

**SUPERIOR COURT
(CLASS ACTIONS)**

CANADA
PROVINCE OF QUEBEC
DISTRICT OF MONTREAL

No.: 500-06-000894-176

DATE: February 29, 2024

BY THE HONOURABLE DOMINIQUE POULIN, J.S.C.

MICHEL CARRIÈRE
Plaintiff

v.

GEN DIGITAL INC. (to the rights of DEFENDANT SYMANTEC CORPORATION)
Defendant

and

FONDS D'AIDE AUX ACTIONS COLLECTIVES
Impleaded party

JUDGMENT
(APPROVAL OF SETTLEMENT)

OVERVIEW

[1] The Plaintiff is seeking the approval of a transaction concluded with the Defendant in the course of a Class Action instituted on behalf of 565 000 class members in Quebec.

[2] The Class Action alleges, *inter alia*, that the Defendant sold to the class members anti-virus products which were affected by design defects and claims that the class members should be indemnified for their loss of use of the products.

[3] The Defendant denies any liability. It invokes the absence of any serious design defect. Furthermore, it raises that the Plaintiff fails to demonstrate that the alleged defect

would have diminished the protection afforded by its anti-virus products or that it would have occasioned a prejudice to the class members.

[4] The Settlement was concluded shortly prior to the beginning of a trial which was scheduled to take place during the month of October 2023 for a duration of 17 days.

[5] The Settlement covers a parallel class action instituted in Ontario, subject to its approval in that other province.

[6] For the reasons that follow, the Court approves the Settlement and the reimbursement of the fees and disbursements of the Plaintiff's counsel.

ANALYSIS

1. THE FAIRNESS AND REASONABLENESS OF THE TRANSACTION AND THE BEST INTERESTS OF THE CLASS

1.1 Legal principles

[7] The approval of the Settlement is subject to the validation that it is fair, equitable, and that it is in the best interests of the class members.

[8] The Court of Appeal sets the applicable legal framework in *A.B. c. Clercs of St. Viator of Canada*:¹

[33] A settlement entered into in the context of a class action is valid only if it is approved by the court, in accordance with article 590 *C.C.P.*

[34] Before approving a transaction, the judge must be satisfied that it is "fair, equitable and in the best interests of the members". As part of his analysis, he must "bear in mind the broad principles and objectives underlying class actions, weigh the advantages and disadvantages of the settlement, as well as the reciprocal concessions, the risks of litigation and the costs involved." In practice, the assessment of the fairness and reasonableness of the transaction is often based on the following criteria, imported from American law:

- The likelihood of success of the litigation;
- The importance and nature of the evidence adduced;
- The terms, conditions and modalities of the transaction;
- Lawyers' recommendations and experience;

¹ *A.B. c. Clercs de Saint-Viateur du Canada*, 2023 QCCA 527, ("**Clercs de Saint-Viateur**"), at paras. 33 and 34.

- The anticipated costs and likely duration of the litigation;
- If applicable, the recommendation of a neutral third party;
- The nature and number of objections to the transaction;
- The good faith of the parties and the absence of collusion.

[Translation; references omitted]

[9] The Court must approve the agreement as proposed, or refuse to ratify it. It does not have the discretion to amend the agreement or to approve it only partially.

1.2 The Settlement Terms, Conditions and Modalities

[10] The Settlement can be summarized as follows.

[11] The Settlement includes 565,000 members in Quebec and 640,000 members in Ontario. It provides for the collective recovery of a global monetary compensation of \$ 6,000,000, as well as an option for the obtention of a license or a discount on the purchase of another product of the Defendant.

[12] In essence, the class members who are not current clients of the Defendant must submit a claim form in order to obtain compensation:

- If they choose option 1, they will be entitled to \$ 5 cash compensation and a license or discount code limited to 90 days (\$ 7.50 value).
- If they choose option 2, they will not be remitted any monetary compensation, but will receive a licence or discount code for 180 or 365 days depending on the number of years they held a licence during the class period (\$ 15 or \$ 30 value).

