

SUPERIOR COURT

CANADA
PROVINCE OF QUÉBEC
DISTRICT OF MONTRÉAL

N°: 500-06-000460-093

DATE: NOVEMBER 18, 2014

PRESIDING: THE HONOURABLE ANDRÉ PRÉVOST, J.C.S.

YVES BOYER
Plaintiff

v.

AGENCE MÉTROPOLITAINE DE TRANSPORT (AMT)
Defendant

JUDGMENT SETTLEMENT APPROVAL

[1] On September 3, 2010, the Court authorized the institution of the Class Action and authorized Yves Boyer to act as Representative of the following groups:

“Any person holding a TRAIN or TRAM card during the months of January and/or February 2009, and having used the commuter train service of the Agence Métropolitaine de transport (AMT) on the Deux-Montagnes railway line during the peak business hours, that is between 6 AM and 9 AM and between 4 PM and 7 PM on weekdays.”

“Any person holding a TRAIN or TRAM card during the months of January and/or February 2009, and having used the commuter train service of the Agence Métropolitaine de transport (AMT) on the Dorion-Rigaud railway line during the peak business hours, that is between 6 AM and 9 AM and between 4 PM and 7 PM on week days.”

[2] The trial of a thirteen day (13) duration was due to begin on November 3, 2014.

[3] However, on October 8, 2014, the Parties reached an Agreement in principle. Therefore, on October 16, the Court authorized the publication of a notice announcing the conduct of a hearing on

November 7 to approve the Settlement. The notice was published in accordance with the terms and conditions of the authorization.

THE TRANSACTION

[4] The transaction¹, concluded without admission of responsibility on the part of the Defendant, provides for its payment of a total sum of \$977,000 (the Settlement amount). This sum includes all legal fees and solicitor and client costs to be paid to Mr. Boyer's lawyers.

[5] The number of Class members is estimated to be 19,800. The Settlement amount corresponds to 50% of the average price paid by the members for their January or February 2009 monthly ticket. This amount is added to a 50% discount on the March 2009 monthly ticket already offered by the AMT to its clients.

[6] Given the large number of members involved, the transaction provides that a specialized firm, *Crawford Canada*, shall act as Claims Administrator.

[7] In order to determine the amount to be paid to each member, the Settlement amount shall be allocated in accordance with the following priorities:

- a. The Claims Administrator's fees and expenses;
- b. Mr. Boyer's lawyers' fees and expenses as approved by the Court;
- c. A \$1,500 amount to Mr. Boyer for his involvement as Representative;
- d. A maximum compensation amount of \$49 per member;
- e. Any remaining funds to organizations as approved by the Court, after deduction of the sums due to the Fonds d'aide aux recours collectifs, in accordance with the law.

[8] The net Settlement amount shall be distributed to the members on a claims' pro-rata basis, as approved by the Claims Administrator to a maximum of \$49.

[9] The claim procedure is simple.

[10] Within 60 days following the publication of the legal Settlement notice as provided herein, the members shall complete a Solemn Declaration Form. The Form shall be made available by the Claims Administrator, either directly or through its Web Site, as well as by Mr. Boyer's lawyers firm, Sylvestre, Fafard Painchaud s.e.n.c.r.l.

[11] The Form provides that each member shall:

- a. enter his name, his current address, (including the postal code), his phone number and his email address (where appropriate);

¹ R-5

- b. enter his January and February 2009 address, if different from his current address, including the postal code;
- c. confirm having held a monthly TRAIN or TRAM pass in January and/or February of 2009;
- d. confirm the route taken on the Dorion-Rigaud railway line or the Deux-Montagnes railway line in January and /or February 2009;
- e. provide a proof of address in the form of a valid piece of identity.

[12] Should there be funds remaining, the Parties agree to distribute these in equal amounts to two public transport charitable organizations, i.e. the *Alliance des regroupements des usagers du transport adapté du Québec* (ARUTAQ) and TRANSIT, *l'Alliance pour le financement des transports collectifs*.

TRANSACTION APPROVAL

[13] Section 1025 of the Québec Code of Civil Procedure² provides as follows:

1025. The transaction, acceptance of a tender or acquiescence, except where it is unconditional in the whole of the demand, is valid only if approved by the court. This approval cannot be given unless a notice has been given to the members.

The notice must state:

(a) that the transaction will be submitted to the court for approval, specifying the date and place of such proceeding;

(b) the nature of the transaction and the method of execution;

(c) the procedure to be followed by the members to prove their claims; and

(d) that the members have the right to present their arguments to the court as regards the transaction and the distribution of any balance remaining.

The judgment determines, if such is the case, the terms and conditions for the application of articles 1029 to 1040.

