SUPERIOR COURT

CANADA
PROVINCE OF QUEBEC
DISTRICT OF MONTREAL

No: 500-06-001152-210

DATE: March 21, 2022

BY THE HONOURABLE THOMAS M. DAVIS, J.S.C.

TANIA SCISCENTE

Plaintiff

v.

AUDI CANADA INC.
and

VOLKSWAGEN GROUP CANADA INC.

Defendants

JUDGMENT

OVERVIEW

[1] Plaintiff Tania Sciscente seeks the authorization of a pan-Canadian class action following an alleged data breach of personal information in relation to clients of Defendants, Audi Canada Inc. **(Audi)** and Volkswagen Group Canada Inc. **(VW)**. The breach is believed to have occurred sometime prior to March 2021.

[2] The information includes:

- First and last name;
- Personal mailing address;
- Business mailing address;
- Email address;
- Phone number;
- Driver's license numbers;
- Date of Birth;
- Social Security or Social Insurance Numbers;
- Credit information ("eligibility for a purchase, loan, or lease");
- Account or loan numbers;
- Tax identification numbers);
- Information about a vehicle purchased, leased, or inquired about, such as: Vehicle Identification Number (VIN), Make, Model, Year, Color, and Trim packages.

[3] Ms. Sciscente claims that she was not identified of the breach on a timely basis and that when notification did occur, it was deficient. Further, Canadians victimized by the breach were not offered appropriate protection against the potential damages of the breach, such as fraud or identity theft.

[4] She claims compensatory and punitive damages alleging a failure of Audi and VW to respect the following laws:

a) Sections 3, 35, 36, 37 and 1621 of the *Civil Code of Quebec*, S.Q. 1991, c. 64*;*

b) Sections 5 and 49 of the *Charter of Human Rights and Freedoms*, CQRL, c. C-12;

c) Sections 1, 2, 10, 13 and 17 of the *Act Respecting the Protection of Personal Information in the Private Sector*, CQRL, c. P-39.1;

d) Sections 2, 3, 5 and 11 of the *Personal Information Protection and Electronic Documents Act*, SC 2000, c. 5, as well as its sections 4.1, 4.3, 4.7 to 4.7.4 of its Schedule 1;[1]

[5] It is also relevant for the purposes of the present application that Ms. Sciscente claims to have purchased protection for her personal data shortly after she became aware of the breach:

> 35. Plaintiff read the TechCrunch.com article contained in R-5 titled "Volkswagen Says a Vendor's Security Lapse Exposed 3.3 Million Drivers' Details" published on June 11, 2021, and contacted undersigned attorney to mandate them to institute the present class action proceedings on her behalf and on behalf of the Class Members.
>
> 36. In order to help protect herself from fraud and identity theft, Plaintiff (…) purchased the recurring monthly subscription of the Equifax Canada Complete Premier credit monitoring services, at a price of $21.94 per month (namely $19.95 plus taxes), which amounts she claims from Defendants as damages stemming directly from the Data Breach, the whole as more fully appears from her Equifax Canada email confirmation dated June 14, 2021, communicated herewith as Exhibit R-7. Plaintiff also activated the Equifax Canada 6-year fraud alert on her credit file on June 14, 2021, the whole in order to further protect her credit files and identity.[2]

[6] The present judgment is limited to deciding the application of Audi to adduce relevant evidence and to examine Ms. Sciscente out of Court.

1. AUDI'S APPLICATION

[7] The proposed evidence is described by Audi as: "a succinct sworn statement of an Audi representative[3] in relation to the facts and circumstances in dispute".

[8] The information in the sworn statement would be in relation to the following:

a) The fact that the Exhibits R-3, R-4 and R-6 Ms. Sciscente relies on to establish the Data Security Incident relate only to U.S. customers and interested buyers and were disseminated in the U.S. only;

b) Audi's voluntary disclosure of the Data Security Incident to the Commission d'accès à l'information ("CAI") on June 15, 2021 (the "CAI Letter") and its scope and extent in Quebec;

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1 Modified authorization application, par. 32.
2 *Ibid*., par. 35 and 36.
3 Douglas Black, Director, Business Development.

> c) The notice Audi sent to Ms. Sciscente and other Audi customers and interested buyers in Canada to advise them of the Data Security Incident and its scope and extent (the "ACI Notice")

[9] Audi posits that sworn statement will be relevant and useful to allow the Court to conduct an efficient verification of the criteria of Article 575 C.C.P.

