SUPERIOR COURT

CANADA
PROVINCE OF QUEBEC
DISTRICT OF MONTRÉAL

No.: 500-06-001081-203

DATE: September 22, 2022

BY THE HONOURABLE MARTIN F. SHEEHAN, J.S.C.

STEVE HOLCMAN
Applicant
v.
RESTAURANT BRANDS INTERNATIONAL INC.
and
RESTAURANT BRANDS INTERNATIONAL LIMITED PARTNERSHIP
and
THE TDL GROUP CORP.
Defendants
and
FONDS D'AIDE AUX ACTIONS COLLECTIVES
Mis en cause

JUDGMENT

OVERVIEW

[1] Plaintiff, Mr. Steve Holcman, requests that the Court:

1.1. approve the national settlement agreement (the "**Settlement Agreement**")[1] that he reached with the defendants Restaurant Brands International Inc., Restaurant Brands International Limited Partnership and The TDL Group Corp. (collectively, the "**Defendants**" or "**Tim Hortons**") on May 26, 2022; and

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[1] Exhibit T-1.

1.2. approve the notices of the approval of the Settlement Agreement[2] (the "**Settlement Approval Notices**") and the transmission of the notices via email.

[2] Defendants support the application.

[3] The parties ask that the approval of class counsel fees be deferred.

[4] The application is granted. The Settlement Agreement is fair, equitable and in the best interests of the class members. The plan for the dissemination of the Settlement Approval Notices is appropriate to reach the maximum amount of class members.

CONTEXT

[5] On June 12, 2020, the *Financial Post* published an article alleging that Tim Hortons was using its mobile application (the "**App**") to track users' locations.[3]

[6] Four separate proposed class actions were filed in three provinces - including the one in Quebec. Each of them is predicated upon the same factual basis and stems from the facts presented in the *Financial Post* article. In addition to the present proceedings, the following class actions were filed in British Columbia and Ontario[4] after the original application was filed in Quebec:

6.1. *Wai Lam Jacky Law* v. *Restaurant Brands International Inc. and Radar Labs, Inc.* (British Columbia, Supreme Court number VLC-S-S-207985), on behalf of a putative national class;

6.2. *William Jung* v. *Restaurant Brands International Inc., Restaurant Brands International LP, The TDL Group Corp., BK Canada Service ULC and Radar Labs, Inc.* (Ontario, SCJ number CV-20-00648562-00CP), on behalf of a putative national class excluding residents of Quebec; and

6.3. *Ashley Sitko and Ashley Cadeau* v. *Restaurant Brands International Inc.* (Ontario, SCJ number CV-20-00643263-00CP), on behalf of a putative national class (process to commence claims not completed).

Hereinafter, the ("**Other Class Actions**").

[7] The Office of the Privacy Commissioner of Canada, in conjunction with its provincial counterparts in British Columbia, Alberta and Quebec (together the "**Privacy Commissioner**"), investigated the allegations made in the *Financial Post* article. Their report (the "**Report**") was filed on June 1, 2022.[5] The findings of the Report can be summarized as follows:

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2 Exhibit T-5 and Schedules C and D to the Transaction.
3 Exhibit P-5.
4 Exhibit T-7.
5 Exhibit T-6.

7.1. Tim Hortons collected granular location data for purposes of delivering targeted advertising, to better promote its coffee and associated products, but it never used the data for this identified purpose.

7.2. Tim Hortons' actual use of the data was very limited. When it did use it, it did so on an aggregated, de-identified basis to conduct limited analytics related to user trends.

7.3. Tim Hortons did not collect and use the location data in question for an appropriate purpose in the circumstances. Tim Hortons did not have a legitimate need to collect vast amounts of sensitive location information because it never used that information for its stated purpose. Furthermore, the consequences associated with the App's collection of that data represented a loss of users' privacy that was not proportional to the potential benefits derived from its collection.