[13] Members who are current clients of the Defendant and who held a licence during the class period may either:

- choose to submit a claim form with the same options as the above members, or
- do nothing, in which case they will be deemed to have chosen option 2 and will automatically be granted a license or discount code without having to make a claim.

[14] The agreement provides for the possibility of a redistribution of the balance of the Settlement fund among members who have chosen Option 1 and who have held a licence for at least two years between July 24, 2010, and June 27, 2016, with a pro-rata reduction if the Settlement fund is found to be insufficient.

[15] The Settlement provides that the discount codes or free licenses will not be subject to an expiration date. The payment of the indemnity will be paid from a cash account in the amount of \$ 6,000,000, under the supervision of the Claims Administrator RicePoint. If there is a balance remaining after a second distribution of the amount of \$ 6,000,000 (and the interest generated), 47 % of it (representing the proportion of the members of the Québec class covered by the *Settlement*) will be deemed to be attributable to the Fonds d'aide aux actions collectives du Québec (the “**FAAC**”) in accordance with the *Regulation respecting the percentage withheld by the Fonds d'aide aux actions collectives*, F-3.2.0.1.1, r. 2. The remaining balance will be paid to a non-profit organization to be mutually agreed upon by the Parties and subsequently approved by the Court;

[16] In addition, the Settlement requires the Defendant to pay:

- An amount of \$ 5,040,000 plus taxes for counsel's fees in both Class actions, subject to the approval of the Courts of Quebec and Ontario;
- An amount of \$ 364,393.92 in disbursements (of which \$ 192,393.92 represents the portion relating to the Quebec Class Action);
- An amount of \$ 10,000 plus taxes for the Plaintiffs' expert review of the lists of class members detailing information as regards their coordinates and purchases of products from the Defendant;
- The reasonable costs of administration of the Settlement by the Claims Administrator, as well as the costs of publishing notices to members, the whole being assessed by the Parties at \$ 250,000 plus taxes.

[17] In total, the benefits granted to the class members are estimated to \$ 30,000,000 by the Plaintiff's counsel.

[18] In consideration of the Settlement, the Defendant, which continues to deny liability, will receive a standard release on behalf of all class members who have not opted out of the Class Action.

[19] The Settlement is subject to the approval of the Courts of the two provinces.

1.3 Discussion

[20] The Court agrees with the Plaintiff's submission that the Settlement fulfills the primary purpose of the procedural vehicle of the class action, which is to promote access to justice for consumers with modest claims who would otherwise be deprived of it.

[21] The benefits conferred by the Settlement on the members of the Class Action, taken as a whole, are tangible and appreciable.

[22] In many cases, the benefits will correspond to the use of a standard antivirus product from the Defendant for a period of one year, net of any costs and disbursements.

[23] For many class members, the benefits of the Settlement will be awarded by a credit to the account associated to their credit card on file with the Defendant, even if they have not submitted a claim. The same applies as regards the attribution of discount codes for class members who currently have an account with the Defendant.

[24] The case involves many issues of facts and law and is strongly contested on issues of liability, prejudice and on the possibility of obtaining a collective recovery. Not only would the Plaintiff need to establish the existence of a defect afflicting the product, but also the existence of a prejudice, either by proving an intrusion into the systems protected by the product or by the demonstration of a correlative reduction of the class members' obligations as a consequence of the alleged deficiency.

[25] The Parties announced voluminous evidence to be adduced, including several hundred exhibits and technical expertise reports necessitating 17 days of hearing, including seven days of expert evidence. The Settlement avoids a costly trial for the Parties and for the administration of justice, not to mention the costs of a possible appeal.

[26] Counsel for the Plaintiff has no reluctance to recommend that the Court approve the Settlement.

[27] There is no question that the Plaintiff's lawyers are experienced in litigation, having led many class actions of all kinds. As Justice Bisson recently commented, "*Kugler Kandestin is widely recognized as a pioneer in class actions and is one of the leaders in this field. In particular, the firm has won and settled major class actions in the areas of sexual assault, dangerous or defective products, consumer law, and financial services that have lasted many years, including Imperial Tobacco Canada Itée v. Quebec Council on Tobacco and Health.*"²

[28] It is evidenced by the procedural history and by the fact that the Settlement took place after mediation that the good faith of the Parties is not in question.