[10] As to the examination of Ms. Sciscente, Audi raises concerns and questions about the timing between her reading about the breach, mandating lawyers and filing the authorization application:

> Accordingly, over a 3-day period that includes a weekend, the Plaintiff would have learned about the Data Security Incident, conducted an investigation and retained and mandated a lawyer to draft and initiate this proposed class action;[4]

[11] Audi also raises the following:

> More importantly, the Equifax Canada email confirmation, Exhibit R-7, was sent to the Plaintiff on June 14, 2021, at 6:06:53 pm, i.e. after both the Application for Authorization to Institute a Class Action and the Claim[5] were filed, indicating that:
>
> a) Upon seizing the court on June 14, 2021, the Plaintiff had not purchased twelve months of Equifax Canada credit monitoring services, contrary to her firm allegation;
>
> b) Upon filing the Claim, the Plaintiff had not purchased the recurring monthly subscription of the Equifax Canada Complete Premier credit monitoring services, contrary to her firm allegation;
>
> In addition, the proper consideration of the Claim and Exhibit R-5 reveal the following:
>
> a) The Claim is silent as to when the Plaintiff would have read the "TechCrunch.com article" that incepted the Claim and how it was brought to her attention;
>
> b) Unlike all other media articles included in Exhibit R-5 which disclose the date they were printed out of the Internet and their respective URL, the "TechCrunch.com article" was edited to remove its date of printing and its URL;[6]

[12] Audi posits that the examination of Ms. Sciscente will provide the Court with useful and relevant information with respect to the following:

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4 Par. 12 of Audi's application.

5 The Claim is the Corrected and Amended Application for Authorization to Institute a Class Action dated June 14, 2021.

6 Pars. 13 and 14 of Audi's Application.

a) When and how the Plaintiff became aware of the Data Security Incident and the facts alleged in the Claim, including the TechCrunch.com article;

b) The circumstances and timing of the Plaintiff's purchase of credit monitoring services;

c) The anxiety, stress, inconvenience, loss of time and/or fear the Plaintiff would have experienced at the time the Claim was filed;

d) The nature and extent of the enquiry the Plaintiff conducted in relation to the Claim;

e) The Plaintiff's knowledge of the impact of the Data Security Incident on other proposed class members;[7]

2. THE SWORN STATEMENT

[13] The proposed statement generally reflects the purpose that Audi attributes to it.

[14] With respect to the utility of Exhibits R-3, R-4 and R-6 the following paragraph is the most relevant:

5. However, Exhibits R-3, R-4 and R-6 were not disseminated in Canada, but rather in the United States only:

a) Exhibit R-3 is the template Notice from Audi of America ("AoA") dated June 11, 2021 which was sent only to U.S. customers and interested buyers whose sensitive Personal information was included in the Data Security Incident;

b) Exhibit R-4 is the notification letter addressed to the Attorney General of the State of Maine by U.S. counsel for Volkswagen Group of America ("VWGoA"), on behalf of its operating divisions AoA and Volkswagen of America, regarding a security incident affecting residents of Maine only;

c) Exhibit R-6 is the IDX document providing information on the enrollment process for the crédit monitoring services offered only to U.S. customers and interested buyers.

[15] And as to Audi's voluntary disclosure, the following paragraph is useful:

6. On June 16, 2021, ACI, through its attorneys Bennett Jones LLP, issued a letter to the Commission d'accès à l'information ("CAI") to advise it of the Data Security Incident on a voluntary basis (the "CAI Letter"), as appears from a copy of the CAI Letter dated June 16, 2021, Exhibit ACI-1.

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[7] Par. 16 of Audi's application.

[16] The content of the letter is set out in a subsequent paragraph.

[17] The statement notes that a notice of the breach was sent to Ms. Sciscente and other customers.

[18] Finally, there is an indication that Audi does not believe that Volkswagen customers were affected by the breach.

3. MS. SCISCENTE'S POSITION

[19] Ms. Sciscente opposes the production of the additional evidence into the record. She posits that Audi: "…has the burden to prove and to convince the Court that such evidence and examination are essential and indispensable for the exercise of determining whether the criteria of Article 575 C.C.P. are met (not that they are useful or perhaps required at the subsequent merits stage of the case)."[8]

[20] It seems somewhat unclear in her arguments what her position is on the production of the proposed sworn statement.

[21] With respect to the purchase of the protection purchased from Equifax, she notes that the amended application was only filed on June 15, 2021, after the purchase of the additional protection.