7.4. Users cannot provide consent when the purpose of the collection, use and disclosure of personal information is not appropriate, reasonable, or legitimate within the meaning of applicable privacy legislation.

7.5. In any event, Tim Hortons did not obtain valid consent, as would have been required for its collection and use of the data in question. Tim Hortons failed to inform users that it would collect their location information even when the App was closed. It also misled users by stating that it would only collect information when the App was open. Finally, Tim Hortons failed to ensure that users understood the consequences of consenting to the continual collection of location data when the App was closed.

7.6. In August 2020, subsequent to notification of the investigation, Tim Hortons permanently ceased collecting granular location data, via the App, for purposes of targeted advertising.

[8] In response to recommendations by the Privacy Commissioner, Tim Hortons agreed to: (i) delete all granular location data in question, as well as data derived therefrom, and have its third-party service providers do the same; and (ii) establish, and thereafter maintain, a privacy management program with respect to the App and any other apps that Tim Hortons launches in the future, to ensure compliance with privacy legislation.

[9] The Report concludes that the complaint was well founded but that the issue was conditionally resolved.

[10] On June 15, 2022 (rectified judgment issued on July 4, 2022),[6] this court authorized a national class action for settlement purposes (the "**Authorization Judgment**") on behalf of the following class (the "**Class Members**"):

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6 *Holcman* v. *Restaurants Brands International Inc.*, 2022 QCCS 2168.

Tous les résidents canadiens utilisateurs de l'application Tim Hortons® avec des comptes enregistrés au Canada dont les informations de géolocalisation ont été collectées par l'une des défenderesses entre le 1er avril 2019 et le 30 septembre 2020.	All Canadian Resident users of the Tim Hortons® application with registered accounts in Canada whose geolocation information was collected by any of the Defendants between April 1, 2019, and September 30, 2020.

[11] The Authorization Judgment also approved the national notice program (the "**Authorization Notices**"), including the opt-out and objection deadline of August 31, 2022, and scheduled the settlement approval hearing on September 6, 2022.

[12] The proposed Settlement Agreement would settle all claims included in the present proceedings as well as those set out in the Other Class Actions.

[13] The Settlement Agreement provides for the dismissal or permanent stay of the Other Class Actions.[7]

ANALYSIS

[14] A class action is a proceeding in which one person, the representative, sues on behalf of all members of a class who have a similar claim. Since the class representative is not specifically mandated to act on behalf of these members, prior authorization from the Court is required before a class action can be filed.[8]

[15] Once a class action is authorized, the Court continues to look out for the interests of absent class members.[9]

[16] The absence of a specific mandate of the representative and the court's duty to look after the interests of the members underline the need for court approval of any class action settlement.

[17] In approving a settlement, the Court must always keep in mind the social objectives of the class action procedure: to facilitate access to justice, to modify harmful conduct and to preserve judicial resources.[10]

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7 Exhibit T-1, para. 42.

8 *L'Oratoire Saint-Joseph du Mont-Royal* c. *J.J.*, 2019 CSC 35, para. 6.

9 *Option Consommateurs* c. *Banque Amex du Canada*, 2018 QCCA 305, paras. 61 and 84; Luc CHAMBERLAND, Jean-François ROBERGE, Sébastien ROCHETTE and al., *Le grand collectif: Code de procédure civile: commentaires et annotations*, 5th ed., volume 2, Montréal, Éditions Yvon Blais, 2020; Pierre-Claude LAFOND, *Le recours collectif, le rôle du juge et sa conception de la justice : impact et évolution*, Cowansville, Éditions Yvon Blais, 2006, pp. 44 to 53.

10 *L'Oratoire Saint-Joseph du Mont-Royal* c. *J.J.*, *supra*, note 8, para. 6; *Western Canadian Shopping Centres Inc.* v. *Dutton*, 2001 SCC 46, paras. 27 to 29; *Abihsira* c. *Stubhub inc.*, 2020 QCCS 2593, para. 24.

