

SUPERIOR COURT

CANADA
PROVINCE OF QUEBEC
DISTRICT OF MONTREAL

No. 500-06-000777-157

DATE: March 20, 2018

PRESIDING: THE HONOURABLE ANNE JACOB, J.S.C.

MARTIN ROBICHAUD

Plaintiff

v.

INTRAWEST ULC

Respondent

JUDGMENT

on an application for authorization to institute a class action

[1] Martin Robichaud ("Robichaud") is bringing an application for authorization to institute a class action against Intrawest ULC ("Intrawest"), which manages Club Intrawest (the "Club")¹.

[2] He also requests that he be ascribed the status of representative for the following class:

[TRANSLATION]

All natural persons who purchased Club Intrawest points in Quebec from Intrawest ULC, or from one of its subsidiaries or related companies, with the exception of those who had divested themselves of the points before a mandatory fixed minimum resale price for the points was introduced in 2007, which had to be respected for all of the advantages related to the points and to participation in Club Intrawest to be transferred.

[3] Robichaud feels that his application meets the criteria of article 575 C.C.P. Intrawest is of the opposite opinion, stating that none of the criteria are met in this case.

JJ0502

¹ The Club is now known under the name Embarc®.

THE PARTIES

[4] Intrawest is a corporation incorporated in Alberta whose principal establishment in Quebec is a resort located at Mont-Tremblant.

[5] Since 1994, consumers have been able to become members of Club Intrawest and book vacation time ("timesharing").

[6] To become a member of the Club, points must be purchased, enabling Members to stay at different resorts associated with Intrawest every year.

[7] On May 9, 2009, Robichaud entered into such an adhesion contract with an indeterminate term. He is a consumer within the meaning of the *Consumer Protection Act* ("CPA")² and the *Civil Code of Québec* ("C.C.Q.").

FACTUAL FRAMEWORK AS FOUND AT THIS STAGE³**The Club's invitation**

[8] In the spring of 2009, Robichaud received a telephone call from a Club representative, inviting him and his spouse to attend a presentation on Saturday, May 9, at Mont-Tremblant.

[9] The presentation was to be only 90 minutes long. If the couple accepted the invitation, they could stay at the site free of charge for the weekend as of the day before the presentation.

[10] Robichaud accepted the invitation.

[11] On May 8, Robichaud and his spouse went to Mont-Tremblant, but did not stay at the Club.

The presentation on May 9, 2009, and membership in the Club

[12] The next morning, the couple noticed that there were a number of other couples in the waiting room when they arrived.

[13] A representative greeted the couple and gave them a guided tour of the site during which he asked about their previous travels, interests and budget.

² CQLR, c. P-40.1.

³ The facts are set out in the originating application, the exhibits, the stenographic notes of the examination on November 29, 2016 and the responses to the undertakings of March 14, 2017.

[14] The couple was then taken to a cubicle. At intervals, the other couples went through the same routine.

[15] The representative then showed them several magazines filled with photographs and offering a plethora of possible vacation weeks and access to the Club's different sites.

[16] He explained that the purchase of points made it possible to vacation **anywhere in the world**.

[17] This was only possible, however, by also becoming a member of the ExtraOrdinary Escapes program ("EE"), which was offered free of charge for one year.

[18] In addition, with the purchase of points, the Club was offering two weeks of vacation including airfare for the first trip if the chosen destination was in Canada or the United States.

[19] The couple was given a small wooden suitcase containing several pamphlets with photographs of various travel destinations⁴.

[20] Robichaud does not believe that there was a CD inside the suitcase.

[21] During his presentation of the benefits of Club membership, the representative stated that points could be transferred to family members.

[22] However, the couple, who had been together for 20 years, had no children. Robichaud told the representative that he did not plan to transfer his points, but rather to sell them to a third party.

[23] His main concern was therefore the resale of points.

[24] The representative explained that in the case of a sale to a third party, the Club had a right of first refusal to prevent points from being sold at low prices, thereby protecting their value. In addition, after five years, the member could ask the Club to redeem his points.

[25] Robichaud concluded that this meant he would eventually be able to get back basically his deposit.

[26] At the end of the presentation, the couple agreed to purchase **160 points** at a price of **\$30,560 (\$191 per point)** plus administration fees and annual resort dues. A discount on points reduced the net price to **\$28,044 (\$175 per point)**. The couple would have access to one week of vacation per year and to the EE program, free of charge for one year.

⁴ The pamphlets are valid for one year.

[27] According to Robichaud, the intensive marketing effort exceeded the scheduled length of the session.

