Credit Security Insurance Agency Inc. (**CSIA**) is a wholly owned subsidiary of Benesure which was incorporated in 1989. It operates in Québec as an insurance firm selling life and disability insurance. CSIA engages in activities associated with the sale and distribution of the MPP product which require an authorized insurance representative.

[9] In Québec, the MPP product is distributed through a referral model whereby mortgage brokers refer their client to CSIA in the context of individual policies. In the rest-of-Canada, the referral model is generally not used. The mortgage brokerages are typically group policyholders and their clients are issued certificates under those policies.

[10] Broker Support Centre Inc. (**BSC**) also is a wholly owned subsidiary of Benesure. It provides various administrative and technological support services to mortgage brokers across Canada, including providing support to brokers outside Québec for the products

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1 The Court reproduces here extracts of the evidence filed by the Defendants at the authorization hearing.

across Canada, including providing support to brokers outside Québec for the products distributed by CSIA and developing and licensing software tools used by mortgage brokers in Québec to refer their clients to CSIA.

[11] BSC receives certain fees in consideration for the tools and services it offers to mortgage brokers. It also engages with Davis + Henderson (**D+H**) who maintains the mortgage origination system used to prepare and deliver the mortgage creditor insurance referral forms to mortgage brokers.

[12] D+H hosts and maintains a web-based software application known as **Filogix** or **D+H Expert**, which is used by 15,000 mortgage brokers and in-house specialists at financial institutions in Canada to connect with 55 mortgage lenders, as well as credit bureaus, appraisers and, insurance providers as part of the mortgage origination process.

[13] In January 2013, Manulife acquired all of the issued and outstanding shares of Benesure and, thereby, Manulife indirectly became the owner of the entities BSC and CSIA.

[14] Tacamor Holdings Inc. (**Tacamor**)[2] is a corporation incorporated under the laws of Newfoundland and Labrador. Up until approximately the first quarter of 2013, Tacamor was managing a call center to which were referred, for further individual risk assessment, the consumers whose applications for the Products had been denied. Tacamor is no longer involved with Benesure or Manulife's operations.

[15] In the Authorization Application, Plaintiffs refer to Benesure, CSIA, BSC and Tacamor as being the Benesure Group (**Benesure Group**).

2. PROCEDURAL CONTEXT

[16] On February 20, 2013, a lawsuit under the *Class Proceedings Act*[3] was filed before the Supreme Court of British Columbia concerning the Products and against the same Defendants as in the present proceedings, save for Mark Smith (**BC Action** or **Leonard**).

[17] On February 27, 2013, a lawsuit under the *Class Proceedings Act*[4] was filed before the Ontario Superior Court of Justice concerning the Products and against the same Defendants as in the present proceedings, save for Mark Smith (**First Ontario Action**).

[18] On September 9, 2013, a lawsuit was filed before the Superior Court of Québec concerning these Products and against the same Defendants as in the present proceeding (**First Québec Action**). This lawsuit was discontinued on September 22, 2015.

[19] On March 27, 2015, a lawsuit was instituted under the *Class Actions Act*[5] before the Court of Queen's Bench for Saskatchewan concerning the Products and against the

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2 This Defendant did not answer the Authorization Application.
3 R.S.B.C. 1996, c. 50.
4 S.O. 1992, c. 6.
5 S.S. 2001, c. C-12.01.

same Defendants as in the present proceeding, except for Mark Smith (**Saskatchewan Action**).

[20] On March 30, 2016, the Application for certification as a class action in the BC Claim was denied by the Supreme Court of British Columbia. This judgment was appealed but the appeal was adjourned to allow the parties to move for approval of a settlement in the lower court.

[21] On July 11, 2017, the Plaintiffs filed the present Authorization Application (**Second Québec Action** or **Ehouzou**).

[22] On July 13, 2017, the attorneys representing Ehouzou also filed a proceeding under the *Class Proceedings Act*[6] before the Ontario Superior Court of Justice concerning the Products and against the same Defendants as in the present proceedings (**Second Ontario Action**).

[23] On September 13, 2018, the Court allowed Defendants to submit relevant evidence in view of the authorization hearing.

[24] On October 19, 2018, the parties in the BC Action and the First Ontario Action reached a settlement, which does not include Québec class members. This settlement agreement provides for a release of all claims against the defendants and a Cy Pres Donation totalling $4.25 million less the legal fees not to exceed $900,000. The settlement is conditional to the approval by the courts of BC and Ontario and provides for an opt-out option to members of the classes.

[25] The settlement approval hearing took place on February 15, 2019, in BC. The attorneys representing Ehouzou were present during such hearing to contest the proposed settlement.

[26] On April 17, 2019, Justice Grauer dismissed the application for certification and settlement approval of the BC Claim because he found that he did not have jurisdiction to set aside the previous order dismissing the application for certification. Justice Grauer also pointed out that re-opening and certifying the BC Action as a class proceeding and, approving the settlement, would seriously impair the ability of the class in Ehouzou to pursue their claims in Québec.