1. IS THE PROPOSED SETTLEMENT AGREEMENT FAIR, EQUITABLE AND IN THE BEST INTERESTS OF CLASS MEMBERS?

1.1 Applicable Law

[18] Article 590 of the *Code of Civil Procedure* ("**C.C.P.**") confirms that a class action settlement is subject to the approval of the court. This approval is granted only after notices have been sent to the members informing them of the nature of the class action, the general provisions of the proposed settlement and the options available to them.[11]

[19] Although article 590 C.C.P. does not set out specific criteria, it is now well recognized that the role of the court in approving a settlement is to ensure that it is fair, equitable and in the best interests of the class members.[12] In doing so, the court must weigh the respective benefits and disadvantages of the settlement agreement for the class members.[13] It must also keep in mind the initial objectives of the proceeding and compare them against the actual benefits the class members obtain as a result of the settlement agreement.[14] Finally, the court must ensure that the integrity of the judicial process is maintained.[15]

[20] To assist in this endeavour, Quebec courts have overwhelmingly adopted the criteria developed by Justice Sharpe in *Dabbs* v. *Sun Life Assurance Co. of Canada*:[16]

20.1. the likelihood of success of the action;

20.2. the importance and nature of the evidence adduced;

20.3. the terms and conditions of the settlement;

20.4. the recommendation of counsel and their experience;

20.5. the cost of future expenses and the probable duration of the litigation;

20.6. the recommendation of a neutral third party, if any;

20.7. the number and nature of objections to the settlement agreement; and

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11 Catherine PICHÉ, *Le règlement à l'amiable de l'action collective*, Cowansville, Éditions Yvon Blais, 2014, pp. 191 and 192.

12 *Option Consommateurs* c. *Banque Amex du Canada*, *supra*, note 9, para. 84; *Allen* c. *Centre intégré universitaire de santé et de services sociaux de la Capitale-Nationale*, 2018 QCCS 5313, para. 55; *Jacques* c. *189346 Canada inc. (Pétroles Therrien inc.)*, 2017 QCCS 4020, para. 8 (Application for approval of a second settlement agreement and attorneys' fees granted, 2020 QCCS 319); *Bouchard* c. *Abitibi-Consolidated*, J.E. 2004-1503 (C.S.), para. 16.

13 *Option Consommateurs* c. *Banque Amex du Canada*, *supra*, note 9, para. 84; *Conseil québécois sur le tabac et la santé* c. *JTI-MacDonald Corp.*, 2011 QCCS 4981, para. 49.

14 *Arrouart* c. *Anacolor inc.*, 2019 QCCS 4795, para. 20.

15 C. PICHÉ, *supra*, note 11, p. 164.

16 *Dabbs* v. *Sun Life Assurance Co. of Canada*, [1998] O.J. No. 1598 (Q.L.) (Gen. Div.), para. 15; *Option Consommateurs* c. *Banque Amex du Canada*, *supra*, note 9, para. 25.

20.8. the good faith of the parties and the absence of collusion.

[21] Thus, the criteria applicable in Quebec are similar to those used in the common law provinces.

[22] As some judges have noted, the exercise is delicate given that once an agreement has been reached, the usual adversarial process gives way to the unanimity of the parties who signed the settlement agreement and who now have a vested interest in seeing it approved by the court.[17] Moreover, at the approval stage, the court generally has only limited knowledge of the circumstances and issues of the dispute.[18]

[23] While the court must remain vigilant, in the absence of a violation of public policy,[19] the court must approve a settlement if it meets the criteria and is in the best interests of class members.[20]

[24] Courts must encourage negotiated settlements, as this is generally in the best interests of the parties. Early resolution of disputes promotes access to justice. Avoiding lengthy and costly trials contributes to the saving of scarce judicial resources.[21] These benefits are consistent with the objective set out in the opening provision of the C.C.P., which states that "This Code is designed to provide, in the public interest, means to prevent and resolve disputes and avoid litigation through appropriate, efficient and fair-minded processes that encourage the persons involved to play an active role."