[28] Once they accepted, the couple was given a book from which to choose their first holiday destination and a bottle of champagne was opened. The atmosphere was festive.

[29] The representative requested that a colleague be present for the contracts.

[30] The only two documents drafted in French that the couple signed did not refer to a fixed minimum price in the event the points were sold to a third party.

The acquisition of 300 additional points on May 20, 2009

[31] After this acquisition, Robichaud did an Internet search and found inexpensive points on eBay⁵.

[32] The agency representative explained that these points were valid only for Club sites, in that **they could not be used anywhere in the world.**

[33] Thus, these 300 additional points could not be added to the initial 160 points to allow travel to a destination available through the EE program.

[34] Robichaud understood that the price per point was lower because he was not purchasing points in the same category.

[35] However, the Club had a site in Mexico and this way the couple could stay there longer than with the initial 160 points.

[36] According to Robichaud, this second purchase was different from the first because of the purchase of points from a different category.

[37] The couple selling the points resided in Massachusetts⁶. They had signed their initial request for a transfer of points on April 15, 2009⁷.

[38] At the time, Robichaud was not bilingual. Therefore, he felt that he was not able to express himself perfectly in English, either verbally or in writing.

[39] Robichaud and his spouse purchased the **300 points** for a price of **\$16,845 (\$56 per point)** before commission and transfer fees.

⁵ On the website www.TimeShareClosingOnline.com.

⁶ Exhibit MR-2. Their member certificate was issued by Intrawest on March 5, 2002.

⁷ Exhibit MR-4, bundled.

[40] They received a two-page document to sign entitled *Summary of Key Elements of your Membership - Understanding & Acknowledgement*⁸, a one-page document entitled *Sale and Transfer Worksheet*, which was filled in by hand, and a four-page document entitled *Agreement to purchase and sell Club Intrawest Membership*⁹.

[41] The document *Sale and Transfer Worksheet* provided that the selling member wishing to transfer his or her EEs had to meet four criteria, including that his or her buyer had not attended an Intrawest presentation in the last 12 months, when the minimum selling price was \$165 per point.

[42] There was a note indicating that Robichaud was not a Club member. Despite this inaccuracy, the Club contacted Robichaud to find out if he wanted to add the 300 points to the account with the initial 160 points.

[43] The membership certificate for the 300 points was issued on July 19, 2009, and was retroactive to June 1, 2009¹⁰.

Robichaud's attempts to sell Club points

[44] After these purchases, the couple used their points on an annual basis. In particular, they went to the site in Zihuatanejo, Mexico, a number of times.

[45] On October 9, 2014, Robichaud sent an email to the Club stating that its representative had indicated in June 2009 that Intrawest could redeem his points after five years. Robichaud asked how to proceed with this redemption process.

[46] On October 10, 2014, a Club representative sent him an email, referring him to the FAQ section of the website¹¹.

[47] In a subsequent exchange of emails, Robichaud was informed of the existence and application of a fixed minimum price for the sale of his initial points.

[48] In **late December 2014**, Robichaud, who was in Zihuatanejo at the time, wanted to sell his points. He met another member who expressed an interest in buying them.

[49] Robichaud explained to the other member that he could purchase the 300 points in that category at a lower price than the 160 points in the other category for which the applicable fixed minimum price was \$175 per point at the time.

⁸ Exhibit MR-3.

⁹ Exhibit MR-1, bundled.

¹⁰ Exhibit MR-4, bundled.

¹¹ Undertaking E-8, bundled.

[50] The prospective buyer consulted a Club representative, who advised against that purchase from a third party and made him an offer at a price lower than the fixed minimum price. Robichaud was not allowed to sell his points below that price.

[51] Subsequently, Robichaud changed his strategy. He tried to sell his initial 160 points on the Kijiji website in order to divest himself first of the points that seemed to him the most difficult to deal with because they were more expensive.

[52] From **January 6 to February 24, 2015**, a number of emails were exchanged between Robichaud and Club representatives regarding the clauses of various documents¹².

[53] The email of February 10, 2015 emphasized that, according to the Intrawest's contracts department, the CD constituted the prospectus to which the adhesion contract referred.

[54] The email of February 20 raised the fact that since the points were purchased in 2009, the various documents were probably on a CD and that a clause pertaining to a fixed minimum price had been included since 2007.

[55] In **March 2015**, after a period punctuated by Internet searches and obtaining legal opinions, Robichaud came to understand his rights on the subject.

[56] This application for authorization was instituted in **December 2015** and concerns only purchases made directly from the Club.