[29] No class member opposes the transaction.

[30] The FAAC also thoroughly analyzed the wording of the Settlement, provided comments on its contents and defers to the Court as regards its approval.

[31] The Court considers that the Settlement is fair, equitable and in the best interests of the class members.

² *Schneider (Estate of Schneider) v. Centre d'hébergement et de soins de longue durée Herron inc*, 2021 QCCS 1808 at para. 71.

2. THE APPROVAL OF THE FEES AND DISBURSEMENTS OF COUNSEL

2.1 Legal principles

[32] The Court of Appeal sets out the legal framework applicable to the approval of fees in *Clercs de Saint-Viateur*.³ Justice Bisson, j.s.c. summarizes this framework as follows in *Option Consommateurs v. Panasonic Corporation*:⁴

[63] The Tribunal summarizes the applicable law as follows:

1. A fee agreement is presumed to be valid and can only be set aside if its application is not fair and reasonable to the members in the circumstances of the transaction under review;
2. No fee agreement binds the judge;
3. The criteria for judging the fairness and reasonableness of fees are based on those listed in section 102 of the *Code of Professional Conduct of Lawyers*, which are not exhaustive, namely: experience; the time and effort required and devoted to the matter; the difficulty of the matter; the importance of the matter to the client; the responsibility assumed; the provision of professional services that are unusual or require special skill or exceptional promptness; the result obtained; the fees prescribed by statute or regulation; disbursements, fees, commissions, rebates, costs or other benefits that are or will be paid by a third party with respect to the mandate entrusted by the client;
4. The respective weight to be given to these criteria may vary depending on the circumstances;
5. The range of percentages deemed reasonable by the courts is normally between 15 % and 33 % (or even 20 % to 33.33 %) of the settlement fund;
6. The Tribunal's analysis cannot be limited to determining whether the fee agreement provides for a percentage within a generally applied range;
7. Rather, the analysis process must begin with: (a) an assessment of all criteria set out in the *Code of Professional Conduct of Lawyers*, other than the multiplier; and (b) the taking into account of the risk assumed by lawyers. If it is concluded that the amount (not the percentage) of fees payable is reasonable, the analysis can end there. However, if the amount of the fee appears to be unreasonable, then the hours spent on the case should be taken into account and a multiplier should be applied to adjust the amount of the fee so that it becomes reasonable.

³ *Clercs de Saint-Viateur*, supra, note 1, at para. 55.

⁴ *Consumer Option v. Panasonic Corporation*, 2023 QCCS 3591, at para. 63.

[Translation, Reference omitted]

[33] Percentage fee agreements are intended to address the risk assumed by lawyers who fund the action over many years. As Justice Piché points out, *beyond the economic incentives to bring such actions, there is the reality of the practice where there are significant delays, a certain complexity of cases, a significant volume of evidence, and, above all, uncertainty as to the favourable outcome of the case and, therefore, as to the payment of fees.*⁵

[34] While mitigating the risks that lawyers assume, percentage-based fee agreements provide advantages by promoting access to justice for litigants who would not otherwise have the means to pursue a remedy. Such agreements should therefore not be discouraged and lawyers *are entitled to expect that their fee agreement will be respected.*⁶

[35] The Court of Appeal held that the risk assumed by the lawyers and the result obtained were important factors in the analysis, even taking precedence depending on the circumstances.⁷ The risk must be assessed at the time the lawyers are given the mandate.⁸

[36] The result takes into account, among other factors, the deterrent effects that may cause a substantial recovery for the class, even if negligible for each of the individual members. Indeed, “[t]he contribution to access to justice and the deterrence of misconduct may justify substantial fees to the extent that this type of action generates benefits for citizens that would not otherwise be attainable.”⁹