[25] Also, reducing the time between the filing of a claim and the distribution of benefits has an impact on the rate of claims and the ability of members to prove their membership in the class.[22] For the same reason, a simple, quick and efficient claims process that minimizes administrative costs argues in favour of settlement approval.[23]

[26] The agreement does not have to be perfect. It should be remembered that a settlement negotiated to avoid the risks and costs of litigation necessarily involves some compromise. Moreover, since settlement discussions are protected by privilege, the reasons for these compromises are not always disclosed.[24]

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17 *Pellemans* c. *Lacroix*, 2011 QCCS 1345, para. 21, quoted with approval in *Allen* c. *Centre intégré universitaire de santé et de services sociaux de la Capitale-Nationale*, *supra*, note 12, para. 33.

18 *Pellemans* c. *Lacroix*, *supra*, note 17, para. 21.

19 *M.G.* c. *Association Selwyn House*, 2008 QCCS 3695, para. 22.

20 *Jacques* c. *189346 Canada inc. (Pétroles Therrien inc.)*, *supra*, note 12, para. 11.

21 L. CHAMBERLAND, J.-F. ROBERGE, S. ROCHETTE and al., *supra*, note 9; Bruce JOHNSTON and Yves LAUZON, *Traité pratique de l'action collective*, Montréal, Éditions Yvon Blais, 2021, para. 5.3.1.3.

22 *Beauchamp* c. *Procureure générale du Québec*, 2019 QCCS 2421, para. 57.

23 *Ibid*, paras. 33 and 40.

24 *Option Consommateurs* c. *Banque Amex du Canada*, *supra*, note 9, para. 84; *Halfon* c. *Moose International Inc.*, 2017 QCCS 4300, para. 23; *Option Consommateurs* c. *Infineon Technologies, a.g.*, 2013 QCCS 1191, paras. 39 and 40; B. JOHNSTON and Y. LAUZON, *supra*, note 21, para. 5.3.1.3.

[27] The court may not alter the settlement reached by the parties, although the court may suggest that the parties amend the settlement to correct certain deficiencies in order to facilitate approval.[25] The proposed release must be carefully drafted to ensure that it does not absolve the defendants of liability for conduct that does not fall within the claims set out in the complaint or for which the members are not being compensated.[26]

1.2 Discussion

[28] Class Members were notified in accordance with the Authorization Judgment. The Authorization Notices and the proposed Settlement Agreement have also been posted on Class Counsel's website and on the Superior Court's Class Action Registry.

[29] Defendants sent the Authorization Notices directly to the Class Members using the last email address on file in accordance with the notice plan.[27]

[30] The only issue is to determine whether the settlement is reasonable in light of the criteria set out by the courts.

[31] Applying the above criteria, the Court concludes that the Settlement Agreement is fair, reasonable and in the best interest of the Class Members.

[32] The Court approves it.

1.2.1 The Likelihood of Success of the Class Action

[33] When analyzing the likelihood of success, the court's role is not to decide which party would have prevailed at trial.[28] It must be kept in mind that settlements often occur because the parties wish to avoid creating a precedent. It suffices to establish that there were obstacles to the eventual success of the action. Here, notwithstanding the Report of the Privacy Commissioner, Plaintiff's success was not guaranteed.

[34] On the one hand, while the Privacy Commissioner determined that Defendants had not obtained proper consent, Defendants contest this finding. They claim that they used multiple mechanisms to ensure that the App's users provided explicit consent to the collection of their location-based data.[29] Users who refused to grant such permission did not have their location-based data collected by the Defendants. Users who had granted permission were free to revoke their consent at any time.

