

SUPERIOR COURT

CANADA
PROVINCE OF QUEBEC
DISTRICT OF MONTREAL

No: 500-06-001015-193

DATE: February 13, 2020

BY THE HONOURABLE SYLVAIN LUSSIER, J.S.C.

YOUVAL BENABOU
Plaintiff

vs.

STOCKX LLC
Defendant

JUDGMENT

1. OVERVIEW

[1] Plaintiff Youval Benabou (Benabou) seeks the authorization to institute a class action against Defendant StockX LLC (StockX) on behalf of « all persons in Quebec and the rest of Canada... whose personal and/or financial information was provided to StockX and compromised, lost and/or stolen... as a result of the Data Breach that occurred on July 26, 2019 ».

[2] Benabou alleges¹ that upon learning that its records and client information had been hacked, StockX failed to inform its users of the unauthorized access and instead, tried to hide it.

¹ Paragr. 11 of the Application for Authorization to Institute a Class Action.

[3] StockXs summarizes Benabou's grievances against it as follows² :

- (a) Every putative class members had their personal and financial information lost by StockX;
- (b) It was only after being exposed by the media that StockX first notified some of its users of the data breach;
- (c) StockX did not send notifications through its APP on the basis that many users do not read emails from StockX;
- (d) StockX failed to implement the proper steps to safeguard and protect the information of the putative class members;
- (e) StockX has failed or refused to offer any protection to the putative class members;
- (f) StockX was grossly negligent and/or intentionally negligent under the circumstances; and
- (g) StockX's negligence has shown a malicious, oppressive and high-handed conduct that represents a marked departure from ordinary standards of decency.

[4] Advancing that these allegations are false, StockX seeks permission to file relevant evidence pursuant to article 574 C.C.P., consisting of :

- a) An affidavit by Mark Walz and attached exhibits;
- b) A letter from Tim Mots, Investigator for the Office of the Information and Privacy Commissioner for British Columbia.

[5] Benabou does not contest the filing of Mr. Walz's affidavit, save for paragraphs 37 and 38 thereof, leaving the rest to the Court's discretion and objects to the filing of Mr. Mots' letter.

[6] Pleadings on these issues were exchanged in writing, pursuant to Sec. 230 of the *Directives de la Cour supérieure pour le district de Montréal*.

² Paragr. 5 of StockX' Amended Motion for Permission to file Relevant Evidence.

2. DISCUSSION

[7] Since the facts alleged in an application for authorization to institute a class action are taken as averred, and that the contestation thereof is oral only, the Court's permission is necessary to file additional evidence, whether the filing is contested or not³.

Governing principles

[8] The principles governing the submission of relevant evidence are well known. It is constant that the evidence may only be filed for the purpose of determining whether the criteria of article 575 *C.C.P.* are met⁴. As Justice Dominique Bélanger wrote in *Lambert (Gestion Peggy) v. Écolait Itée*⁵ :

[38] Dans tous les cas, la preuve autorisée doit permettre d'évaluer les quatre critères que le juge de l'autorisation doit examiner et non le bien-fondé du dossier. Et si, par malheur, le juge de l'autorisation se retrouve devant des faits contradictoires, il doit faire prévaloir le principe général qui est de tenir pour avérés ceux de la requête pour autorisation, sauf s'ils apparaissent invraisemblables ou manifestement inexacts.

[9] The allegations of the Motion for authorization are to be taken as averred but evidence may be filed to demonstrate the falsity or the ludicrous character of certain allegations⁶.

[10] In addition, it is useful to allow the production of evidence explaining the business and operations of Defendant⁷. Moreover, the documentation establishing the contractual relationship and respective obligations of the parties is judged useful and is allowed⁸.

[11] Proof providing the Court with useful and contextual clarification allowing it to better understand the facts of the case or composition of the class may also be allowed⁹.

³ Article 574 *C.C.P.*; *Allstate du Canada, compagnie d'assurance v. Agostino*, 2012 QCCA 678, paragr. 25.

⁴ *Asselin c. Desjardins cabinet de services financiers inc.*, 2017 QCCA 1763.

⁵ 2016 QCCA 659.