[57] On **February 9, 2016**, Robichaud learned of an email from the Club announcing a flash sale entitled *72-Hour Flash Sale* and decided to conduct a test to check the Club price.

[58] He sent an email stating that he wanted to acquire 100 additional points¹³. However, the Club's price per point was below his mandatory fixed minimum sale price at that time.

[59] In the **spring of 2016**, the Club made Robichaud an offer to redeem his points at a price lower than he had paid for them in 2009.

[60] In **September 2016**, the Court granted Intrawest permission to question Robichaud to seek particulars on certain allegations.

[61] The examination took place in **November 2016**. The answers to the undertakings then made were sent in **March 2017**.

¹² Undertaking E-8, in bundle.

¹³ Exhibit MR-6.

SUMMARY REVIEW OF THE TRANSACTIONAL DOCUMENTS**The documents related to membership and the purchase of the initial 160 points**

[62] The **first document**, entitled [TRANSLATION] ***Purchase and Membership Agreement*** ("**Agreement**"), is eight pages long. The first seven pages contain 14 clauses¹⁴.

[63] Clause 1 refers to the 15th modified version of the Club's [TRANSLATION] *Master Declaration* (the "Declaration"), which is not to be found in the documentation submitted.

[64] Clause 4 also refers to that Declaration statement as well as to receipt by the buyer of the contract, the prospectus, the regulations, the trust agreement, the statutes, the guidelines, and the Declaration. It also indicates that the buyer had the opportunity to read and understand the scope of the provisions. However, these documents are not to be found in the documentation submitted.

[65] Clause 6 indicates that the member will bear the cost of his or her share of the *resort dues*, which represent the membership expenses to be determined by the Club each year, as well as the special contributions for capital improvements and other special expenses, and personal contributions.

[66] Clause 7 provides that before selling his or her membership and points to a third party, the buyer must offer the Club a right of first refusal in accordance with the procedure set out in the Declaration.

[67] Clause 8 refers to the [TRANSLATION] *Buyer acceptance agreement* that is part of the agreement, which is not to be found in the documentation submitted. A note states that the buyer declares that the purchase is for personal use and not for resale or other monetary or financial benefits and that no representation of any kind has been made to him or her regarding the potential for resale.

[68] Article 12 inserts an "entire agreement" clause, which specifies that the contract constitutes the only contract entered into between the parties and that there are no statements or guarantees, whether written or oral, made or relied upon other than those set out in the contract.

[69] Clause 14 states that the buyer acknowledges receipt of the *Club documents*, including a prospectus that is governed by and interpreted in accordance with the laws of British Columbia. Spaces provided to specify whether documents were sent on paper or on disc are unchecked.

¹⁴ Exhibit R-2.

[70] The agreement was signed by the couple on May 9, 2009, and by a signing officer of the Club, who also signed in the space provided for the signature of a witness.

[71] The last page is a sheet entitled [TRANSLATION] *Member Information Sheet*. It has three sections.

[72] The first contains information related to the purchase of 160 points at a price of \$30,560¹⁵ plus administration fees (\$600) and prorated resort dues (\$614.13) for a purchase price of \$31,774.13. Application of the deposit of \$3,730.13 resulted in a net price of **\$28,044**¹⁶.

[73] The second section contains information pertaining to annual resort dues of \$1,052.80 (\$6.58 per point) for the period from June 1 to December 31, 2009, which amounted to \$614.13.

[74] From 2009 to 2016, Robichaud paid **\$8,858.93** in annual resort dues, which increased every year.

[75] Finally, the third section provides for the possibility of 10-year financing at an interest rate of 13.90% for an additional amount of \$24,004.80.

[76] The **second document** entitled [TRANSLATION] ***Summary of key elements of your membership – Acknowledgement of the terms of the Agreement*** ("**Summary**") appears to be a two-sided pamphlet with an introductory welcome paragraph and fifteen unnumbered items¹⁷.

[77] The ninth item, entitled "ExtraOrdinary Escapes", is short and contains only one paragraph, which indicates that the program is offered free of charge for the first year and that thereafter annual renewal fees apply.

[78] The twelfth item, entitled [TRANSLATION] "Resale", indicates the right to sell a membership at any time subject to the Club's right of first refusal and the possibility of asking the Club to redeem the membership after five years in accordance with the provisions of the "Redemption program" (which was not to be found in the documentation submitted).

[79] This second document, also dated May 9, 2009, bears the couple's signature.

¹⁵ This is equivalent to \$191 per point.

¹⁶ This is equivalent to \$175 per point.

¹⁷ Exhibit R-3.