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25 *Option Consommateurs* c. *Banque Amex du Canada*, *supra*., note 9, paras. 37 and 74; *Bouchard* c. *Abitibi Consolidated*, *supra*, note 12, para. 17; L. CHAMBERLAND, J.-F. ROBERGE, S. ROCHETTE and al., *supra*, note 9.

26 *Leung* c. *Uber Canada inc.*, 2022 QCCS 1076, para. 57; *Walter* c. *Ligue de hockey junior majeur du Québec inc.*, 2020 QCCS 3724, paras. 41 to 47.

27 Exhibit T-2, Schedule A.

28 *Picard* c. *Ironman Canada inc.*, 2022 QCCS 2218, para. 31.

29 Affidavit of Matthew Moore, Head of Digital and Loyalty at TDL, dated July 14, 2021.

[35] Precedents exist that recognize the validity of electronic consents similar to the ones obtained by the Defendants.[30]

[36] More importantly, the Privacy Commissioner determined that the Defendants had never used the geolocation data collected through the App except in an aggregated anonymized basis.[31] As such, Class Members would have faced some difficulty in proving that they suffered a prejudice from the collection of geolocation data.

[37] Indeed, Canadian tribunals have consistently concluded that matters involving data breaches and infringements on privacy rights are no different than other delictual or tort claims in that they require evidence of damages that go beyond a subjective fear of future victimization or mere annoyances.[32]

[38] As for punitive damages, both civil[33] and common[34] law precedents require a demonstration of intentional, egregious, malicious or other highly reprehensible misconduct. Given the findings of the Privacy Commissioner, such proof could have involved some difficulty.

[39] Thus, both sides had valid arguments to present which justified the compromises reflected in the Settlement Agreement.

[40] This argues in favour of approving the Settlement Agreement.

1.2.2 The Importance and Nature of the Evidence Adduced

[41] The conduct of this class action would likely have required the administration of complex and extensive documentary and testimonial evidence from both parties.

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30 *Dell Computer Corp.* v. *Union des consommateurs*, 2007 SCC 34, paras. 97 to 101; *Ehouzou* v. *Manufacturers Life Insurance Company*, 2019 QCCS 2017, paras 55 to 57 (confirmed by the Court of Appeal, 2021 QCCA 1214 and permission to appeal at the Supreme Court of Canada rejected (C.S. Can., 2022-03-24) 39863); *Seigneur* c. *Netflix International*, 2018 QCCS 4629, paras. 45 to 48 (affirmed by the Court of Appeal in 2019 QCCA 1671 and permission to appeal to the Supreme Court of Canada rejected (C.S. Can., 2020-04-02) 38931); *Maginnis and Magnaye* v. *FCA Canada et al.*, 2020 ONSC 5462, paras. 36, 39, 41 and 43; *St-Arnaud* c. *Facebook inc.*, 2011 QCCS 1506, paras. 35 to 39 (Discontinuance of Appeal (C.A., 2011-08-19) 500-09-021662-119).

31 Exhibit T-6, para. 41.

32 *Lamoureux* v. *Organisme canadien de réglementation du commerce des valeurs mobilières (OCRCVM)*, 2021 QCCS 1093, paras. 63 and 72 (affirmed by the Court of Appeal in 2022 QCCA 685, paras 18 to 23); *Setoguchi* v. *Uber B.V.*, 2021 ABQB 18, paras. 56 and 57; *Li* v. *Equifax inc.*, 2019 QCCS 4340, paras. 23, 24, 27 and 31; *Bourbonnière* v. *Yahoo! Inc.*, 2019 QCCS 2624, paras. 34 to 44; *Mazzonna* v. *DaimlerChrysler Financial Services Canada Inc./Services financiers DaimlerChrysler inc.*, 2012 QCCS 958, paras. 40, 56, 57 and 58.

33 *Cinar Corporation* v. *Robinson*, 2013 SCC 73, para. 138; *de Montigny* v. *Brossard (Succession)*, 2010 SCC 51, para. 49; *Québec (Public Curator)* v. *Syndicat national des employés de l'hôpital St-Ferdinand*, [1996] 3 R.C.S. 211, para. 121.