[27] The settlement approval hearing is scheduled for May 16, 2019, in Ontario.

3. ANALYSIS

3.1 The Class

[28] Plaintiffs request the authorization to institute a class action on behalf of the following Class:

a. All individuals residing in Canada:

   i. Whose PERSONAL INFORMATION was accessed by BENESURE GROUP and/or MANULIFE via FILOGIX; or

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6 S.O. 1992, c. 6.

ii. Who have purchased the PRODUCTS; or

iii. Who have received the PRODUCTS WAIVER; or

iv. Who have received the SAFETY CATH LETTER;

b. Excluded from this above-described class (hereafter the "Class") are the employees, officers and directors of the Respondents, or any entity affiliated with Respondents as well as their legal representatives, heirs, successors and assigns;

[29] The Court must establish the period of the proposed Class as it does not include a starting or an ending date.

[30] Defendants submitted that the Class period should start three years prior to the filing of the Authorization Application (i.e. July 12, 2014) and should not end at a later date than the authorization judgment. Plaintiffs did not provide any submission in this regard.

[31] For the following reasons, the Court sets the date at which Plaintiffs applied for their mortgage (i.e. July 2, 2014) as the starting date and the date of the present judgment as the ending date.[7]

[32] Firstly, if the Court was to follow Defendants' suggestion, Plaintiffs would no longer be members of the Class. Secondly, the Authorization Application does not address the issue of Plaintiffs' knowledge of the various causes of action alleged against the Defendants. Therefore, in light of the applicable three year prescription delay, the Court cannot conclude, at this point in time, that the proposed action would be prescribed for Plaintiffs. Lastly, the Class cannot stay open indefinitely and the authorization judgment should end the Class period.

[33] In view of Article 3148 C.C.Q., Québec Authorities have jurisdiction over a class with an extra-territorial component if a real and substantial link exists between Québec and the cause of action raised for the entire proposed class.[8] Furthermore, when an applicant suggests a national class, he must demonstrate at the authorization hearing that the laws and the applicable legal concepts are similar in the other provinces.[9]

[34] For the following reasons, the Court limits the Class to Québec residents:

(a) None of the Defendants are domiciled in Québec.

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7 *Kennedy* v. *Colacem Canada inc.*, 2015 QCCS 222, par. 218; *Riendeau* v. *Brault & Martineau inc.*, 2007 QCCS 4603, par. 78 à 82 (principal and cross appeals denied, 2010 QCCA 366); *Abicidan* v. *Bell Canada*, 2017 QCCS 1198, par. 105; *Beauchamp* v. *Procureur général du Québec*, 2017 QCCS 5184, par. 128.

8 Article 3148 C.C.Q.; *Picard* v. *Air Canada*, 2011 QCCS 5186 par. 115; *Nova* v. *Apple Inc.*, 2014 QCCS 6169, par. 86 (appeal withdrawal, 2015-12-07); *Charbonneau* v. *Apple Canada*, 2016 QCCS 5770 (motion for leave to appeal denied, 2018 QCCA 2089).

9 *Nova* v. *Apple Inc., 2014 QCCS 6169, par. 88 (*appeal withdrawal, 2015-12-07*)*.

(b) Manulife and Manulife Financial Company have an establishment in Québec. However, there are no allegations that the alleged wrongs suffered by out of province consumers "relate to activities in Québec".

(c) Similarly, there are no allegations for the entire proposed Class, that the fault was committed in Québec, the injury was suffered in Québec, an injurious act or omission occurred in Québec or one of the obligations arising from a contract was to be performed in Québec. The evidence filed by Manulife rather demonstrates that the MPP product is distributed differently in Québec than in the rest of Canada.

(d) Furthermore, the distribution of insurance products is a provincially regulated matter. At the hearing, Plaintiffs only referred to the Québec legislation and did not demonstrate that the laws and the applicable legal concepts are similar in the other provinces.

(e) Lastly, the members of the proposed Class who are not residents of Québec are already covered by the other class proceedings in the other jurisdictions.

[35] Finally, the class description must be based on objective criteria, which are rational and not circular or imprecise. It must allow a person to know whether or not she is a class member. The use of defined terms in the proposed Class defeat this purpose. Therefore, Court redefines the Class as follows:

a. All individuals residing in Québec during the period of July 2, 2014 and May 9, 2019 who have purchased or were offered by a mortgage broker or a lender the products known as Mortgage Protection Plan or Credit Security Plan and whose personal information was accessed by Defendants without their consent.

b. Excluded from this above-described class are the employees, officers and directors of the Defendants, or any entity affiliated with Defendants as well as their legal representatives, heirs, successors and assigns.