The documents related to the purchase of 300 additional points

[80] The document entitled ***Summary of Key Elements of your Membership - Understanding & Acknowledgment*** consists of two 8½" x 11" pages with an introductory welcome paragraph and fourteen unnumbered items¹⁸.

[81] The first item, entitled *ExtraOrdinary Escapes*, is elaborate and contains nine paragraphs. It indicates that points and EE privileges may be transferred to an immediate family member (by sale, gift or inheritance). However, the benefits and privileges of EEs cannot be transferred to a third party unless specific criteria are met, including selling at a price of \$165 per point.

[82] The terms used in the second item, entitled *Resale/Repurchase*, differ from those in the 12th item of the French document supplied on May 9, 2009. The item also stipulates that there is no guarantee that funds will be sufficient in any given year to redeem the points of all the members who make such a request.

[83] This document was signed by the couple on May 19, 2009.

[84] The document entitled ***Agreement to purchase and sell Club Intrawest membership*** consists of four pages with 18 clauses¹⁹.

[85] Clause 2 reveals that the total price is US\$18,000. Time Share Closing Online's commission fees total \$1,595 and are payable by the seller (\$1,000) and the buyer (\$595).

[86] Clause 14 indicates that the agreement is governed by the laws of the State of California.

[87] Clause 17 indicates that Intrawest imposes a transfer fee of \$560, which is included in the total price mentioned above.

[88] Thus, the purchase price for 300 points is \$16,845 excluding commission fee and transfer fees. The seller must pay \$1,000 for a net sale price of \$15,845.

[89] Clause 18 indicates that Intrawest has a right of first refusal on every transaction.

[90] The agreement was signed on May 20, 2009, by the couple selling and the couple purchasing.

¹⁸ Exhibit MR-3.

¹⁹ Exhibit MR-1, bundled.

ANALYSIS

[91] Article 575 C.C.P. sets out the four criteria that must be considered in an application for authorization to institute a class action:

The court authorizes the class action and appoints the class member it designates as representative plaintiff if it is of the opinion that

- (1) the claims of the members of the class raise identical, similar or related issues of law or fact;
- (2) the facts alleged appear to justify the conclusions sought;
- (3) the composition of the class makes it difficult or impracticable to apply the rules for mandates to take part in judicial proceedings on behalf of others or for consolidation of proceedings; and
- (4) the class member appointed as representative plaintiff is in a position to properly represent the class members.

The first criterion

Do the class members' claims raise identical, similar or related issues of law or fact?

[92] Robichaud suggests the following questions:

- a) Did Intrawest engage in prohibited trade practices against members?
- b) Were the fees claimed from the members valid under the CPA?
- c) If applicable, must Intrawest reimburse the fees to the members?
- d) Considering Intrawest's offences against the CPA, if any, are members entitled to a reduction of their obligation with respect to the purchase of points?
- e) If so, what is the reduction?
- f) Are members entitled to punitive damages for Intrawest's breaches of the CPA?
- g) In the alternative, are the clauses that govern the ability of members to terminate their contractual relationship with Intrawest and the latter's conduct in implementing them abusive in nature and effect?

[93] Robichaud is claiming for himself and the members of the class:

- a) Full reimbursement of expenses paid that were not indicated in their contract, pursuant to sections 12 and 272 of the CPA;
- b) That their obligation with respect to the price to be paid for the points be reduced by 75%, considering the loss of the value of the points, pursuant to sections 219, 228 and 272 of the CPA;
- c) \$5,000 in punitive damages for flagrant and deliberate breaches of its obligations, pursuant to section 272 of the CPA.

[94] Robichaud submits that his application raises issues that are identical, similar or related to those of other members.

[95] He argues that several provisions of the *Civil Code of Québec* and of the CPA apply to the transactional relationship that binds each member to Intrawest.

[96] First, the membership agreement signed by each member of the proposed class constitutes a standard adhesion contract containing a number of external clauses and various other abusive clauses or clauses prohibited by the CPA.

[97] Article 1435 C.C.Q. states that an external clause is binding on the parties. However, in a consumer contract or contract of adhesion, such a clause is null if, at the time of formation of the contract, it was not expressly brought to the attention of the consumer or adhering party, unless the other party proves that the consumer or adhering party otherwise knew of it.

[98] The external clause, physically separated from the contract, must be reasonably accessible in the sense that the co-contracting party must have had a reasonable opportunity to read it²⁰.

[99] Section 25.9 of the *Regulation respecting the application of the Consumer Protection Act*²¹ states that the stipulation making an external clause binding on a consumer despite the fact that such a clause cannot be set up against the consumer by reason of article 1435 of the C.C.Q. is prohibited.