4. THE LAW

[22] The principles governing both the right of a defendant to examine a petitioner in relation to the allegations of an authorization application and a defendant's right to adduce additional evidence are well explained by Justice Courchesne in *Option Consommateurs* c. *Samsung Electronics Canada inc*.:

> *[11] Le Tribunal rappelle certains principes émis par les tribunaux et qui doivent être considérés lorsqu'une demande d'interrogatoire et de communication de documents pré-autorisation lui est soumise :*
>
> *- 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.;*

[8] Par. 20 of Plaintiff's written argument.

> *- 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 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, 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 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.*[9]
>
> [References omitted; The Court's underlining]

[23] In *Auger* c. *General Motors*, Justice Conte considers the production of additional evidence in this way:

> [11] Nevertheless, as the facts alleged by Petitioner are deemed to be true, the court has discretion to allow Respondent to adduce additional evidence where such evidence would be relevant to its role in filtering out proposed class actions which have no reasonable chance of success on the merits. In that light, courts have permitted a party to correct allegations which are clearly false or complete the record at the authorization stage.[10]
>
> [Reference omitted]

[24] On the question of appropriate evidence, one might also consider the judgment of Justice Lucas in *Seigneur* c. *Netflix International*:

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9 2017 QCCS 1751.
10 2018 QCCS 2510.

> *[27] Avec égards, le Tribunal estime qu'en l'espèce, la demande d'autorisation présente une description partielle seulement des circonstances relatives à l'implantation des changements de tarification. Or, au moyen de courts affidavits et de quatre pièces, Netflix entend préciser ces éléments factuels et ainsi favoriser la compréhension de sa façon d'initier des changements pour compléter cette description, ce que le Tribunal estime nécessaire et utile dans les circonstances.*
>
> *[28] En effet, il convient d'autoriser une preuve qui donne un portrait plus complet de la situation et favorise une meilleure compréhension du contexte factuel de la demande, permettant ainsi une vérification efficiente des critères de l'article 575 C.p.c.*
>
> *[29] En l'occurrence, sans s'avancer dans le domaine de la preuve et du fond, les informations succinctes contenues dans les affidavits, ainsi que les bannières et courriels présentés sont intimement liées aux faits tenus pour avérés, et semblent a priori ne pas les contredire, mais plutôt les compléter, ce qui pourrait être pertinent dans la détermination des conditions d'application de l'article 575 C.p.c.*[11]

[25] Justice Sheean's recent judgment in *Mireault* c. *Loblaws inc.* is also helpful to understand the limits of a pre-trail examination of the proposed representative:

> *[19] Les faits à la base du recours individuel du demandeur sont importants pour déterminer si le recours doit être autorisé et si le demandeur peut agir à titre de représentant.*
>
> *[20] De même, les tribunaux permettent souvent un interrogatoire pour valider les capacités du demandeur à agir comme représentant, surtout en présence d'allégations vagues et générales dans la demande d'autorisation.*[12]

5. ANALYSIS

5.1 The Proposed Sworn Statement

[26] Paragraphs 4 and 5 of the proposed sworn statement provide the context of exhibits R-3, R-4 and R-6 and meet the limited criteria that allows the Court to permit the production of evidence. They complete the somewhat vague allegations of the authorization application with respect to these exhibits.

[27] Curiously, in the authorization application there is no reference to the steps that Audi took to advise the Quebec Commission d'accès à l'information of the breach. This said, paragraphs 6 and 7 of the proposed sworn statement setting out those steps do not serve to complete or demonstrate the falsity of any of the allegations of the authorization application at this juncture. The fault impugned to Audi is not in relation to its

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11 2018 QCCS 1275
12 2021 QCCS 2197.

communication to the Commission, but rather its failure to properly inform its customers, including Ms. Sciscente.

[28] Paragraphs 6 and 7 will not be authorized in the sworn statement to be produced.

[29] More surprisingly, there is no mention of the notice Ms. Sciscente herself received from Audi. Paragraphs 8 and 9 of the proposed sworn statement complete the vague and clearly incomplete allegations as to this element of the authorization application and are essential to allow the Court to determine whether the criteria of article 575 C.C.P. are satisfied.

[30] The same can be said for paragraph 10. That apparently no Canadian Volkswagen customers were impacted by the breach is an essential element in relation to the ultimate definition of the class in the event that the action is authorized.

5.2 The Examination of Ms. Sciscente

[31] One might summarize the words of Justices Courchesne and Sheean, as they relate to an application to examine a plaintiff, by saying that it will only be appropriate where the degree of vagueness around the factual allegations of the authorization application prevents the Court from carrying out an adequate analysis of whether or not the criteria of article 575 C.P.C. are satisfied. Is this the case in the present matter?

[32] The real issues in the present matter center around Ms. Sciscente personal right of action and perhaps her ability to adequately represent the group.