3.2 Criteria for Authorization

[36] According to article 575 C.C.P., the court authorizes the class action and appoints the class member it designates as representative plaintiff if it is of the opinion that all the following criteria have been met:

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

(2) The facts alleged seem 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;

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

[37] At the authorization stage, the court must perform a filtering role by ensuring that the requirements of article 575 C.C.P. are met. The plaintiff's individual cause of action must be analyzed to determine whether it meets the applicable criteria.[10]

[38] The court must adopt a flexible and liberal approach toward class actions as it is a procedural vehicle to achieve the twin goals of deterrence and victim compensation.[11]

[39] The plaintiff must show an arguable case. It is sufficient for the plaintiff to present a case with a good colour of right that has a chance of success, without needing to establish a reasonable possibility of success.[12]

3.2.1 The facts alleged appear to justify the conclusions sought

[40] The plaintiff must establish an arguable cause of action against each and every defendant. Vague, general, and imprecise allegations are not sufficient to meet such a burden. Nor are hypothetical or purely speculative allegations.[13]

[41] When analyzing this criterion, the facts alleged must be considered as true, unless they appear to be clearly inaccurate or implausible, particularly in light of the relevant evidence adduced at the authorization hearing.[14]

[42] In addition, the court must distinguish factual allegations from arguments, opinions, unsupported inferences and hypotheses, as well as assertions that are implausible or false. The insinuations, opinions, and legal arguments set out in the authorization proceeding are not facts that the court must regard as true.

[43] Plaintiffs allege the following six causes of action against all Defendants:

(a) Breach of rights to privacy of class members by accessing, without lawful justification, the personal information provided to the mortgage brokers or financial institutions for the purpose of generating a referral form for the MPP product or a CSP form (par. 47 and 53 to 67 of the Authorization Application - **Violation of Consumers' Privacy**);

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10 *Option Consommateur* v. *Bell Mobilité*, 2008 QCCA 2201 at par. 54; *Whirpool Canada* v. *Gaudette*, 2018 QCCA 1206 at par. 21 (leave to appeal to SCC requested, 38341 (October 1, 2018)); *Sofio* v. *Organisme canadien de réglementation du commerce des valeurs mobilières (OCRCVM)*, 2015 QCCA 1820 at par. 10; *Union des consommateurs* v. *Bell Canada*, 2012 QCCA 1287 (leave to appeal to SCC denied, 34994 (January 17, 2013)).

11 *Infineon Technologies AG* v. *Option consommateurs*, 2013 CSC 59 at par. 60; *Bank of Montreal* v. *Marcotte*, 2014 CSC 55 at par. 43, *Theratechnologies inc.* v. *121851 Canada inc.*, 2015 CSC 18 at par. 35; *Asselin* v. *Desjardins Cabinet de services financiers inc.*, 2017 QCCA 1673 at par. 29 (leave to appeal to SCC requested, 37898 (December 28, 2017)).

12 *Vivendi Canada Inc.* v. *Dell'Aniello*, 2014 SCC 1 at par. 35; *Fortier* v. *Meubles Léon ltée*, 2014 QCCA 195 at par. 65 (application to correct judgment dismissed, 2014 QCCA 594).

13 *Charles* v. *Boiron Canada inc.*, 2016 QCCA 1716 at para. 43 (leave to appeal to SCC denied, with dissenting reasons, 37366 (May 4, 2017)).

14 *Lambert (Gestion Peggy)* v. *Écolait*, 2016 QCCA 659 at par. 38.

(b) Conduct of the business of insurance without holding the appropriate licences (par. 48, 68 to 88 and 123 of the Authorization Application - **Conducting the Business of Insurance Without Holding the Appropriate Licences**)

(c) Presentation to consumers with a form that deceived them into purchasing the MPP product (par. 49a) and 89 to 94 of the Authorization Application - **Misleading Waiver Practises**);

(d) Presentation to consumers with a reminder notice that they have not applied for mortgage insurance that contained misrepresentations (par. 49b) and 95 à 112 of the Authorization Application - **Safety Catch letter**);

(e) Submission of some consumers to individual health assessments that would result in consumers being offered insurance products with excessive fees (par. 49c), 113 to 122 and 123 of the Authorization Application - **Excessive Fee Practises**);

(f) Failure to inform consumers of the existence of the Settlement Agreement and Consent Order of the British Columbia Superintendent of Financial Institutions (par. 50 and 51 of the Authorization Application - **Breaches following the FIC Order**).

[44] Plaintiffs allege that the prejudice suffered by the members of the Class include the following:

(a) Payment of premiums and other charges for unlawful products;

(b) Loss of value related to purchasing a duly regulated insurance product;

(c) Loss of the value of possession of insurance for the future;

(d) Prejudice arising out of privacy violations committed willfully and repeatedly;

(e) Trouble, hassel or inconvenience associated to the purchase of the products.

[45] They also allege that Defendants' conduct makes them liable for the payment of punitive damages.

[46] At the authorization hearing, Plaintiffs through their counsel, admitted not having purchased neither the MPP product nor received a Safety Catch Letter. Therefore, Plaintiffs have not personally suffered the damages identified in subparagraphs (a), (b), (c) and (e) above.