[100] Under article 1437 C.C.Q., an abusive clause in a consumer contract or contract of adhesion is null.

²⁰ *Dell Computer Corp. v. Union des consommateurs*, 2007 SCC 34.

²¹ Chapter P-40.1, r.3.

[101] Moreover, section 11.2 of the CPA states that a stipulation under which a merchant may amend a contract unilaterally is prohibited unless the stipulation also: (a) specifies the elements of the contract that may be amended unilaterally; (b) provides that the merchant must send the consumer, at least 30 days before the amendment comes into force, a written notice setting out exclusively the new clause, or the amended clause and the clause as it read formerly, the date of the coming into force of the amendment and; (c) provides that the consumer may refuse the amendment and cancel the contract without cost, penalty or cancellation indemnity by sending the merchant a notice to that effect no later than 30 days after the amendment comes into force, if the amendment entails an increase in the consumer's obligations or a reduction in the merchant's obligations.

[102] In addition, under section 12 of the CPA, no costs may be claimed from a consumer unless the amount thereof is precisely indicated in the contract.

[103] According to Robichaud, clause 6 of the adhesion contract relating to annual resort dues is contrary to these sections of the CPA.

[104] Intrawest affirmed that the resort dues are not costs covered by section 12 of the CPA in that they are akin to a contribution such as condo fees. Robichaud refutes this argument on the grounds that the purchase of points does not confer a title of ownership in immovable property.

[105] In addition, under section 19 of the CPA, a clause in a contract that is wholly or partly governed by a law other than an Act of the Parliament of Quebec or of Canada is prohibited. Yet clause 14 of the adhesion contract indicates that the contract is governed and interpreted in accordance with the laws of British Columbia.

[106] Lastly, Robichaud submits that a reading of both documents signed when becoming a Club member, namely, the *Agreement* and the *Summary*, does not reveal the fixed minimum price, and the terms and conditions of the right of first refusal and of the redemption are not specified.

[107] The representative's verbal representations did not raise the existence of such a minimum price for a future resale of the points.

[108] Section 216 of the CPA states that a representation includes an affirmation, a behaviour or an omission.

[109] Section 218 of the CPA sets out that the general impression it gives must be taken into account and, as the case may be, the terms used, to determine whether or not a representation constitutes a prohibited practice.

[110] In *Richard v. Time Inc.*, involving the well-known Sweepstakes contest, the Supreme Court recalled that this general impression is assessed in terms of the concept of the average consumer, who is credulous and inexperienced²².

[111] The CPA provides in section 219 that no merchant may, by any means whatever, make false or misleading representations to a consumer or, in section 228, fail to mention an important fact.

[112] Section 25.5 of the above-cited regulation respecting application provides that a stipulation intended to exclude or limit a merchant's obligation to be bound by a written or verbal statement made by its representative is prohibited.

[113] Finally, section 272 CPA states that a consumer may demand, as the case may be, reduced obligations, damages, and punitive damages from a merchant who fails to fulfil an obligation imposed by the CPA.

[114] Intrawest submits that the application for authorization alleges misrepresentation or the failure to disclose important facts in the context of the information session and the documentation transmitted on that date.

[115] Intrawest claims that this type of application requires an individual analysis as opposed to a collective approach.

[116] However, the evidence gathered prior to then seems to imply a certain modus operandi in the approach of the Club's representatives to the couples at the information session.

[117] It is certainly not impossible that the class members could have received different *verbal representations* from the various representatives despite the quest for corporate uniformity in their approach and presentations to the clientele.

[118] It should be otherwise, however, with respect to the *written representations*. Indeed, because of the costs involved in purchasing points when joining the Club, there is every reason to believe that the important and relevant information was gathered in written documentation destined, without discrimination and distinction, to all.

[119] Intrawest's disclosure of this documentation should make it possible to answer the questions raised with respect to all class members.

[120] Intrawest argues that the issue of annual fees and that related to the disposition of points from a sale to a third party or redemption by the Club require a distinct and complex analysis that cannot be managed in a single proceeding. It proposes rejecting the application in order to spare judicial resources.

²² 2012 SCC 8.

[121] The Court considers that judicial resources are more likely to be spared by avoiding the multiplication of suits raising the same issues.

[122] Lastly, Intrawest submits that each member's *quantum* requires an individual analysis under the proportionality principle set out in article 18 C.C.P.²³.

[123] Intrawest explained that the date and initial purchase price of the points, the use of the points, a member's request or lack thereof to have points redeemed within the framework of the redemption program, a member's attempt or lack thereof to sell his points or not, and several sub-questions related to such an initiative will all have to be taken into account.