34 *Fidler* v. *Sun Life Assurance Co. of Canada*, [2006] 2 SCR 3, paras. 61 and 62; *Whiten* v. *Pilot Insurance Co.*, [2002] 1 SCR 595, paras. 36 and 94.

[42] The intricate technological aspects of this dispute could have required expert evidence on both sides.

[43] As indicated above, demonstration of moral damages would have necessitated extensive individual testimonial evidence. Demonstration of punitive damages would have required evidence to establish Defendants' knowledge and intent.

1.2.3 The Terms and Conditions of the Settlement

1.2.3.1 The Terms of the Settlement Agreement

[44] The Settlement Agreement provides compensation in the form of a credit to be used for the purchase of one Hot Beverage and one Baked Good (as defined in the Settlement Agreement) from any participating Tim Hortons store within Canada.

[45] Approximately 1.9 million credits will be issued to Class Members. The total potential value of the Settlement Agreement is estimated at $16,179,000.

[46] The credit can be used only once. Class Members will have a maximum of 24 months to redeem it.[35] It is non-transferable, non-refundable, and non-cash convertible.

[47] Defendants have already modified their conduct as of September 2020. They have also undertaken to permanently delete any geolocation information about Class Members that may be in their possession and shall instruct their third-party vendor to do the same.

[48] Defendants also agree to pay class counsel fees as approved by the Court inclusive of all extrajudicial fees, expert fees, costs and disbursements.

[49] Before discussing the terms of the Settlement Agreement, a few observations are in order with regard to the use of coupons, vouchers or credits in class action settlements. The Court must also address Defendants' request to file the affidavit of Michael Fera, dated September 1, 2022 (the "**Fera Affidavit**"), under seal.

1.2.3.2 Settlements Involving Coupons, Vouchers or Credits

[50] Settlements that offer compensation in the form of coupons, vouchers or credits have sometimes been criticized. It has been said that they provide benefits to the companies being sued which runs afoul of the objective to deter harmful behaviour. Other objections include the low take-up rate of coupons, the fact that compensation may be tied to a purchase obligation, undue restrictions on the use of coupons and the high fees claimed by class counsel.[36]

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35 Exhibit T-1, s. 35 and 36.

36 Warren K. WINKLER, Paul M. PERELL, Jasminka KALAJDZIC and al., *The Law of Class Actions in Canada*, Toronto, Canada Law Book, 2014, p. 303; C. PICHÉ, *supra*, note 11, pp. 38 and 39; Stéphanie POULIN, « Les règlements de recours collectifs par voie de coupons : la justice sous forme de programme de fidélisation? », dans Groupe de recherche en droit international et comparé de la

[51] Such objections are valid and must be considered when evaluating whether a coupon transaction is fair, reasonable and in the best interest of members.

[52] This being said, these types of settlements may be appropriate in certain circumstances. The following factors, while not exhaustive, should be weighed when a court is asked to consider whether a coupon settlement is fair, reasonable and in the best interest of members:

52.1. The individual value of the settlement: When the individual value of the settlement is low, it is often impractical or too costly to issue cheques or proceed with Interac transfers. In such cases, a coupon may be preferable to a *cy-près* payment which would not directly benefit class members.

52.2. The possibility to choose other compensation or to transfer the voucher: Courts are more likely to approve coupon settlements where the agreement provides that members may choose between coupons and other compensation, or when the coupon is transferable.[37]

52.3. The value of the coupon in proportion to the cost of redeeming it: When the good or service offered requires a subjectively important investment, some members may be indirectly forced to forego their compensation due to lack of financial means. On the other hand, when the settlement consists of a free item without further obligation or a rebate on a product or service that class members already use, credits may be the best way to automatically compensate members.