⁶ *Asselin c. Desjardins Cabinet de services financiers inc.*, 2017 QCCA 1673 (CanLII), Leave to appeal to the Suprême Court of Canada granted, n : 37898, paragr. 91.

⁷ *Ehouzou c. Manufacturers Life Insurance Company*, 2018 QCCS 4908 (CanLII), paragr. 23; *Gagné c. Rail World inc.*, 2014 QCCS 32 (CanLII), paragr. 67, 137 et 162.

⁸ *Jacques c. Petro-Canada*, 2009 QCCS 4787 (CanLII); *Gagné c. Rail World*, 2014 QCCS 32 (CanLII), par. 77, 97, 136 et 137.

⁹ *Leventakis v. Amazon-com inc.*, 2020 QCCS 289, paragr. 10; *Allstate du Canada, compagnie d'assurance v. Agostino*, 2012 QCCA 678, at paragr. 64.

[12] In this context, Justice Suzanne Courchesne summarized the criteria guiding the Court's analysis :

- le juge dispose d'un pouvoir discrétionnaire afin d'autoriser une preuve pertinente et appropriée ainsi que la tenue d'un interrogatoire du représentant, dans le cadre du processus d'autorisation;
- un interrogatoire n'est approprié que s'il est pertinent et utile à la vérification des critères de l'article 575 *C.p.c.*;
- l'interrogatoire doit respecter les principes de la conduite raisonnable et de la proportionnalité posés aux articles 18 et 19 *C.p.c.*;
- la vérification de la véracité des allégations de la demande relève du fond;
- le tribunal doit analyser la demande soumise à la lumière des enseignements récents de la Cour suprême du Canada et de la Cour d'appel sur l'autorisation des actions collectives et qui favorisent une interprétation et une application libérales des critères d'autorisation;
- à ce stade, la finalité de la demande se limite au seuil fixé par la Cour suprême du Canada, soit la démonstration d'une cause défendable. Le tribunal doit se garder d'autoriser une preuve qui inclut davantage que ce qui est strictement nécessaire pour atteindre ce seuil;
- le tribunal doit se demander si la preuve requise l'aidera à déterminer si les critères d'autorisation sont respectés ou si elle permettra plutôt de déterminer si le recours est fondé ; dans cette dernière hypothèse, la preuve n'est pas recevable à ce stade;
- la prudence est de mise dans l'analyse d'une demande de permission de produire une preuve appropriée ; il s'agit de choisir une voie mitoyenne entre la rigidité et la permissivité;
- il doit être démontré que l'interrogatoire demandé est approprié et pertinent dans les circonstances spécifiques et les faits propres du dossier, notamment en regard des allégations et du contenu de la demande d'autorisation;
- le fardeau de convaincre le tribunal de l'utilité et du caractère approprié de la preuve repose sur la partie qui la demande.¹⁰

¹⁰ *Options Consommateurs c. Samsung Electronics Canada*, 2017 QCCS 1751, paragr. 11.

Mark Walz's Affidavit

[13] The Affidavit of Mark Walz may be summarized as follows :

- (a) Paragraphs 1 to 4 : Personal information and knowledge of the facts of the case;
- (b) Paragraphs 5 to 6 : Summary Description of StockX's activity;
- (c) Paragraphs 7 to 15 : Treatment and use of users' accounts information for online transactions. More particularly those paragraphs detail that no credit card or account information is stored by StockX.
- (d) Paragraphs 16 to 28 describe the responsive measures taken by StockX upon learning about suspicious activity potentially involving to use data;
- (e) Paragraphs 29 to 31 describe which user information was accessed by hackers.
- (f) Paragraphs 32 to 36 describe the proactive measures taken by StockX in response to the Data Breach.
- (g) A screenshot of a typical online registration is filed as exhibit MW-1 to the affidavit,

[14] The information presented in paragraphs 1 to 36 of Mr. Walz's affidavit corresponds to the evidence typically allowed to contradict erroneous or false statements, to explain the business context in which the transactions take place or how contractual relationships are established with class members.