[14] Following the publication of the notice approved by the Court on October 16, 2014, as many as 83 communications were received by Mr. Boyer's lawyers. None of these objected to the Agreement reached by the Parties. No objections had been raised either at the time of the hearing last November 7.

² R.S.Q.,c. C-25.

[15] When asked to approve a transaction, the court must first ensure that the transaction is fair, equitable and in the best interest of the Class members³. The guiding criteria are generally as follows⁴ :

- The Class Action likelihood of success;
- The importance and nature of the administered proof;
- The terms and conditions of the transaction;
- The lawyers' recommendations and their experience;
- The cost of future expenses and the probable duration of the lawsuit;
- The recommendation of a neutral third party, where appropriate;
- The number and nature of objections to the transaction;
- The good faith of the Parties;
- The absence of collusion.

[16] None of these criteria is decisive per se. Each case is one of a kind⁵.

[17] We must also remember that as a matter of principle, the court must encourage the settlement of lawsuits through negotiations, this generally being in the best interest of the Parties⁶.

[18] Let us apply these criteria to the transaction at issue.

a. The Class Action's likelihood of success.

[19] The outcome of this Class Action is hardly predictable.

³ Bouchard c. Abitibi Consolidated, REJB 2004-66455 (C.S.), par. 16.

⁴ Dabbs c. Sun Life, 1998 O.J. 1598 (C.S.J. Ont.); Pellemans c. Lacroix, 2011 QCCS 1345, par. 20; Tremblay c. Lavoie, 2014 QCCS 4955, par.13.

⁵ Option consommateurs c. Fédération des Caisses Desjardins du Québec, 2011 QCCS 4841, par. 26.

⁶ Pellemans c. Lacroix, précité, note 4, par. 21; Option consommateurs c. Fédérations des Caisses Desjardins du Québec,, Id., par. 27.

[20] The AMT puts forward a serious line of defense, namely regarding the scope of its obligations under its transportation contract with its users, the weather conditions that prevailed in January and February 2009 as well as its quantum of damages.

b. *The importance and nature of the administered proof*

[21] The proof turns out to be complex in more ways than one.

[22] Firstly, one has to establish that the AMT is at fault and that there is a causal link to the damages suffered by the members. Yet, the commuter train service disruption in January and February 2009 could be due to mechanical as well as organizational problems, as well as to the specific weather conditions that prevailed at the time.

[23] The proof of damages suffered by the members also present a challenge as they can vary greatly from one member to the other.

c. *The terms and conditions of the transaction*

[24] The transaction provides for an AMT payment of an amount corresponding to 50% of the total price paid by the 19,800 members for their January or February 2009 monthly ticket.

[25] According to the scenarios presented to the Court, if 63 % or less of the members (12,500) file a claim, they will receive the maximum compensation of \$49 after payment of fees and expenses.

[26] After 12 500 claims, the net amount per member drops progressively to reach a minimum amount of a little over \$29.20, if the 19,800 members exercise their rights. Nonetheless, this represents 30% of the price paid for their monthly commuting ticket.

[27] Such compensation is added to the 50% discount already agreed to by the AMT on the March 2009 monthly commuting tickets.

[28] Given that the AMT trains' punctuality rate for January and February 2009 remained between 82.8 % and 92.8 %, this compensation appears to be fair and reasonable.

d. *The lawyers' recommendations and their experience;*

[29] The lawyers representing the Class members as well as those representing the Defendants have a solid Class action experience.

[30] They state that they are quite satisfied with the Settlement reached and do not hesitate to recommend its approval.

d. *The cost of future expenses and the probable duration of the lawsuit.*

[31] The lawsuit was due to last thirteen (13) days with its ensuing expenses.

[32] The litigation settlement also allows us to avoid the costs of an appeal.

e. The lawyers' recommendation and their experience

[33] No negative comment has been received since the publication of the notice approved by the Court on October 16, 2014.

[34] The transaction also provides for the payment of a compensation amount of \$1,500 to Mr. Boyer as Representative.

[35] No statutory provision currently provides for the payment of such compensation. However, Section 593 of the new *Code of Civil Procedure*⁷ will allow it when it takes effect.

[36] Nonetheless, some judgments have allowed such compensation when an agreement by mutual consent of a class action provided for it specifically⁸. Usually, this compensation was by and large a small compensation in comparison with the Settlement amount. This is the case here also.

[37] The file shows an active involvement on the part of Mr. Boyer. He was the one who approached the lawyers to launch a class action. He revised the procedures prepared by them and participated in the negotiations that led to the out-of-court settlement.

[38] He also participated in press conferences and reacted to the many comments received from the commuter train users that he met.

[39] Therefore it does not seem appropriate to reject the approval of the transaction for this reason only.