[47] The Court will analyse hereinafter each one of the alleged causes of action in light of the criterion set forth in article 575 (2) C.C.P.

3.2.1.1 Violation of Consumers' Privacy

[48] Plaintiffs' personal cause of action is found in only 4 of the 242 paragraphs that comprise the Authorization Application, which read as follows:

> [206] The Applicants have applied for a mortgage on or around July 2nd, 2014 through a mortgage broker;

[207] The Applicants' mortgage application was processed through the FILOGIX platform;

[208] After the application for mortgage was completed, the PRODUCTS were offered to the Applicants;

[209] The Applicants' PERSONAL INFORMATION was accessed without legal justification by BENESURE GROUP and/or MANULIFE via FILOGIX;

[49] In essence, Plaintiffs claim that their mortgage application was processed through a platform hosted and maintained by D+H and that BSC had access to their personal information, without legal justification, to generate the referral form for the MPP product, which was thereafter presented to them by their mortgage broker.

[50] In support of their action, Plaintiffs refer to Article 1458 C.C.Q. which states:

> 1458. Every person has a duty to honour his contractual undertakings.
>
> Where he fails in this duty, he is liable for any bodily, moral or material injury he causes to the other contracting party and is bound to make reparation for the injury; neither he nor the other party may in such a case avoid the rules governing contractual liability by opting for rules that would be more favourable to them.

[51] They also refer to following articles of the *Act respecting the protection of personal information in the private sector:*[15]

> 5. Any person collecting personal information to establish a file on another person or to record personal information in such a file may collect only the information necessary for the object of the file.
>
> Such information must be collected by lawful means.
>
> 6. Any person collecting personal information relating to another person may collect such information only from the person concerned, **unless the latter consents** to collection from third persons.
>
> [...]
>
> 8. A person who collects personal information from the person concerned must, when establishing a file on that person, inform him
>
> (1) of the object of the file;
>
> (2) of the use which will be made of the information and the categories of persons who will have access to it within the enterprise;
>
> (3) of the place where the file will be kept and of the rights of access and rectification.
>
> [...]
>
> 13. No person may communicate to a third person the personal information contained in a file he holds on another person, or use it for purposes not relevant

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[15] CQLR c P-39.1.

> to the object of the file, **unless the person concerned consents thereto** or such communication or use is provided for by this Act.
>
> (our emphasis)

[52] Plaintiffs also rely on a decision rendered by Justice Nolet in *Albilia* vs *Apple inc.*[16] authorizing the bringing of a Class Action in the context of a breach of privacy. In that matter, the plaintiff claimed that personal identifiable information concerning each of the class members was collected through free Apps downloaded from the Apple Store onto iPhones or iPads and was transmitted, without their knowledge or consent, to third parties, for purposes wholly unrelated to the use and functionality of the devices or Apps.

[53] For the following reasons, the Court concludes that, contrary to the *Albilia* case, Plaintiffs in the present matter did not show an arguable case regarding the violation of their personal information.

[54] Firstly, the allegations of the Authorization Application regarding Plaintiffs' personal cause of action are insufficient to establish an arguable case. The statement found in paragraph 209 to the effect that their personal information was accessed by BSC without legal justification, constitutes an argument, not a fact. Plaintiffs provide no allegations of fact supporting such conclusion.

[55] Secondly, the evidence filed at the authorization hearing demonstrates that Defendants Manulife and D+H took a number of steps to ensure that mortgage brokers obtained the consent of prospective borrowers before the transmission of any personal information to third parties.

[56] Such evidence showed the following:

(a) D+H has a contractual relationship with mortgage brokers and BSC for the access to and use of D+H Expert;

(b) As a condition of using D+H Expert, D+H requires all mortgage brokers to acknowledge that they have obtained their customers' consent to the collection, use and disclosure of personal information through the software application;

(c) D+H also makes available to mortgage brokers a sample consent form with respect to the transmission of their customers' personal information, which provides the following:

> [...] the Mortgage application form as well as other information you [the mortgage broker] obtain in relation to my credit history may be disclosed to potential mortgage lenders, mortgage insurers, other service providers, organization providing technological or other support services required in relation to this application and any other parties with whom I/we propose to have a financial relationship.

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[16] 2013 QCCS 2805.

(d) The mortgage brokers may choose to use the sample consent form or their own forms of consent.

(e) As a condition of gaining access to the application, the mortgage brokers signing on as users of D+H Expert must confirm to D+H that they have obtained their customers' consent to the disclosure of personal information.

[57] Plaintiffs did not file in support of the authorization application neither the consent form nor the mortgage application used by their mortgage broker. Furthermore, there are no allegations establishing that no consent form was provided to them or that they did not execute the consent form, provided by their mortgage broker, allowing the transmission of their personal information to a third-party administrator for the purpose of generating a referral form for the MPP product.

[58] In the BC Claim, Justice Truscott denied certification of the breach of privacy claim because the representative plaintiffs had signed consent forms that were broad enough to allow for the transmission of information to Manulife Defendants.