[37] The fact remains that the Tribunal must ensure that the agreement is not “*likely to give the profession a profit-making and commercial character*”.¹⁰ In this regard, the Court of Appeal emphasizes that care must be taken not to endorse the application of a fee agreement and the payment of considerable fees in cases where the lawyer's work does not justify it, for example, if he or she has merely followed the course of a case in another jurisdiction.¹¹

[38] The application of fee agreements often leads to an award which exceeds the time actually spent on the matter by the lawyers. It is therefore proscribed to undertake the analysis by considering the value of the actual time spent, given the circular result of the exercise. For this reason, the Court of Appeal stated that the analysis must begin by

⁵ *Bergeron v. Procureur général du Québec*, 2023 QCCS 1264 (CanLII) at para. 94 (Translation).

⁶ *Clercs de Saint-Viateur*, supra, note 1, at para. 57.

⁷ *Id.* at para. 66.

⁸ *Id.* at para. 54.

⁹ Pierre-Claude Lafond, *Libres propos sur la pratique de l'action collective*, Montréal, Yvon Blais, 2020, p. 274 [P.-C. Lafond, *Libres propos ...*], cited by the Court of Appeal in *Clercs de Saint-Viateur*, at para. 55.

¹⁰ *Code of Professional Conduct of Lawyers*, CQLR, c. B-1, r. 3.1, s. 7.

¹¹ *Clercs de Saint-Viateur*, supra, note 1, at para. 66.

taking into account the risk assumed by counsel and the other factors set out in the *Code of Professional Conduct*.

[39] If the fees appear unreasonable, the multiplier tool then becomes useful. In this regard, the Court of Appeal noted that the standard adopted by the Superior Court ranges from 2 to 3, but it does not necessarily ensue that a reduction of the fees will be warranted in the presence of a superior multiplier.¹²

2.2 Discussion

[40] There is no doubt that commencing a class action of the present nature entailed a considerable risk for the Plaintiff's counsel, including the possibility of not being compensated for all the work done if the class action is dismissed. Not being paid for several years while the case was ongoing burdened the aggregated risk factors.

[41] The Court accepts the Plaintiff's counsel submission that this risk appeared significant from the time of the signing of their fee agreement. More particularly, they explain that they anticipated that the Defendant would vigorously contest the action, deny wrongdoing, deny a causal connection to any damage, and vigorously contest the possibility of obtaining a class recovery, as the Defendant in fact did. They accepted this mandate regardless of the number of years the case was expected to last, knowing that the evidence would be technical and necessitated the hiring of specialized experts and that important resources would need to be devoted to this litigation, limiting the possibility of investing on other matters.

[42] As for the results obtained, the Plaintiff's lawyers raise that as a result of the negotiations, the offer to the class members is advantageous in that the Settlement was negotiated in such a way that it is possible for the class members to choose the type of compensation they consider to be in their best interests.

[43] The Plaintiff values the benefits granted to the members of both class actions to at least \$ 30,000,000. Since the proportion of the members of the Class Action in Québec is estimated to 47 %, the lawyers submit that they have negotiated a Settlement with a value of at least \$ 14,100,000 for their clients.

[44] The amount of fees payable to counsel for the Quebec class hence corresponds to approximately 12.5 % of the value of the profits obtained, which is lower than the range generally considered by the courts as reasonable (between 20 % and 33 1/3 %). The lawyers agree to reimburse in full the amounts of funding received from the FAAC, i.e., the sum of \$ 135,962.79.

[45] They invoke that they had to face numerous obstacles during the course of the proceedings, both in terms of documentary research and in terms of access to material

¹² *Id.* at para. 62.

evidence (source codes) essential for the assessment of liability and quantum of damages, including the demonstration of the requisites for a collective recovery.

[46] They invoke that they carried out their mandate with integrity and professionalism, that they have diligently brought this matter forward to trial and they humbly submit that they have earned the fees submitted to the Court for its approval.

[47] Finally, they inform the Court that they have spent more than 2,050 hours, with a value in excess of \$ 1,127,000 according to their otherwise applicable hourly rate, so that the fees for which the Court's approval is sought, represent a multiplier of less than 1.6.