[124] However, this cumbersome approach unnecessarily complicates the file.

[125] The Court is of the view that the principle of proportionality militates in favour of grouping together questions and resources.

[126] Robichaud claims that his points are worth about 75% less than the price paid when he became a member of the Club on May 9, 2009, because of the terms and conditions governing the resale, which were not disclosed at the time of becoming a member.

[127] His assessment is based on a table found online in January 2015 showing the fall in point prices since 2009²⁴.

[128] However, he does not know whether the table refers exclusively to points purchased directly from the Club.

[129] Although the reliability of the data will have to be established, there is no need at this stage to exclude this method.

[130] The case law recognizes that a single identical and similar issue suffices to justify authorization, provided that it is likely to significantly affect the outcome of the class action²⁵.

[131] The Court is of the view that there is more than one similar issue in this case.

²³ *Lorrain c. Petra-Canada*, 2013 QCCA 332.

²⁴ Undertakings E-11 and E-12. The website is www.brannan.org.

²⁵ *Vivendi Canada Inc. v. Dell'Aniello*, 2014 SCC 1.

The second criterion

Do the facts alleged appear to justify the conclusions sought?

[132] The plaintiff submits that the facts alleged in his proceeding and the explanations and clarifications provided during his out-of-court examination amply demonstrate that this is an arguable case that justifies the conclusions sought.

[133] The Club submits that the facts alleged in the proceeding and those related to the examination are vague, general and imprecise and that the application appears frivolous²⁶.

[134] In this case and at this stage, the plaintiff's sole burden is to demonstrate "a good colour of right" or "a *prima facie* case". This is a burden of demonstration, not of proof.

[135] It is true that a portion of the relevant documentation appears to be missing.

[136] The membership agreement of May 9, 2009, refers to external clauses contained in other documents.

[137] The plaintiff claims that he received only the two documents drafted in French and has no recollection of a CD.

[138] However, to date, Intrawest has not submitted any request to have examined any additional documentation that may have been given to Robichaud by its representative at the presentation session on May 9, 2009.

[139] The two documents signed on May 9, 2009, do not deal with a fixed minimum price for resale in the event of a sale to a third party.

[140] Intrawest submits that the May 20, 2009, documentation deals with the fixed minimum price aspect and that Robichaud's application is therefore prescribed.

[141] Robichaud explains that, at that time, he believed that he was purchasing cheaper points in a lower category that did not allow him to travel anywhere in the world.

[142] The Court considers that the issue of prescription is premature, as there is no evidence at this time to show that Robichaud was aware that the existence of such a fixed minimum price would render any future resale to a third party illusory if the Club were to offer to sell points at a price lower than the minimum price imposed on Robichaud.

²⁶ *Bouchard c. Agropur Coopérative*, 2006 QCCA 1342; *Infineon Technologies AG v. Option consommateurs*, 2013 SCC 59.

[143] The evidence, as yet uncontradicted, reveals that it was not until December 2014 and the months that followed that Robichaud became aware of the alleged situation.

[144] Since then, Robichaud considers that he is limited to three options.

[145] The first is to wait indefinitely for Intrawest to redeem his 160 points at an acceptable price by continuing to pay the annual resort dues.

[146] The second is to sell his 160 points to Intrawest at a price significantly lower than their purchase price in May 2009, which represents a considerable loss compared to the deposit.

[147] The third is to sell his 160 points to a third party without the transfer of the EEs at a price significantly lower than their purchase price in May 2009, which is also a considerable loss compared to the deposit.

[148] Lastly, Intrawest also submits that Robichaud, following the purchase of his points in May 2009, has been paying the annual invoice for the resort dues in clause 6 of the Agreement sent since the fall of 2009, and that a portion of the annual resort dues is now prescribed.

[149] This is not an argument that justifies rejecting the application, as it is a defence that goes to the merits.

[150] The Court rules that the facts alleged appear, at this stage, to justify the conclusions sought.

The third criterion

Does the composition of the class make it difficult or impracticable to apply the rules for mandates to take part in judicial proceedings on behalf of others or for consolidation of proceedings?

[151] Intrawest submits that the Court does not have enough information about the size and composition of the class.

[152] Robichaud points out, in paragraphs 53 to 55 of his application, that several thousand people are or have been Club members. The estimated number of members of the class is derived from an assessment based on the Club's claim of having over 25,000 members and the fact that the resort site at Mont-Tremblant is one of the main selling points.

[153] Moreover, some Club members who do not reside in Quebec acquired their points at the Mont-Tremblant site.