[59] Lastly, the Authorization Application does not include any facts supporting any prejudice suffered by the Plaintiffs and arising out of the alleged privacy violations.

3.2.1.2 Business of insurance without the appropriate licences

[60] Plaintiffs claim that Benesure Group coordinated a scheme to create an unlicensed insurance business in Canada and that such scheme was covered up through a partnership with Manulife and facilitated by D+H's platform.

[61] They submit that by marketing, selling and administering the Products, Benesure Group acted as an insurer, or at the very least presented itself as an insurer, despite the lack of having the appropriate licences and thus, with the knowledge and consent of Manulife. Benesure Group neither its agents or employees were ever licensed to act as an insurer.

[62] Plaintiffs also claim that Mr. Lorriman and Mr. Smith, as Director or Officer of Benesure, played a central role in the creation and/or coordination and operation of Benesure Group's unlicensed insurance activities.

[63] In Plaintiffs' view, Benesure Group, Manulife and Mr. Lorriman circumvented insurance legislation and avoided the associated costs of complying with it.

[64] At the hearing, Plaintiffs' counsel argued that Benesure Group and Manulife violated article 1a) of the *Act respecting insurance*[17] and articles 4 and 8 of the *Act respecting the distribution of financial products and services*[18] enacting the following:

> 1. In this Act and in the regulations, unless the context indicates a different meaning, the following expressions mean:
>
> (a) "**insurer**" : any person who directly or indirectly advertises or acts as an insurer, issues or undertakes to issue an insurance contract, receives

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17 CQLR c A-32.

18 CQLR c D-9.2.

> premiums, assessments or other amounts under such a contract or to pay mutual benefits, or undertakes to pay insurance benefits or mutual benefits, excluding any professional syndicate authorized to exercise the powers provided in subparagraph 1 of section 9 of the Professional Syndicates Act (chapter S-40) or any person who, in the field of insurance, offers or enters into only contracts of additional warranty under which he binds himself towards another person to assume directly or indirectly, wholly or partly, the cost of repair or replacement of property or part of any property in case of defect or malfunction; 4. A group insurance representative is a natural person who offers insurance products in group insurance of persons or group annuities from one or more insurers.
>
> 4. [...]
>
> Actuaries who, in pursuing activities as an actuary, offer insurance products in group insurance of persons or group annuities are not group insurance representatives.
>
> 8. An insurer is an insurer holding a licence issued under the Act respecting insurance (chapter A-32), other than a professional order authorized to insure its members' liability.

[65] In support of his argument, Plaintiffs' counsel relied on sections 9.4, 9.10, 10.4 and Appendices C and J of the Plan Management Agreement intervened between Benesure and Manulife in 2007 and communicated as exhibit R-2, which is protected by a Confidentiality and Sealing Order.

[66] These sections cover Benesure's responsibilities which include facilitating the underwriting of all mortgage creditor insurance applications, the ongoing services to insured borrowers and appointing the agents in respect of MPP product for each territory. The premiums collected by Benesure are kept in a trust account and payments are made in accordance with the provisions of the Plan Management Agreement. It also refers to a profit sharing between the two entities.

[67] Plaintiffs' counsel also relied on exhibit R-13[19], a PowerPoint presentation in which Benesure claims to be Canada's only virtual insurance company by performing all the functions of an insurer, while being unlicensed and having partnered with licensed insurance companies "to fill that void".

[68] The exhibits R-2 and R-13 predate the acquisition of Benesure by Manulife and therefore the Class period. However, in his sworn declaration, Mr. Thompson confirms that the Plan Management Agreement over time included the following key terms:

(a) **Scope of the Agreement**: its covers the division of responsibilities, the financial arrangements and the undertakings by each party with respect to MPP;

(b) **Benesure responsibilities** include:

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[19] Undated document also protected by a Sealing Order.

(i) Managing premium rates of MPP, Benesure recommends premium positioning from a competitive perspective and Manulife assesses the financial implications of the proposed pricing based on certain assumptions. Manulife may approve or decline the recommended rates;

(ii) Creating and managing the form of all Plan Documents (as defined therein) to be used by various entities and managing all processes in respect of Plan Documents;

(iii) Facilitating, through its administration system, the underwriting of all mortgage creditor insurance applications and the ongoing services to Insured Borrowers (as defined therein), including the processing adjudication and payment of claims subject to Manulife standards, and overseeing consistency with procedures; and

(iv) Appointing the Agent(s) in respect of MPP for each territory. "Agent" is defined as a licensed life insurance agent, appointed by Benesure, who performs any plan activities which require a licensed life agent, based on the applicable regulations.

(c) **Representations** include that Benesure will maintain for the duration of the Agreement any necessary Provincial licenses required to provide the Plan Management Services.

(d) **Manulife Responsibilities** include:

(i) Acting as the insurer in respect to MPP;

(ii) Providing legal and regulatory support where requested by Benesure; and

(iii) Accepting or declining material changes proposed by Benesure in respect of the services performed by Benesure.