[48] The Court agrees that the proposed fees and disbursements detailed in Exhibit R-2 should be approved.

[49] Finally, the lawyers ask the Court to approve the disbursements of \$ 22,513.28 for two mediations that took place in this case which were prepaid by them. Under the Settlement, these disbursements are payable by the class members from the Settlement fund. Those costs were incurred in the interests of the class members and should be reimbursed.

POUR CES MOTIFS, LE TRIBUNAL :

WHEREFORE, THE COURT:

[50] **APPROUVE** le Règlement (pièce R-1) et **ORDONNE** aux parties de s'y conformer;

[50] **APPROVES** the Settlement (Exhibit R-1) and **ORDERS** the parties to comply therewith;

[51] **DÉCLARE** que le Règlement est juste, raisonnable et dans le meilleur intérêt des membres de l'Action Collective;

[51] **DECLARES** that the Settlement is fair, reasonable and in the best interests of the members of the Class Action;

[52] **DÉCLARE** que conditionnellement au paiement des bénéfices dus en vertu du Règlement par la Défenderesse dans les délais impartis, que le Règlement liera tous les membres de l'Action Collective qui ne se sont pas exclus de celle-ci;

[52] **DECLARES** that conditional on the payment of benefits owed by the Defendant pursuant to the Settlement within the applicable deadlines, the Settlement shall bind all the members of the Class Action who did not opt-out;

[53] **DÉCLARE** que suite au jugement de clôture attestant que la Défenderesse s'est acquittée de toutes et chacune de ses obligations en vertu du Règlement, le Demandeur Michel Carrière, en son nom personnel et au nom des Membres du groupe du Québec (sauf les Personnes qui se sont exclues du groupe) et au nom de leurs agents, mandataires, représentants, héritiers, successeurs et ayants droit, le cas échéant, donnent quittance et mainlevée totale, générale, irrévocable et finale à Symantec et Gen Digital, y compris les membres de leur groupe, leurs entités liées, leurs filiales et leurs mandataires, agents, représentants, associés, assureurs, réassureurs, actionnaires, employés, dirigeants, administrateurs, professionnels, successeurs et ayants droit respectifs, pour toute réclamation, demande, action, poursuite ou cause d'action en dommages, passée, présente ou future (notamment des dommages-intérêts exemplaires, majorés, légaux et autres dommages-intérêts multiples ou sanctions de quelque nature que ce soit; ou tout remède de quelque nature que ce soit, connu ou inconnu), qu'elle soit de nature collective, individuelle ou autre, y compris les honoraires des experts, les débours, les honoraires judiciaires, les honoraires d'avocat sur la base avocat-client (excluant les Honoraires des avocats des membres de l'Action Collective) et les frais de justice, que le Demandeur et les Membres du groupe du Québec ont eus, ont ou pourraient avoir et qui sont liés ou découlent de l'un ou l'autre des faits ou causes d'action allégués dans les procédures se rapportant à l'Action collective;

[54] **CONFIRME** la nomination de RicePoint Administration Inc., comme

[53] **DECLARES** that following the closing judgment confirming that the Defendant has duly undertaken each and every one of its obligations pursuant to the Settlement, Plaintiff Michel Carrière, in his own name and on behalf of Quebec Class Members (other than Opt-Outs), and on behalf of their agents, mandataries, representatives, heirs, successors and assigns, if any, give a full, general, irrevocable and final release and discharge to Symantec and Gen Digital, including their affiliates, related entities, subsidiaries, and their respective mandataries, agents, representatives, partners, insurers, reinsurers, shareholders, employees, officers, directors, professionals, staff, successors and assigns, for any past, current or future claim, demand, action, suit or cause of action in damage (including but not limited to punitive, aggravated, statutory and other multiple damages or penalties of any kind; or remedies of whatever character, known or unknown), whether class, individual or otherwise in nature, including experts' fees, disbursements, judicial fees, solicitor-client fees (excluding the Class Counsel Fees), and legal fees, that the Plaintiffs and the Class Members had, have or may have, arising out of, related to, arising in connection with or resulting or stemming from any of the facts or causes of action alleged in the proceedings relating to the Actions;