[154] There is no data provided by Robichaud or Intrawest as to the percentage of the 25,000 members who earned their points in Quebec.

[155] The logistics and organization of locating so many members and communicating with them make individual actions or the consolidation of proceedings illusory, in particular because some people who express themselves in Internet chat rooms use pseudonyms, which do not allow them to be identified²⁷.

[156] Moreover, it is worth remembering that the peculiarity of this case lies in the fact that the potential members of the class are in a way already grouped within the same Club, which is also covered in this case.

[157] The likely number of members is one aspect among many others, including the members' geographical location, the costs involved and the legal constraints inherent to the use of mandate and joinder of parties in comparison with the class action.

[158] In short, there is no single mathematical formula applicable in this case²⁸.

[159] If there is any doubt about the size of the class, it must benefit the plaintiff²⁹.

[160] Robichaud's answer to the undertakings of March 14, 2017, discloses the names of 13 persons who have already indicated their intention to take part in this class proceeding³⁰.

[161] In addition, Robichaud spoke with three representatives of a group of 1,000 persons who submitted claims to Intrawest and who also contacted Robichaud's lawyers³¹.

[162] These numbers appear sufficient in this case, in that there is no need to interpret restrictively the third paragraph of article 575 of the C.C.P.³².

[163] Finally, Intrawest argues that the group is too broad in that it does not allow the prescribed claims to be excluded.

²⁷ *Labranche c. Énergie éolienne des Moulins, s.e.c.*, 2016 QCCS 1479.

²⁸ *Abicidan c. Bell Canada*, 2017 QCCS 1198.

²⁹ *Carrier c. Québec (Procureur général)*, 2011 QCCA 1231.

³⁰ Undertaking E-1.

³¹ Undertaking E-2.

³² *Lambert (Gestion Peggy) c. Écolait Itée*, 2016 QCCA 659

[164] In this respect, caution should be exercised at this stage and the arbitrary exclusion of potentially legitimate claimants should be avoided³³.

[165] In this case, the terms of the adhesion contract refer to the Club's right of first refusal at the time of a sale to a third party and a five-year period before being eligible to request redemption by the Club.

[166] According to Robichaud, the members who have not exercised these options since acquiring their points may not have realized the real impact of a fixed minimum price which is higher than that of the points offered by the Club. They could potentially be in a position of impossibility to act thereby suspending prescription.

[167] The Court considers that the argument is premature since it will be possible later, under article 588 C.C.P., to modify or divide the group.

The fourth criterion

Is Robichaud able to ensure adequate representation of the members?

[168] It is generally necessary to consider three factors: Robichaud's interest in this action, his competency and the absence of conflict with the class members³⁴.

[169] Thus, a plaintiff whose personal remedy is non-existent or extremely weak is not an adequate representative³⁵.

[170] Intrawest reiterates that Robichaud does not have an arguable case and that his action is prescribed.

[171] The Court does not accept these arguments for the reasons stated in the review of the second criteria.

[172] In addition, Intrawest raises the minimal involvement of Robichaud in preparing the file.

[173] Robichaud believes that his involvement is adequate. He has personal knowledge of the facts upon which the application is founded and has an understanding of the issues and his role.

³³ *Sibiga c. Fido Solutions*, 2016 QCCA 1299.

³⁴ *Lnfineon Technologies AG v. Option consommateurs*, 2013 SCC 59.

³⁵ *Contat c. General Motors du Canada*, 2009 QCCA 1699.

[174] He searched the Internet and visited forums revealing similar situations experienced by other members. He also spent time and energy recruiting a law firm to obtain answers to legal questions raised in this matter.

[175] The Court considers that his involvement is certainly not minimal.

[176] In addition, Intrawest invokes Robichaud's lack of transparency, since his application does not contain any allegation of his subsequent acquisition of 300 additional points and his attempt to trick the Club by falsely claiming in February 2016, that he wanted to acquire additional points, whereas his sole objective was to obtain the price of the points offered by the Club during its flash sale.

[177] To explain the absence of allegations related to the acquisition of additional points in May 2009, Robichaud responded that the judicial application covers only the points acquired directly from the Club. He also added that the steps he took in February 2016, which, incidentally, was subsequent to the application for authorization, were legitimate.

[178] The Court is of the view that Intrawest's accusations appear to be an attempt at diversion, especially since transactional transparency will be examined closely in the course of this dispute³⁶.

[179] Finally, Intrawest asserts that the plaintiff's interests are not in line with those of the other class members in that it is possible that a majority of the members simply wish to use their points to reserve vacation residences without any intention or expectation of a possible transfer or resale.