[69] Plaintiffs' counsel also relied on the conclusions of the BC Superintendent of Financial Institutions found in the Settlement and Consent Order rendered in February 2014 (**FIC Order**), communicated as exhibit R-3, relating to contraventions of s. 75, 91, 176 and 178 of the *Financial Institutions Act* (**FIA**)[20] in that:

(a) An unauthorized insurance business was performed by an entity that is not an insurance company;

(b) The marketing and advertising of the insurance products did not properly disclose the identity of the insurer;

(c) Prohibited payments of commission to unlicensed agents were made.

[70] The BC Superintendent ordered administrative penalties to be paid under s. 253.1 of the FIA and costs under s. 241.1 of the Act.

[71] For the following reasons, the Court concludes that Plaintiffs failed to show an arguable case with regards to this cause of action.

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[20] RSBC 1996, c 141.

[72] Plaintiffs failed to allege the necessary facts to show that during the Class period, which is subsequent to Manulife's acquisition of Benesure Group, the referral model put in place does not respect the regulatory framework applicable in Québec.

[73] In Québec, the *Act respecting insurance*[21] restricts those who can act as insurers to legal persons holding licences issued by the AMF. Manulife is authorized to act as an insurer in Québec and holds the required licences.[22]

[74] Also, the *Act respecting the distribution of financial products and services*[23] requires insurance to be distributed in Québec through insurance representatives, who are natural persons authorized to act by a certificate issued by the AMF and acting for a firm which is registered with the AMF.

[75] In Québec, the mortgage brokers refer the consumers to CSIA. The latter outsources to 515963 N.B. Inc. some of the activities associated with the MPP program. CSIA and 515963 N.B. Inc. are firms registered with the AMF and employ insurance representatives to offer the MPP product.[24]

[76] The FIC Order is insufficient to show an arguable case since it only relates to BC legislation in the context of the distribution model implemented by Benesure Group and Manulife in BC, which differs from the referral model used in Québec.

[77] Furthermore, the FIC Order indicates that Manulife Defendants "*provided Undertakings to rectify the matters giving rise to the Superintendents' concerns*". It also confirms that the Superintendent *"is not aware of any harm to policyholders"* and that the Companies *"advise and confirm that the insurance coverages issued by the Companies under the MPP program continue to be valid and in effect*".

[78] Plaintiffs failed to demonstrate that a civil claim can be brought for a breach of Québec legislation relating to insurance. Nor did they allege the false or misleading representations made to them and the damages suffered as a result of such conduct in order to trigger a recourse under s. 52 and 36 of the *Competition Act.*[25]

[79] The allegations concerning Plaintiffs' personal cause of action only refer to a potential breach of privacy. Plaintiffs did not purchase the MPP product. Therefore they did not suffer any of the damages claimed with regard to the purchase of the Products. They also failed to demonstrate how they would be entitled to punitive damages.

[80] Plaintiffs also alleged that Bensure Group and Manulife did not maintain adequate funds or reserves to meet the estimated liabilities associated with the Products sold to customers. However, no documents are filed in support of such allegations. The FIC Order does not support that any licensing compliance contraventions have affected

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21 CQLR c A-32.
22 As it appears from exhibit E attached to Mr. Thompson's sworn declaration.
23 CQLR c D-9.2.
24 As it appears from Mr. Thompson's sworn declaration and the exhibits B and C attached therewith.
25 RSC 1985, c C-34.

Manulife's ability to maintain adequate reserves and its ability to provide insurance coverage where required.

[81] Lastly, Plaintiffs failed to allege the necessary facts to grant a recourse against a Director or Officer personally or lifting the corporate veil.

3.2.1.3 Misleading waiver practises

[82] Plaintiffs alleged that the MPP Form communicated as exhibit R-4 deceived Class members into applying for the product because it is worded in such a way to make the waiver of purchase impossible.

[83] It is important to note that exhibit R-4 is not the form that was presented to the Plaintiffs back in July 2014.

[84] The referral form for the MPP product used in Québec when Plaintiffs were offered the MPP product was filed as exhibit D in support of Mr. Thompson's sworn declaration. It is a form by which individuals can accept to be referred to a licensed insurance advisor who will assist them in applying for the MPP product.

[85] A simple reading of the document confirms that individuals who do not want to benefit from such services can simply initial the waiver box on the form, or not fill out the form at all.

[86] It is clearly possible to choose not to apply for the product despite being presented with the referral form for the MPP product since that is exactly what occurred,with respect to the Plaintiffs.

[87] Allegations that are contradicted by the evidence cannot justify the conclusions sought within the meaning of article 575 (2) C.C.P.

[88] In view of the above, the Court concludes that Plaintiffs did not demonstrate a arguable case with regards to this cause of action.

3.2.1.4 Safety catch letter

[89] Plaintiffs alleged that Benesure Group and Manulife solicited consumers by impersonating mortgage brokers, as it appears from the Safety Catch Letter communicated as exhibit R-5.