[15] In a similar context of access to customer information through a data breach, Justice Stephen Hamilton, then of this Court, authorized the filing of an affidavit providing information about the data breach. As in the present case, petitioner was not contesting the filing¹¹.

[16] Benabou contests the filing of paragraphs 37 and 38, as well as Exhibit MW-2 on the ground that they only aim to contradict certain factual allegations.

[17] The Court finds that these paragraphs aim to complete the information available at the authorization hearing by establishing that Benabou continued using the Sockx platform after the Data Breach.

¹¹ *Zucherman v. Target Corporation*, 2016 QCCS 3160, paragr. 18.

[18] In order for the Class action to be authorized, Benabou must demonstrate that he has standing, with a personal cause of action against StockX¹². He must meet the criteria of article 575(4) *C.C.P.* as a representative, as light as they may be.

[19] If it established that he has suffered no damage, his application could be dismissed for lack of « *lien de droit* ». It is premature to decide same of this stage. It might be premature to decide it at the authorization stage as well. But it is better left for discussion at that stage. Paragraphs 37 and 38 of Mr. Walz's affidavit will inform the Court at that appropriate moment and will accordingly be admitted in evidence, along with Exhibit MW-2.

Tim Mots' Letter

[20] StockX seeks to introduce in evidence Tim Mots' letter to Bradley Freedman of BLG dated December 20, 2019.

[21] Tim Mots is an investigator with the Office of the Information Privacy Commission for British Columbia, assigned to complete the monitoring of the Data Breach.

[22] Following his investigation, he closes the file and makes a number of findings or observations :

- a) StockX had reasonable security systems in place prior to the breach.
- b) StockX took reasonable steps to contain the breach.
- c) StockX notified those affected by the breach by providing sufficient information to remediate potential risks and offered free fraud and identity theft.
- d) StockX increased its security after the breach;
- e) StockX made every reasonable effort to mitigate any potential harm to the affected individuals and has taken appropriate steps to prevent future breaches.

[23] StockX is certainly very happy with these findings. Unfortunately for them, they are of no use before this Court.

[24] The filing of the results of an investigation by a regulatory body from another province meets a series of insurmountable hurdles :

¹² *Sofio inc. v. Organisme canadien de réglementation du commerce de valeurs mobilières*, 2015 QCCA 1820.

- a) Different statutes apply;¹³
- b) It constitutes hearsay;¹⁴
- c) It would usurp this Court's duty to make a finding as to the appropriateness of the measures taken by StockX before and after the breach¹⁵, in light of the law which this Court will have to apply, respecting our rules of private international law.

[25] The court adopts the words of Justice Louis Lacoursière in *Mazzonna v. Daimler Chrysler Financial Services inc.*¹⁶ :

[24] The Office of the Privacy Commissioner of Canada has, as alleged by the proposed amended paragraphs, launched an investigation and issued some findings pursuant to Ms. Mazzonna's complaint through her attorneys.

[25] Once again, the Court fails to see how these can have a bearing on its analysis of the conditions of section 1003 of the *Code of Civil Procedure* as they apply to Ms. Mazzonna.

[26] The Court will make its own decision based on Ms. Mazzonna's allegations and would not be influenced by the enquiry and findings of the Office of the Privacy Commissioner, nor would it have been influenced, should I add, should the findings of the Commissioner have been different.

[26] Permission to file Mr. Mots' letter will be refused.

Cross Examination of Mr. Waltz

[27] Benabou's lawyer has indicated that should Mr. Waltz's affidavit be filed in evidence, he wants to examine him pursuant to articles 105 and 222 *C.C.P.* before the authorization hearing.

[28] The Court believes that the admission of additional evidence at the authorization stage must be monitored closely. This includes examinations, including those of defendant's affiants.

[29] Notwithstanding the scope of examination granted by article 222 *C.C.P.*, article 158(3) *C.C.P.* also gives the court, as a case management tool, the right to determine terms for the conduct of pre-trial examinations.

¹³ *Ehouzou v. Manufacturers Life Insurance Company*, 2019 QCCS 2017, at paragr. 75 (in appeal).