[33] With respect to when she read the TechCrunch article (exhibit R-5), it is true that the application is vague as to the time that she read it. However, it was published on June 11, 2021, so one knows that she read it between then and the moment that the application was signed on June 14. More precision is not necessary at this juncture to allow the Court to evaluate the article 575 C.C.P. criteria.

[34] The issue of the timing of the purchase of the Equifax protection is more troublesome as the only document offered as evidence is the Equifax confirmation of the purchase (exhibit R-7), the timing of which seems to be after the initial application and even the corrected one were signed. It is unclear when Ms. Sciscente actually purchased the protection and as this is an element of her action, questioning her to obtain clarification is appropriate.

[35] As to the degree of anxiety and stress suffered by Ms. Sciscente as a result of the breach, it is not a topic for pretrial examination. That the breach caused her stress is to be taken as true at this juncture and the extent of it is a matter for the merits.

[36] On the question of any verification, inquiry or investigation that Ms. Sciscente would have conducted, or any actual action she would have taken to validate her contentions, in the Court’s view questioning her is not appropriate in the context of the

present matter. It is evident from both the factual allegations of the application and the evidence that Audi will be allowed to adduce that the class will be a large one. One can assume that a reasonable consumer upon becoming aware of the possible theft of his or her personal data would be concerned.

[37] In addition the obvious size of the group in some measure lowers the bar as to the scope of the inquiry that a representative must make. This was explained recently by the Court of Appeal in *Apple Canada inc*. c. *Badaoui*:

> *[29] Comme le soulignait récemment ma collègue la juge Bich, dans l'arrêt Godin c. Aréna des Canadiens inc., l'une des conditions d'autorisation d'une action collective est l'existence même d'un groupe. Toutefois, on remarque au cours des dernières années que le devoir d'enquête imposé au demandeur d'autorisation pour l'identification d'un groupe a été tempéré. Le niveau de recherche à effectuer dépend essentiellement de la nature du recours entrepris ainsi que de ses caractéristiques. Lorsqu'il est évident qu'un grand nombre de consommateurs se retrouve dans la même situation que le demandeur, il devient moins important de tenter de les identifier. Le juge Brown, dans l'arrêt L'Oratoire Saint-Joseph, cite d'ailleurs l'arrêt de notre Cour dans Lévesque c. Vidéotron s.e.n.c. et il mentionne ceci :* […][13]

6. PLAINTIFF'S REQUEST TO EXAMINE DOUGLAS BLACK

[38] In the event that the Court allows the production of the sworn statement Plaintiff seeks to examine him on its allegations. Plaintiff in her written argument alludes to the following elements for potential questions[14]:

a) Par. 5 c) – why credit monitoring services have been offered to "U.S. customers and interested buyers" only, but not offered to Canadians affected by the same data breach (as appears from Exhibit ACI-2);

[…]

p) Par. 8 – whether there is evidence of Plaintiff having actually received the "ACI Notice" sent to an address in Saint-Laurent, Quebec;

q) Par. 8 – how and to whom exactly the ACI Notices were sent and if its was not sent to everyone included in the proposed Class herein, including whether any such notices were returned to Defendant as undeliverable;

r) Par. 9 a) – how "ACI was alerted" about the data breach;

s) Par. 9 a) – the identity of the "unauthorized third party";

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13 2021 QCCA 432.

14 Par 42. The Court only reproduces the elements relating to those sections of the sworn statement that the Court will allow to be produced.

t) Par. 9 b) – what were the conclusions of the “investigation”;

u) Par. 9 c) – the investigation conclusions are not filed nor is the name of the “vendor” (who is also mentioned multiple other times in the sworn statement);

v) Par. 9 d) – the details of the “information” which was breached;

w) Par. 9 e) – the unnamed “vendor” is mentioned again and the affiant does not clarify what is the so-called “source of the incident” which was apparently identified;

x) Par. 9 f) – explaining what “in some instances” is referring to precisely, especially as regarding the putative Canadian Class herein;

y) Par. 9 g) – which “authorities” have been informed;

z) Par. 9 g) – which “external cybersecurity experts” is being referred to and what conclusions or recommendations have been provided;

aa) Par. 9 g) – which “steps” have been “taken” in order to “address the matter with the vendor” (vendor still unnamed);

bb) Par. 10 – explanations as to how this paragraph can purport to conclude and attest to the Court that “individuals who purchased or leased Volkswagen-branded vehicles or interest buyers of Volkswagen vehicles in Quebec or in Canada” were “not affected”, whereas at paragraph 7 d) of the sworn statement, the affiant clearly confirms and attests that the “third party obtained limited personal information received from or about U.S. and Canadian customers and interested buyers from a vendor used by Audi, Volkswagen and some authorized dealers.”;