[90] They claim that Benesure Group and Manulife sent, under the mortgage broker's name, reminder notices to consumers that had not applied for mortgage insurance.

[91] However, the evidence adduced by Defendants confirms that no Safety Catch Letter is sent to applicants who have been referred via Québec-based brokerages and brokers using the Québec referral form. This explains why Plaintiffs never received a Safety Catch Letter. Exhibit R-5 concerns a broker and a consumer located in Ontario.

[92] In view of the above, Plaintiffs did not show an arguable case with regards to the Safety Catch Letters for the Class limited to Québec residents.

3.2.1.5 Excessive fee practises

[93] Plaintiffs allege that Defendants submitted health questionnaires to certain consumers which resulted in them being offered insurance policies at excessive prices.

[94] Plaintiffs' individual cause of action must be analyzed to determine whether it meets the criteria set forth in article 575(2) C.C.P.

[95] Again, the allegations regarding the personal cause of action are limited to the following:

> [206] The Applicants have applied for a mortgage on or around July 2nd, 2014 through a mortgage broker;
>
> [207] The Applicants' mortgage application was processed through the FILOGIX platform;
>
> [208] After the application for mortgage was completed, the PRODUCTS were offered to the Applicants;
>
> [209] The Applicants' PERSONAL INFORMATION was accessed without legal justification by BENESURE GROUP and/or MANULIFE via FILOGIX;

[96] Plaintiffs did not provide any facts giving rise to an individual remedy for this cause of action. Therefore, the Court is of the view that Plaintiffs did not show an arguable case with regard to this cause of action.

3.2.1.6 Breaches following the FIC Order

[97] Plaintiffs claim that as soon as Manulife and Benesure became aware of the FIC Order, they had the fiduciary obligation to inform all consumers of the "*defect of the Products*" and of a violation of privacy, resulting from illegal access to consumers' personal information.

[98] They also allege that Defendants did not modify their business practices following the FIC Order in a manner that would respect the legislative framework.

[99] The FIC Order does not deal with the issue of breach of privacy. It is of public knowledge, as it is posted on the BC Financial Institutions Commission website.

[100] Furthermore, the FIC Order states that Manulife Defendants "*provided Undertakings to rectify the matters giving rise to the Superintendents' concerns*". Exhibit R-3 contradicts the allegations found in the Authorization Apllication. Therefore, the facts alleged cannot be considered as true.

[101] At the hearing, Plaintiffs failed to submit arguments supporting that Manulife and Benesure had an obligation to inform the consumers in Québec of the observations of the BC Superintendent of Financial Institutions, in respect of the FIA.

[102] For these reasons, the Court concludes that Plaintiffs did not show an arguable case with regards to this cause of action.

3.2.2 The class members' claims raise identical, similar or related issues of law or fact

[103] At the authorization stage, the threshold requirement for common questions is low.[26]

[104] All that is needed is that there is an identical, related or similar question of law or fact, if it settles a not insignificant portion of the dispute.[27]

[105] The common questions submitted need not necessarily lead to common answers.[28] It is not required that each member of a group be in an identical or even a similar position in relation to the defendant or to the injury suffered.[29] It is also not mandatory for the question submitted to unavoidably be common to all the members of the group. Merely related is sufficient.[30]

[106] The common issues described in the Authorization Application are as follows:

a. Regarding the breach of the Class Members' privacy:

   i. Did the Respondents access, communicate or transmit between each other CLASS MEMBERS' PERSONAL INFORMATION without the consent of CLASS MEMBERS?

   ii. If so, did the Respondents violate CLASS MEMBERS' privacy rights?

b. Regarding the PRODUCTS' conformity to applicable laws and regulations:

   i. Did the Respondents have the necessary licenses – or other legal authorizations – to undertake the business of insurance?

   ii. Were the CLASS MEMBERS deceived into purchasing the PRODUCTS?

   iii. If a contract exists between the parties, is the contract valid and applicable?

   iv. After the FIC ORDER, did the Respondents have a duty to inform the CLASS MEMBERS of the defect in the PRODUCTS and of the violation of privacy resulting from illegal access to consumers' PERSONAL INFORMATION?

   v. Did the Respondents have a duty to modify their business practices across Canada in manner that would respect the provincial and federal legislative framework, and did they fail in this duty?

c. Regarding the Respondents' false and misleading representations made to CLASS MEMBERS and consumers in general:

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26 *Infineon Technologies* AG v. *Option* consommateurs, 2013 CSC 59, par. 72.
27 *Vivendi Canada Inc.* v. Dell'Aniello, 2014 CSC 1, par. 58.
28 *Vivendi Canada Inc. v. Dell'Aniello*, 2014 CSC 1, par. 59.
29 *Infineon Technologies AG* v. *Option consommateurs*2013 CSC 59 par. 73.
30 *Société québécoise de gestion collective des droits de reproduction (Copibec)* v. *Université Laval*, 2017 QCCA 199 par. 60.

