

**SUPERIOR COURT
(Class Actions)**

CANADA
PROVINCE OF QUEBEC
DISTRICT OF MONTREAL

No: 500-06-000969-192

DATE: July 16, 2020

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

CHRISTIAN BARBEAU

and

MARIE-EVE BARBEAU

Plaintiffs

vs

COGECO CONNEXION INC.

Defendant

-and-

FONDS D'AIDE AUX ACTIONS COLLECTIVES

Impleaded Party

**JUDGMENT CONCERNING THE APPROVAL OF PLAINTIFFS' COMPENSATION
PROVIDED FOR IN A CLASS ACTION SETTLEMENT AGREEMENT**

[1] The Court is asked to approve a compensation to the Representative Plaintiffs provided for in the Settlement Agreement as follows:

Compensation des Demandeurs

27. Dans les soixante (60) jours suivants la Date d'entrée en vigueur du Règlement, Cogeco paiera à M. Christian Barbeau un montant de 1 000 \$ et lui offrira gratuitement vingt-quatre (24) mois de son service de téléphonie résidentielle actuel, à titre de compensation pour le temps, les efforts et les dépenses encourues dans le cadre de l'Action collective.
28. Dans les soixante (60) jours suivants la Date d'entrée en vigueur du Règlement, Cogeco paiera à Mme Marie-Eve Barbeau un montant de

1 500 \$, à titre de compensation pour le temps, les efforts et les dépenses encourues dans le cadre de l'Action collective.

1. CONTEXT

[2] On April 21st, 2020, the Plaintiffs notified an *Application to Authorize the Class Action for the purpose of approving the Settlement Agreement and Counsel's fees* together with exhibits R-1 to R-6 (**Application**). The Fonds d'aide aux actions collectives (**FAAC**) was added as an Impleaded Party to this proceeding.

[3] On June 2nd, 2020, the Court heard the parties' representations with regard to the Representative Plaintiffs' indemnities provided for in the Settlement Agreement. The FACC did not make any representations.

2. ANALYSIS

[4] The question at issue is whether the Court can approve the payment of the indemnities provided for in the Settlement Agreement which aim to compensate Plaintiffs for their disbursements, time and effort put into the class action. Article 593 CCP, in effect since January 1st, 2016, states that the Court can only award a representative plaintiff an indemnity for disbursements.

[5] The Application does not refer to Plaintiffs' implication in the present instance. However, at the hearing, Plaintiffs' counsel explained their involvement in the file as well as in the two day mediation process which lead to the Settlement Agreement. Defendant's counsel agreed with such representations.

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

[7] In other words, Plaintiffs are of the view that article 593 CCP 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 a representative plaintiff provided for in a settlement agreement to compensate for time and resources spent working on the case.

[8] Plaintiffs also invite the Court not to apply the post-2016 case law in which representative plaintiff is denied remuneration for his role in a class action. In their view, this situation is unfair as such concept is accepted in many other Canadian provinces and in the United States.

[9] 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)

[10] In 2008, the Court of Appeal¹ denied 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.

[11] In following cases rendered prior to January 1st, 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.²

[12] Professor Catherine Piché found that, out of 34 class action settlements analyzed, the average individual representation award was \$4,822.98.³

[13] 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)

[14] 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.⁴ [...]

[15] For the following reasons, the Court is of the view that the Plaintiffs should not be awarded the requested indemnities.

[16] Article 593 CCP was adopted to avoid representative plaintiff from 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

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

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

³ Catherine PICHÉ, "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.

⁴ 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.

action or to approve a transaction.⁵ Indeed, in order to avoid any conflict of interest, a representative plaintiff should not be remunerated at any given time.

[17] 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.


[18] The Court agrees with the post-2016 case law⁶ 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.

[19] Lastly, the Plaintiffs did not allege any specific disbursements in support of the requested indemnities.

WHEREFORE, THE COURT:

[20] **DISMISSES** the conclusions of the Application concerning the approval of the indemnities payable to the Representative Plaintiffs;

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


CHANTAL TREMBLAY, J.S.C.

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Me Éloïse Noiseux
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Hearing date: June 2, 2020

⁵ *Auguste v. Air Transat*, 2019 QCCS 2253, par. 37.

⁶ *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; *Attar v. Red Bull Canada Ltd*, 2020 QCCS 495 (leave to appeal to the Court of Appeal granted, 2020 QCCA 623).