[40] Finally, the transaction appears to be fair, reasonable and in the best interests of the members. Thus, it must be approved.

APPROVAL OF FEES AND DISBURSEMENTS

[41] On February 10, 2009, Mr. Boyer signed a document entitled *Contingency Fee Agreement and Professional Mandate* with the Sylvestre Fafard Painchaud Law Firm⁹ (The Contingency Fee Agreement).

[42] *Sylvestre Fafard Painchaud* shall assume the risk related to the solicitor and client costs in case of dismissal¹⁰. In return, Mr. Boyer accepts to pay the following extra-judicial fees based on the compensation obtained and the progress made:

⁷L. Q. 2014,c.1.

⁸ *Union des consommateurs c. Pfizer Canada inc.*, 2012 QCCS 16, par. 70 à 75; *Lavoie c. Régie de l'assurance maladie du Québec*, 2013 QCCS 866, par. 45 à 56.

⁹ R-11.

¹⁰ Taking into account the financial assistance as provided by the Fonds d'aide aux recours collectifs

- a. if the sum is collected before the filing of the “Declaration of merits”: 20% on the first \$1,500,000 and 15% on the surplus amount;
- b. if the sum is collected after an appeal on the authorization or after the filing of the “Declaration of merits”; 25% of all sums collected;
- c. if the sum is collected after the filing of a notice of appeal before the Court of Appeal: 30% of all sums collected.

[43] The motion for approval of the transaction indicates that as of November 4, 2014, Mr. Boyer’s lawyers had spent a total of 733.06 hours, at hourly rates varying from \$100 to \$450 based on the experience and the status of the person involved, for a total of \$212,388.

[44] We must remember that, pursuant to the transaction, Mr. Boyer’s lawyers’ legal fees are calculated after deduction of the Claims Administrator’s fees and expenses. Thus, applying a percentage of 25% as stipulated in the Contingency Fee Agreement, the extra-judicial fees payable to Mr. Boyer’s lawyers shall vary from \$238, 832.50 if the number of claims is 7,500 up to approximately \$214,000 if this number is 19,800.

[45] Thus, applying the percentage stipulated in the Contingency Fee Agreement, Mr. Boyer’s lawyers recover an amount barely more than the billable time at an hourly rate. One must also take into account that the percentage fee covers the time spent on individual claims, which is an advantage.

[46] The Contingency Fee Agreement benefits from a *prima facie* validity which will be dismissed only to the extent that it is demonstrated that it is not fair and reasonable for the members under the circumstances of the case, or for one of the reasons of nullity of the contract as stipulated in the Québec Civil Code¹¹ .

[47] The case-law often refers to the terms and conditions of Sections 3.08.01 and 3.08.03 of the *Code of ethics of advocates*¹² to establish the fair and reasonable character of a lawyer’s billable fees:

3.08.01. The advocate must charge and accept fair and reasonable fees.

3.08.02. The fees are fair and reasonable if they are warranted by the circumstances and correspond to the professional services rendered. In determining his fees, the advocate must in particular take the following factors into account:

- (a) experience;
- (b) the time devoted to the matter;
- (c) the difficulty of the question involved;
- (d) the importance of the matter;

¹¹ *Pellemans c. Lacroix*, précité, note 4, par. 50.

¹² R.R.Q. c. B-1, r.1.

- (e) the responsibility assumed;
- (f) the performance of unusual professional services or professional services requiring exceptional competence or celerity;
- (g) the result obtained;
- (h) the judicial and extrajudicial fees fixed in the tariffs.

3.08.03. The advocate must avoid all methods and attitudes likely to give to his profession a profit-seeking or commercial character.

[48] It does not seem necessary to review the application of each of the factors listed in Section 3.08.02 regarding the circumstances of this case. The Court has already raised the difficulties related to this lawsuit as well as the specific experience of lawyers, notably the lawyer representing the members of the Class Action.

[49] We should add that the percentage stipulated in the Contingency Fee Agreement is not different from those generally charged in similar cases, which range between 15% and 33%¹³.

[50] To conclude, the Court shall apply the Contingency Fee Agreement to determine the extra-judicial fees to be paid to Mr. Boyer's lawyers.

[51] The disbursements in the amount of \$12,419.87 are also approved.

[52] The Fonds d'aide aux recours collectifs shall be reimbursed directly from this sum for the financial assistance provided for this case, including \$12,000 in fees and \$7,988.15 in disbursements.

FOR THESE REASONS, THE COURT:

[53] **GRANTS** the Plaintiff's motion

[54] **STATES** that the R-5 transaction is fair, reasonable and in the best interest of the members;

[55] **APPROVES** the R-5 transaction and **ORDERS** that it be implemented and applied in conformity with its terms and conditions and the terms and conditions of this judgment.