52.4. The likelihood that the coupons will be redeemed: Voucher settlement may be particularly problematic when access to compensation requires that customers purchase goods or services that may not be needed in the immediate future.[38] As such, the frequency and recurrence of the commercial relationship between defendant and class members may be an important factor to consider. One must also be wary of forcing customers to re-establish a long-term commercial relationship that the customer may now consider objectionable as a result of the complained-about practice.

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consommation, *L'accès des consommateurs à la justice*, Cowansville, Éditions Yvon Blais, 2010, pp. 23 to 47; OPTION CONSOMMATEURS, "*Les règlements coupons : la justice devient-elle un programme de fidélisation?*", June 2007: <option-consommateurs.org/wp-content/uploads/2017/07/recours-collectifs-reglements-coupons-juin-2007.pdf>.

37 *Abihsira* c. *Stubhub inc.*, *supra*, note 10, paras. 45 b) and d); *Hurst* c. *Air Canada*, 2019 QCCS 4614, para. 29; C. PICHÉ, *supra*, note 11, pp. 38 and 39.

38 *Abihsira* c. *Stubhub inc.*, *supra*, note 37, para. 44 h).

52.5. Restrictions or conditions that apply: The easier it is to use the credit, coupon, or voucher, the likelier it will be that the settlement will be approved.[39] Coupon settlements that place undue restrictions or too short a time frame for the redemption of class member compensation should be frowned upon. When compensation requires a purchase or travelling to defendant's establishment, the number and geographical availability of these locations or the possibility of conducting remote transactions is an important factor.

52.6. A change of practice: A coupon settlement may be considered more appropriate when the settlement is accompanied by an undertaking by the defendant to change the commercial practice which gave rise to the class action.[40]

52.7. The obligation to provide a report on the implementation of the settlement: The undertaking to provide the court with a detailed report on the redemption rate is considered to be illustrative of class counsel's intent to ensure that as many members as possible will redeem their coupon.[41] This will especially be the case when the report is presented prior to the approval of class counsel fees.

52.8. Financial means of the defendant: When compensation to class members is deferred, the court must be satisfied that the defendant will be able to honour the coupon or voucher when it is presented.[42]

[53] As Justice Gagnon wisely summarized after reviewing the authorities on the subject: "the court must be extra vigilant in dealing with a coupon settlement, while keeping an open mind as to whether or not it is fair and reasonable".[43]

1.2.3.3 The Request to File the Fera Affidavit under Seal

[54] During settlement negotiations, Defendants provided Class Counsel and Plaintiff with confidential and commercially sensitive information to convince them that the credits being issued were likely to be redeemed.

[55] Defendants submitted this information to the Court in the form of the Fera Affidavit to support their position that the Settlement Agreement is in the best interest of Class Members. However, because the Fera Affidavit contains commercially sensitive information, they ask that the information be filed under seal.

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39 *Ibid*, para. 44 a); *Preisler-Banoon* c. *Airbnb Ireland,* 2020 QCCS 270, paras. 34 to 35 (closing judgment 2021 QCCS 15); *Gosselin* c. *Loblaws inc.*, 2019 QCCS 3941, para. 24; *Jacques* c. *189346 Canada inc. (Pétroles Therrien inc.)*, *supra*, note 12, para. 15.

40 *Picard* c. *Ironman Canada inc.*, *supra*, note 28, para. 55; *Abihsira* c. *Stubhub inc.*, *supra*, note 10, para. 44 j); *Preisler-Banoon* c. *Airbnb Ireland, supra*, note 39, para. 33.

41 *Hurst* c. *Air Canada*, *supra*, note 37, para. 33; *Gosselin* c. *Loblaws inc.*, *supra*, note 39, para. 30.

42 *Abihsira* c. *Stubhub inc.*, *supra*, note 10, para. 44 f).

43 *Ibid*, para. 37.