[180] This is not a valid argument since a member may opt out of the class as constituted.

[181] The Court considers that Robichaud is an adequate representative.

[182] The Court is of the opinion that the four criteria set out in article 575 C.C.P. are met.

THEREFORE, THE COURT:

[183] **GRANTS** the application for authorization;

[184] **AUTHORIZES** the institution of the following class action :

³⁶ *Charles c. Boiron Canada*, 2016 QCCA 1716.

[TRANSLATION]

An action in reduction of price and compensatory and punitive damages in order to sanction the defendant for its use of prohibited trade practices relating to membership in Club Intrawest, and a claim relating to costs, the amount of which was not precisely indicated in the contract.

[185] **ATTRIBUTES** to the plaintiff the status of representative for the purpose of exercising the class action on behalf of the following class of persons:

[TRANSLATION]

All natural persons who purchased Club Intrawest points in Quebec from Intrawest ULC, or from one of its subsidiaries or related companies, with the exception of those who had divested themselves of the points before a mandatory fixed minimum resale price for the points was introduced in 2007, which had to be respected for all of the advantages related to the points and to participation in Club Intrawest to be transferred.

[186] **IDENTIFIES** as follows the main issues of fact and law that will be dealt with collectively:

- a) Has Intrawest engaged in prohibited trade practices against members?
- b) Were the fees claimed from members valid under the CPA?
- c) If applicable, should Intrawest reimburse the fees to the members?
- d) Considering Intrawest's breaches of the CPA, if any, are members entitled to the reduction of their obligation with regard to the acquisition of the points?
- e) If so, what is the reduction?
- f) Are members entitled to punitive damages for Intrawest's breaches of the CPA by Intrawest?
- g) In the alternative, are the clauses that govern the ability of members to terminate their contractual relationship with Intrawest and the latter's conduct in implementing them abusive in nature and effect?

[187] **IDENTIFIES** the conclusions sought in relation to these issues as follows:

- a) **GRANTS** the originating application;
- b) **CONDEMNS** the respondent to reimburse the plaintiff the amount of fees that he paid as annual resort dues, that is, \$8,858.93, with

interest at the legal rate and the additional indemnity provided for in article 1619 of the *Civil Code of Québec* from the date of service of the application for authorization to institute a class action and of attribution of the status of representative;

- c) **CONDEMNNS** the respondent to pay the plaintiff the sum of \$23,830.60 as a reduction in the price that he paid to become a member of Club Intrawest, with interest at the legal rate and the additional indemnity provided for in article 1619 of the *Civil Code of Québec* from the date of service of the application for authorization to institute a class action and of attribution of the status of representative;
- d) **CONDEMNNS** the respondent to pay the plaintiff the sum of \$5,000 in punitive damages, with interest at the legal rate and the additional indemnity provided for in article 1619 of the *Civil Code of Québec* from the date of service of the application for authorization to institute a class action and of attribution of the status of representative;
- e) **ORDERS** the collective recovery of the amount of the claims described below;
- f) **CONDEMNNS** the respondent to reimburse to each member the amount of fees that they paid as annual resort dues, with interest at the legal rate and the additional indemnity provided for in article 1619 of the *Civil Code of Québec* from the date of service of the application for authorization to institute a class action and of attribution of the status of representative;
- g) **CONDEMNNS** the respondent to pay to each member an amount equal to 75% of what they paid to become a member of Club Intrawest, as a reduction in the sales price, with interest at the legal rate and the additional indemnity provided for in article 1619 of the *Civil Code of Québec* from the date of service of the application for authorization to institute a class action and of attribution of the status of representative;
- h) **CONDEMNNS** the respondent to pay to each member the sum of \$5,000 in punitive damages, with interest at the legal rate and the additional indemnity provided for in article 1619 of the *Civil Code of Québec* from the date of service of the application for authorization to institute a class action and of attribution of the status of representative;
- i) **CONDEMNNS** the respondent to any other appropriate remedy deemed fair and reasonable;

[188] **DECLARES** that, unless they opt out, the class members will be bound by any judgment to be rendered on the class action in the manner provided by the law;

[189] **POSTPONES** the debate on the Notice of authorization and on the opting-out period.

[190] **WITH LEGAL COSTS.**

(signed)

ANNE JACOB, J.S.C.

Mtre. Sébastien Richemont
WOODS
Counsel for the plaintiff

Mtre. Ariane Bisailon
Mtre. Robert Torralbo
BLAKE, CASSELS & GRAYDON
Counsel for the respondent

Hearing dates: November 27 and 28, 2017