[56] **ORDERS AND DECLARES** that this judgment shall have binding effect on all Class members who have not validly excluded themselves from this Class Action.

[57] **ORDERS AND DECLARES** that when this judgment shall have authority of a final judgment, the Representative and each member shall be deemed to have given a final, complete and irrevocable release to the Defendant as well as to all its directors, officers, administrators,

¹³ *Pellemans c. Lacroix*, précité, note 4, par. 54.

employees, agents, representatives, successors and underwriters with regard to any lawsuit, action, cause of action, claim and responsibility, of whatever nature, based on a contractual remedy, or other, and related to the allegations of the application introducing proceedings, including regarding (i) any alleged disruption of the AMT commuter train service on the Dorion-Rigaud and Deux-Montagnes railway lines in January and February 2009 and (ii) any alleged damage having resulted from such disruption;

[58] **ORDERS AND DECLARES** that for the purpose of the administration and application of this judgment and transaction, the Court shall retain an ongoing supervisory role;

[59] **ORDERS** that Crawford Canada be designated as the Claims Administrator;

[60] **ORDERS AND DECLARES** that the Defendant shall have no responsibility related to the administration and management of the claims process;

[61] **ORDERS** that the Settlement amount of \$977,000 be deposited in the Claims Administrator's Trust Fund within 30 days following the coming into effect of this judgment.

[62] **ORDERS AND DECLARES** that the R-5 transaction is a transaction pursuant to Sections 2631 to 2637 of the *Quebec Civil Code* and that it is pursuant to this certified Settlement;

[63] **ORDERS** that the remaining funds, as the case may be, shall be paid in equal parts to l'Alliance des regroupements des usagers du transport adapté du Québec (ARUTAQ) and to Transit, l'Alliance pour le financement des transports collectifs;

[64] **ORDERS** that the amounts due to the Fonds d'aide aux recours collectifs shall be paid to it out of the funds remaining in accordance with Section 1(1) of the *Règlement sur le pourcentage prélevé par le Fonds d'aide aux recours collectifs*¹⁴.

[65] **APPROVES** the R-10 Approval Notice in its English and French formats.

[66] **ORDERS** that the R-10 Notice be distributed according to the following terms and conditions, at the Defendant's expenses.

- a) that the R-10 Notice be distributed in French and in English, given the presence of the Anglophone clientele of the Montreal's West Island among the members;
- b) that the R-10 Notice be published in color in French and English in the stations, except for those stations where there is only one display stand where the posting will be in French only, in a 20 by 28 format, from November 21 to December 5, 2014 inclusively;
- c) that the R-10 Notice shall be published on the following social networks:
 - i. on the AMT Twitter feed;

¹⁴ R.R.Q., c. R-2.1,r.2.

- ii. on the AMT Facebook page;
 - iii. on the CNW Twitter feed, by the Claims Administrator;
 - iv. in a short press release published by the Claims Administrator on the CNW Quebec portion announcing the approval and directing the readers to visit the Claims Web Site.
- d) that the Claims Web Site set up by the Claims Administrator be bilingual, allows the completion of the Claims Form on-line before printing and be accessible at www.crawford.reclamationAMT.ca and www.crawford.AMTclaim.ca;
- e) that the R-10 Notice be published once in English, at the members' expenses, in a quarter page format in the daily newspaper *Montreal Gazette*, and once in French, at AMT's expenses, in a 1/3 page format in the daily newspaper *24 Heures*;

[67] **APPROVES** the R-11 Contingency Fee Agreement;

[68] **ORDERS** that the fees corresponding to 25% of the Settlement amount after deduction of the fees and expenses of the Claims Administrator, plus applicable taxes, be paid out to Sylvestre Fafard Painchaud, s.e.n.c.r.l., from the Claims Administrator's Trust Fund;

[69] **ORDERS** that the disbursements to the amount of \$12,419.87 plus applicable taxes, be paid out to Sylvestre Fafard Painchaud from the Claims Administrator's Trust Fund;

[70] **ORDERS** that Sylvestre Fafard Painchaud pay the Fonds d'aide aux recours collectifs from the fees and disbursements received, pursuant to this judgment, the sum of \$19,988.12 as reimbursement for financial assistance obtained;

[71] **ORDERS** that the Claims Administrator submit to the Court the number of claims received, within 90 days following the notice distribution referred to in paragraph 66 herein;

[72] **THIS WITHOUT COSTS.**

Signature on original
ANDRÉ PRÉVOST, J.C.S.

Me Normand Painchaud
Sylvestre Fafard Painchaud
For the Plaintiff

Me Marc-André Boutin
Me Michael Lubetsky
Davies Ward Phillips & Vineberg, sencl, srl
For the Defendant

Hearing Date: November 7, 2014