

**SUPERIOR COURT**  
**(Class Actions)**

CANADA  
PROVINCE OF QUEBEC  
DISTRICT OF MONTREAL

No: 500-06-000780-169

DATE: February 11, 2020

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

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**MICHAEL ATTAR**  
Representative Plaintiff

vs.

**RED BULL CANADA LTD.**

-and-

**RED BULL GMBH**  
Defendants

-and-

**FONDS D'AIDE AUX ACTIONS COLLECTIVES**  
Impleaded Party

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**JUDGMENT ON APPLICATION TO APPROVE THE PLAINTIFF'S HONORARIUM  
PROVIDED FOR IN A NATIONAL CLASS ACTION SETTLEMENT AGREEMENT**

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[1] The parties to the Settlement Agreement ask the Court to approve the payment of an honorarium to the representative Plaintiff provided for in the Settlement Agreement as follows:

*Representative Plaintiff's Disbursements.* If approved by the Court as part of the Settlement Agreement, Red Bull agrees the Representative Plaintiff will be entitled to receive up to CAD \$5,000 from the Settlement Fund in consideration for his disbursements and the time and effort that he has put into the Action and its preparation and investigation, as well as in representing the interests of Settlement Class Members residing in the province of Quebec and in the rest of Canada. The Claims Administrator shall disburse the sum of up to CAD \$5,000 (subject to Court approval) to the Representative Plaintiff from the Settlement Fund within ten (10)

business days after the Effective Date or such other date thereafter as mutually agreed upon by the Claims Administrator and Class Counsel.

[2] The Fonds d'aide aux actions collectives (**FAAC**) opposes the approval of such honorarium given that article 593 CCP now clearly states that the Court can only award representative plaintiff an indemnity for disbursements.

## 1. **CONTEXT**

[3] On November 6<sup>th</sup>, 2019, the Plaintiff notified an *Application to Approve the Plaintiff's Honorarium Provided for in a National Class Action Settlement*, based on article 593 CCP, together with exhibits H-1 to H-7 (**Application**). The FAAC was added as an Impleaded Party to this proceeding.

[4] On December 13<sup>th</sup>, 2019, the FAAC informed the Court of its intention to contest the requested honorarium.

[5] On December 16<sup>th</sup>, 2019, FAAC filed a written contestation.

[6] On that same day, the Plaintiff notified an amended proceeding in which he replaced all references to article 593 CCP with "article 590 CCP" or "Quebec Law" (**Amended Application**).

## 2. **ANALYSIS**

[7] The question at issue is whether the Court can approve the Plaintiff's honorarium provided for in the Settlement Agreement which aims to compensate for both his disbursements and time and effort put into the class action.

[8] Plaintiff's implication in the present instance is described in the Amended Application as follows:

- a) He has been actively involved in the class action before and since it was initially filed on February 18<sup>th</sup>, 2016;
- b) He was involved in the drafting and filing of the class action proceeding and was kept informed of the developments by his attorneys;
- c) After the filing of the class action, he became a member of the Association pour la santé publique du Québec, a non-profit organization which is active in monitoring product labelling of caffeinated energy drinks;
- d) He assisted his attorneys in the gathering of evidence for this case. For instance, on July 11<sup>th</sup>, 2016, he drove to Joliette to pick up a Red Bull Energy Drink can (exhibit P-14) that contained labelling that could help them in demonstrating the case;
- e) On December 11<sup>th</sup>, 2018, he participated in a meeting with the parties held at the Montreal Courthouse to review the settlement agreement;

- f) He agreed to be the lead plaintiff for the benefit of “all Canadian consumers of Red Bull Energy Drinks who did not receive compensation as part of the settlements in the United States”;
- g) His name was associated with the case and published by major English and French media outlets.

[9] Plaintiff submits that in the context of a transaction, the legal criteria for approving the requested honorarium is provided for at article 590 CCP and not at article 593 CCP.

[10] In other words, Plaintiff is of the view that article 593 CCP, in effect since January 1<sup>st</sup>, 2016, applies solely to judgments rendered on the merits of the case. Therefore, this article does not forbid the Superior Court from awarding a reasonable indemnity to the representative plaintiff provided for in a settlement agreement to compensate for time and resources spent working on the case.

[11] Plaintiff also invites the Court not to apply the post-2016 case law which refuses that the representative plaintiff be remunerated for his role in a class action. In his view, this situation is unfair as such concept is accepted in many other Canadian provinces and in the United States.

[12] Article 590 CCP states the following:

590. A transaction, acceptance of a tender, or an acquiescence is valid only if approved by the court. Such approval cannot be given unless notice has been given to the class members.