i. Did the Respondents have a duty to completely and truthfully inform CLASS MEMBERS with respect to the offer, sale and marketing of the PRODUCTS?

ii. If yes, did the Respondents breach this duty when they undertook the business of insurance and engaged in the conduct described in this Application?

iii. Did the Respondents make false or misleading representations to CLASS MEMBERS?

d. Regarding the Respondents' unjust enrichement:

i. Did the Respondents unjustly enrich themselves via their actions or omissions, to the detriment of the CLASS MEMBERS?

ii. In the affirmative, to what extent did the Respondents unjustly enrich themselves?

e. Regarding the Respondents' liability:

i. Did the CLASS MEMBERS suffer any prejudice because of the acts and omission of the Respondents?

ii. What is the general nature and extend of the damages in relation to the prejudice suffered by the CLASS MEMBERS?

iii. Are the Respondents liable to pay punitive damages to the CLASS MEMBERS, and if so, to what extent?

iv. Are the Defedants liable:

1. For reimbursing the CLASS MEMBERS for the sums the Respondents received from the CLASS MEMBERS in connection with the activities related to the sale of the PRODUCTS, by remitting the sums to the CLASS MEMBERS personally, the whole with interest at the legal rate?

2. To pay the CLASS MEMBERS an amount to be determined by this honourable Court as damages for troubles and inconvenience, including loss of bargain, the whole with interest at the legal rate?

3. To pay the CLASS MEMBERS an amount to be determined by this honourable Court as punitive damages, the whole with interest at the legal rate?

[107] The Court is of the view that the above constitute common issues and that the issue of violation of privacy must not be decided on the particular facts of each case. Even if the issue of consent is central and if one cannot assume that all the brokers used the consent form proposed by D+H, the trial judge could create subclasses to deal with differences in the consent forms used.

[108] Therefore, this criterion is met.

3.2.3 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

[109] This third criterion of article 575 C.C.P. seeks to ascertain whether it is difficult or impracticable to proceed by taking legal action for the benefit of another person or by the joining of actions, under sections 88, 91 and 143 C.C.P.

[110] This criterion must be given the same broad and liberal interpretation as the first two.

[111] Plaintiffs allege that the number of Class members is estimated to be several hundreds of thousands, potentially millions of people widely dispersed geographically throughout Canada. Further, they do not know the names or the coordinates of all the Class members.

[112] For the following reasons, the Court is of the view that Plaintiffs did not demonstrate the existence of a Class in light of the evidence filed at the authorization hearing.

[113] Plaintiffs had to show that there exists a class of people that did not provide their consent to the transmission of information to third parties by their respective mortgage brokers.

[114] They do not provide any evidence to this effect but rather rely on unsupported inferences, hypotheses and assumptions.

[115] Furthermore, there is no allegation that Plaintiffs took steps to determine whether there is anyone else who invokes a breach of privacy for the purpose of generating a referral form for the MPP product, much less any evidence that such persons exist.

[116] The mere fact that BSC had the ability to obtain through H+D Expert information that customers had provided to their respective mortgage broker cannot lead to an inference that these persons did not consent to such information being shared.

[117] Therefore, this criterion is not met.

3.2.4 The class member appointed as representative plaintiff is in a position to properly represent the class members

[118] When analyzing this fourth criterion, the Court must be certain that the following three elements are present: (1) interest in the suit, (2) competence, and (3) absence of conflict with the class members.[31]

[119] Once again, this criterion must be given a liberal interpretation. No proposed representative should be excluded unless his or her interest or competence is such that the case could not possibly proceed fairly.[32]

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31 *Infineon Technologies* AG v. *Option* consommateurs, 2013 CSC 59; *Sibiga* v. *Fido Solutions inc.*, 2016 QCCA 1299.

32 *Sibiga* v. *Fido Solutions inc.*, 2016 QCCA 1299, par. 97.

[120] The Plaintiffs have declared in the Authorization Application that they:

(a) Are ready and available to provide the necessary time for the conduct of the class action and are willing and able to work with their attorneys;

(b) Have the capacity and standing to represent all class members;

(c) Have no interests that are in conflict with those of the other class members;

(d) Have sufficient knowledge of the facts justifying the class action;

(e) Are prepared to manage the Class Action in the interest of all Class Members, and are willing and prepared to represent all Class Members and to complete the Class action for the benefit of the Class Members.

[121] The Court is of the view that this criterion is respected.

3.3 Conclusion

[122] The Court refuses to authorize the proposed class action since the criteria set forth in article 575 (2) and (3) C.C.P. are not met.

WHEREFORE, THE COURT:

[123] **REFUSES** Applicants' *Application for Authorization to Institute a Class Action and to Obtain the Status of Representatives*;

[124] **THE WHOLE**, with legal costs.

Chantal Tremblay JSC

CHANTAL TREMBLAY, J.S.C.

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