6.1 The Law

[39] In a recent judgment in the matter of *Elkoubi* c. *TD Waterhouse Canada Inc*.[15] the undersigned considered the right of a plaintiff to examine a declarant when the Court has authorized the production of a sworn statement. The principles for permitting such an examination were also considered by Justice Chantal Tremblay in *Salazar Pasaje* c*. BMW Canada Inc*.:

> [19] The Court refuses Applicant’s request to cross-examine the affiants since the latter did not demonstrate the necessity of such examinations to present her legal syllogism at the authorization hearing and the respect of the other criteria set forth in article 575 of the *Civil Code of Procedure* (CCP). Furthermore, the credibility of these witnesses is not at issue at the authorization stage and the

[15] 2021 QCCS 3691.

> Applicant can argue what in her view constitutes hearsay in reference to the Sworn Declarations.[16]

[40] An example of an examination being permitted is provided by the judgment of Justice Sheehan in *Holcman* c*. Restaurant Brands International inc*.:

> *[23] La déclaration de monsieur Moore comporte plusieurs paragraphes dont plusieurs ne sont pas à la connaissance du demandeur.*
>
> *[24] Même si le droit à un tel interrogatoire de l'affiant n'est pas automatique, les tribunaux permettent généralement de procéder à un tel interrogatoire en limitant sa portée dans le temps et aux éléments soulevés par la déclaration assermentée.*
>
> *[25] Un interrogatoire apparait approprié afin d'aider le juge qui sera saisi de la demande d'autorisation à différencier les faits qui soulèvent un débat de ceux qui ne font pas l'objet de contestation*.[17]
>
> (References omitted)

6.2 Analysis

[41] The legal syllogism in the present matter is summarized by Plaintiff as follows:

> 9. When a data breach affecting approximately 3.3 million Consumers occurs, Defendants had the obligation to immediately and accurately notify its Customers in order to help them prevent further fraud, identity theft, financial losses, losses of time, stress and inconvenience.
>
> 10. This lawsuit stems from Defendants' failure to follow these obligations.[18]

[42] The Court must also bear in mind that its determination of whether to authorize the proposed class action will in large measure be based on whether Plaintiff has demonstrated that she has a personal cause of action.

[43] The Court concludes that Mr. Black may only be questioned on a very limited number of the elements in the sworn statement:

- whether there is evidence of Plaintiff having actually received the "ACI Notice";
- how Audi Canada was alerted about the data breach;
- the basis for the affirmation that the Data Security Incident did not affect individuals who purchased or leased a Volkswagen-branded vehicles or interested buyers of Volkswagen vehicles in Quebec or in Canada.

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16 2018 QCCS 5635.
17 2021 QCCS 2203.
18 Corrected and Amended Application for Authorization to Institute a Class Action.

[44] The other elements may well be relevant in the event that the class action is authorized, but do not assist the Court with the proposed legal syllogism at this juncture.

WHEREFORE, THE COURT:

[45] **GRANTS** Defendant Audi Canada Inc.'s Application for Authorization to Adduce Relevant Evidence and to Examine the Plaintiff in part;

[46] **AUTHORIZES** Defendant Audi Canada to produce the proposed sworn statement of Douglas Black with the exception of paragraphs 6 and 7;

[47] **AUTHORIZES** Defendant Audi Canada to examine Plaintiff for a period of no more than 30 minutes, such examination to be limited to questions relating to the timing of the purchase of the Equifax protection by Plaintiff;

[48] **AUTHORIZES** Plaintiff to examine Douglas Black on his sworn statement for a period of no more than 30 minutes, such examination to be limited to questions relating to:

- whether there is evidence of Plaintiff having actually received the "ACI Notice";
- how Audi Canada was alerted about the data breach;
- the basis for the affirmation that the Data Security Incident did not affect individuals who purchased or leased a Volkswagen-branded vehicles or interested buyers of Volkswagen vehicles in Quebec or in Canada.

[49] **WITHOUT JUDICIAL COSTS.**

Thomas Davis

Signature numérique de Thomas Davis
Date : 2022.03.21 21:46:25 -04'00'

THOMAS M. DAVIS, J.S.C.

Me David Assor
Me Joanie Lévesque
Lex Group inc.
For the Plaintiffs

Me Vincent de l'Étoile
Me Caroline Deschênes
Langlois avocats, S.E.N.C.R.L.
For the Defendants

Judgment rendered on the basis of written representations.

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