[54] **CONFIRMS** the appointment of RicePoint Administration Inc. as Claims

Administrateur des réclamations avec tous les pouvoirs qui lui sont dévolus en vertu du Règlement;

Administrator with all powers granted to it pursuant to the Settlement;

[55] **ORDONNE** à la Défenderesse de payer les déboursés, frais et honoraires, incluant les taxes, de l'Administrateur du Règlement, en conformité avec le Règlement, en plus des autres bénéfices payables directement aux membres de l'Action Collective;

[55] **ORDERS** the Defendant to pay all disbursements, costs, and fees, including taxes, of the Claims Administrator, pursuant to the Settlement, in addition to the other benefits payable directly to the members of the Class Action;

[56] **ORDONNE** l'envoi des avis d'approbation du Règlement conformément et dans les formes des Annexes F et L du Règlement;

[56] **ORDERS** that the Settlement Approval Notice be disseminated in accordance with Schedules F and L of the Settlement;

[57] **DÉCLARE** que le Tribunal restera saisi de toute question se rapportant à l'administration du Règlement de l'Action Collective et qui pourrait lui être soumise, et ce, jusqu'au jugement de clôture à intervenir;

[57] **DECLARES** that the Court remains seized of any question relating to administration of the Settlement of the Class Action which may be referred to it, until such time as a closing judgment has been rendered;

[58] **RÉSERVE** au Fonds d'aide aux actions collectives le droit de déduire du reliquat en argent, le pourcentage qui lui serait dû en conformité avec le Règlement sur le pourcentage prélevé par le Fonds d'aide aux actions collectives, chapitre F-3.2.0.1.1, r. 2;

[58] **RESERVES** the right of the *Fonds d'aide aux actions collectives* to deduct from any remaining cash balance the percentage owed to it in accordance with the *Regulation respecting the percentage withheld by the Fonds d'aide aux actions collectives*, chapter F-3.2.0.1.1, r. 2;

[59] **APPROUVE** les honoraires et déboursés des avocats des membres de l'Action Collective selon la pièce R-2 et **ORDONNE** à la Défenderesse de les payer en sus de tous les autres bénéfices payables directement aux membres de l'Action Collective et ce, dans les 30 jours de la réception d'un compte d'honoraires des avocats des membres de l'Action Collective, le tout, par virement bancaire ou chèque certifié;

[59] **APPROVES** the fees and disbursements of counsel for the members of the Class Action in accordance with Exhibit R-2 and **ORDERS** the Defendant to pay them in addition to all other benefits payable directly to the members of the Class Action, within 30 days of receipt of an invoice from counsel for the members of the Class Action, by wire transfer or certified cheque;

[60] **ORDONNE** à l'Administrateur du Règlement de payer aux avocats des membres de l'Action Collective, à même le Fonds de Règlement, la somme de 22 513,28 \$ représentant les déboursés des médiations payés par ceux-ci et ce, dans les 30 jours de la Date de Prise d'effet du Règlement, le tout, par virement bancaire ou chèque certifié;

[60] **ORDERS** the Claims Administrator to pay to counsel for the members of the Class Action, from the Settlement Fund, the amount of \$22,513.28 representing the portion of the cost paid by them for mediation, within 30 days of the Effective Date of the Settlement, by wire transfer or certified cheque;

[61] **PRENDRE ACTE** que les avocats des membres de l'Action Collective rembourseront, à même les honoraires et déboursés reçus, la somme de 135 962,79\$ au Fonds d'aide aux actions collectives;

[61] **TAKES NOTICE** that counsel for the members of the Class Action shall reimburse, from the amount received as fees and disbursements, the amount of \$135,962.79 to the *Fonds d'aide aux actions collectives*;

[62] **LE TOUT**, sans frais de justice.

[62] **THE WHOLE**, without legal costs.

DOMINIQUE POULIN, J.S.C.

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Hearing date: February 28, 2024