In the case of a transaction, the notice must state that the transaction will be submitted to the court for approval on the date and at the place indicated. It must specify the nature of the transaction, the method of execution chosen and the procedure to be followed by class members to prove their claim. The notice must also inform class members that they may assert their contentions before the court regarding the proposed transaction and the distribution of any remaining balance.

**The judgment approving the transaction determines, if necessary, the mechanics of its execution.**

(our emphasis)

[13] In 2008, the Court of Appeal<sup>1</sup> rendered a judgment refusing to approve an award of US \$150,000 to the Plaintiff Association for its disbursements and time invested in the class action since neither the settlement agreement nor the CCP at that time provided for such indemnity.

[14] In other cases rendered prior to January 1<sup>st</sup>, 2016, indemnities were awarded to the representative plaintiff to compensate his involvement in the class action when the amount provided for in a settlement agreement was reasonable.<sup>2</sup> Professor Catherine

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<sup>1</sup> *Association de protection des épargnants et investisseurs du Québec (APEIQ) v. Ontario Public Service Employees' Union Pension Plan Trust Fund*, 2008 QCCA 1132.

<sup>2</sup> For example, see : *Association pour l'accès à l'avortement v. Québec (Procureur général)*, 2007 QCCS 1796.

Piché found that out of 34 class action settlements analyzed, the average individual representation award was \$4,822.98.<sup>3</sup>

[15] Article 593 CCP now states the following:

**593. The court may award the representative plaintiff an indemnity for disbursements and an amount to cover legal costs and the lawyer's professional fee.** Both are payable out of the amount recovered collectively or before payment of individual claims.

[...]

(our emphasis)

[16] During the process of adoption of article 593 CCP, the Ministry of Justice indicated the following:

Cet article est de droit nouveau. Il vise à indemniser le représentant des débours qu'il fait pour mener à bien l'action collective, sans lui allouer cependant une rémunération pour le temps et l'énergie consacrés à l'affaire.<sup>4</sup> [...]

[17] For the following reasons, the Court is of the view that the Plaintiff should not be awarded the requested honorarium of \$5,000.

[18] Article 593 CCP was adopted to avoid representative plaintiff being remunerated for the role he played in a class action. The Court is of the view that this principle should be applied whether the judgment is rendered on the merits of a class action or to approve a transaction.<sup>5</sup> Indeed, in order to avoid any conflict of interest, the representative plaintiff should not be remunerated at any given time.

[19] Furthermore, in light of article 593 CCP, it would be difficult to reconcile the fact that a representative plaintiff could be remunerated in the context of a transaction but not on the merits of the case when his role is generally less significant in the context of a transaction occurring before the merits of the case.

[20] The Court agrees with the post-2016 case law<sup>6</sup> referring to article 593 CCP to refuse an award to the representative plaintiff in the context of a transaction to compensate for the time and effort put into the class action.

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<sup>3</sup> Catherine PICHE, "Understanding Class Actions Through a Historical Overview and Empirical Data From Quebec From the Past Twenty-five Years", (2019) 15:1 Can Class Action Rev 201 at 239.

<sup>4</sup> Québec, National Assembly, Standing Committee on Institutions, "Étude détaillée du projet de loi n° 28 – Loi instituant le nouveau Code de procédure civile (21)", *Journal des débats*, 40-1, vol 43, No 107 (9 January 2014) at 51-55.

<sup>5</sup> *Auguste v. Air Transat*, 2019 QCCS 2253, par. 37.

<sup>6</sup> *Zouzout v. Wayfair LLC*, C.S. Montreal, n° 500-06-000809-166, December 14, 2017, Monast, j.c.s., par. 85; *Zouzout v Wayfair*, 2018 QCCS 1370, par.2; *Mahmoud v. Société des casinos du Québec inc.*, 2018 QCCS 4526, par. 42; *Frank-Fort Construction Inc. v. Porsche Cars North America Inc*, 2018 QCCS 1727; *Hurst v. Air Canada*, 2019 QCCS 4614, par. 58; *Auguste v. Air Transat*, 2019 QCCS 2253, par. 41; *Michaud v. Sanofi-Aventis Canada inc.*, 2019 QCCS 2067, par. 32.

[21] Lastly, the Plaintiff's implication in the present matter does not justify an award of \$5,000 and he did not allege any specific disbursements in support of the requested award.

**WHEREFORE, THE COURT:**

[22] **DISMISSES** the *Application to Approve the Plaintiff's Honorarium Provided for in a National Class Action Settlement*;

[23] **THE WHOLE**, without costs.

  
CHANTAL TREMBLAY, J.S.C.

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Hearing date: December 17, 2019