¹⁴ *Lampron c. Énergie Algonquin (Ste-Brigitte) inc.*, 2013 QCCS 46; *A.B. c. Les frères du Sacré-Cœur*, 2019 QCCS 258, paragr. 121; *Robert c. Hôpital de Chicoutimi inc.*, J.E. 91-963 (C.A.); *Rouleau c. Placements Etteloc inc.*, 2000 CanLII 19196 (C.S.).

¹⁵ *Girard c. 9007-0673 Québec inc.*, 2019 QCCS 3949, paragr. 14.

¹⁶ 2010 QCCS 5225.

[30] Article 158(3) *C.C.P.* gives examples of the conditions that may be imposed, which include their length and number. It does not limit the nature of the conditions imposed.

[31] Justice Robert Mainville of the Court of Appeal, recently wrote in a case where an affidavit had been filed in support of a motion to disqualify an attorney :

[8] Je rejette aussi la prétention du requérant voulant qu'il ait le droit strict d'interroger immédiatement l'intimée sur tous les faits pertinents. Si l'article 222 C.p.c. élargit la portée de l'interrogatoire au préalable, il ne prévoit pas un droit strict. En effet, le 3^e paragraphe de l'article 158 C.p.c. permet au tribunal, à titre de mesure de gestion, de déterminer si des interrogatoires préalables à l'instruction sont requis et les conditions de ceux-ci. Cela comprend le pouvoir de limiter la portée de tels interrogatoires.¹⁷

[the Court underlines]

[32] Plaintiffs are generally not allowed to discover defendants' representatives of the authorization stage¹⁸.

[33] Justice Benoît Moore of the Court of Appeal recently denied leave to appeal of a judgment which had refused discovery of Defendant's representative under the guise of a request to adduce appropriate evidence¹⁹ :

[11] Il en va de même de la demande pour preuve appropriée. Ces informations, s'il y a lieu, pourront être obtenues plus tard, ce qui n'empêche pas, à ce stade-ci, le requérant de faire la preuve nécessaire à l'autorisation quant à la composition du groupe.

[34] In this case, the Court will allow the written cross-examination of Mr. Walz, pursuant to article 223 *C.C.P.*, only in respect of the allegations of his affidavit.

[35] If the questions asked raise any objections, same will be submitted to the undersigned within 15 days of their communication to StockX's attorneys.

3. CONCLUSIONS

WHEREFORE, THE COURT:

[36] **GRANTS**, in part, StockX LLC's Amended Motion for Permission to File Relevant Evidence.

¹⁷ *Lussier c. Luft*, 2017 QCCA 1392.

¹⁸ *Comité des citoyens inondés de Rosemont c. Montréal (Ville de)*, 2010 QCCS 1879, paragr. 21; *Durand c. Attorney general of Quebec*, 2017 QCCS 2455; *Lavallée c. Ville de Ste-Adèle*, 2018 QCCS 4992.

¹⁹ *Charbonneau c. Location Claireview*, 2019 QCCA 2056.

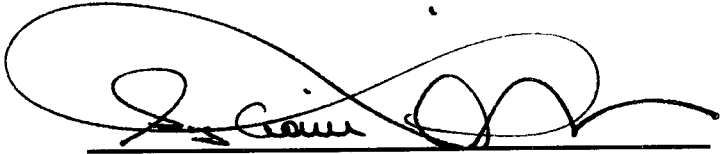
[37] **GRANTS** leave to file in evidence the affidavit of Mark Walz, Exhibit D-1, along with its attachments, exhibits MW-1 and MW-2.

[38] **AUTHORIZES** the cross-examination in writing of Mr. Walz, but only on the allegations of his affidavit, within 30 days of the present judgment.

[39] **DIRECTS** the parties to refer any objections within 15 days of the communication of the questions to StockX's attorneys;

[40] **REFUSES** leave to file Mr. Tim Mots's letter of December 20, 2019 in evidence.

[41] **THE WHOLE** with costs follow suit.



SYLVAIN LUSSIER, J.C.S.

Me David Assor
Lex Group Inc.
Attorneys for Plaintiff

Me Patrick Plante
Me François Grondin
Me Éloïse Gratton
Borden Ladner Gervais
Attorneys for the Defendant