[56] Documents exchanged during the discovery phase of litigation are subject to an implied duty of confidentiality that is intended to promote full disclosure.[44] Similarly, documents exchanged by parties in the context of settlement discussions are also protected by settlement privilege. This privilege "enables parties to participate in settlement negotiations without fear that information they disclose will be used against them in litigation. This promotes honest and frank discussions between the parties, which can make it easier to reach a settlement".[45]

[57] However, the duty to protect the confidentiality of documents exchanged during the discovery phase does not apply to documents that a party chooses to file at trial. When the case proceeds to trial, the expectation of confidentiality disappears in favour of the public nature of the proceedings.[46] Likewise, settlement privilege does not apply when a party decides to file evidence that it provided to the other party during settlement discussions.

[58] The public nature of the judicial process is a fundamental principle recognized both by articles 11 and 12 of the C.C.P. and by numerous judgments of the Supreme Court of Canada.[47]

[59] According to the criteria developed by the case law, a sealing order with respect to documents filed into court will only be issued if:

59.1. the open court principle poses a serious risk to an important public interest;

59.2. the order sought is necessary to address that serious risk to the interest identified, because other reasonable measures will not address that risk; and

59.3. from a proportionality perspective, the benefits of the order outweigh its negative effects.[48]

[60] For the purposes of the analysis, the term "substantial and legitimate interest" in article 12 of the C.C.P. must be assessed in terms of a "public interest in confidentiality" and not in terms of a private interest that relates merely to the party requesting the order.[49]

[61] The evidence here is of a commercial nature. It contains information on the percentage of App users who purchase beverages within a 12-month period, market share information as well as redemption rates of certain prizes awarded during the Roll

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44 *Lac d'amiante du Québec Ltée* v. *2858-0702 Québec inc.*, 2001 SCC 51, para. 73.

45 *Union Carbide Canada Inc.* v. *Bombardier Inc.*, 2014 SCC 35, para. 31.

46 *Lac d'Amiante du Québec Ltée* v. *2858-0702 Québec inc.*, *supra*, note 44, paras. 42 and 43.

47 *Sherman (Succession)* v. *Donovan*, 2021 SCC 25, para. 30; *Globe and Mail* c. *Canada (Attorney General)*, 2010 SCC 41; *Toronto Star Newspapers Ltd.* v. *Ontario*, 2005 SCC 41; *Vancouver Sun (Re)*, 2004 SCC 43; *Sierra Club of Canada* v. *Canada (Minister of Finance)*, 2002 SCC 41; *R.* v. *Mentuck*, 2001 SCC 76; *Dagenais* v. *Radio-Canada*, [1994] 3 S.C.R. 835.

48 *Sherman (Succession)* v. *Donovan*, *supra*, note 47, para. 38; *Sirius Services conseils en technologie de l'information inc.* c. *Boisvert*, 2017 QCCA 518; *Imperial Tobacco Canada Ltd.* c. *Conseil québécois sur le tabac et la santé*, 2015 QCCA 1224, paras. 19 and 20.

49 *Sierra Club du Canada* v. *Canada (Minister of Finance)*, *supra*, note 47, para. 55.

Up to Win! promotional event. Strategically, Tim Hortons does not wish to share this information with its competitors. At first glance, the interest in confidentiality is private and specific to Tim Hortons.

[62] However, if the information had been disclosed to foster the settlement of a regular action, it would remain confidential. It is only because the C.C.P. requires the court's approval of class action settlements that the evidence is being filed. If the Court were to refuse to seal such evidence, there exists a significant risk that defendants may refuse to disclose such information to class counsel which would in turn deter the parties from settling class actions. Alternatively, defendants could refrain from filing information that is helpful to the court when it is asked to decide whether a settlement is in the best interest of class members.

[63] Depriving class counsel or the court of such information could reduce the number of settlements or the likelihood that they will be approved.

[64] Fostering the settlement of disputes is widely acknowledged by the courts as a way to unburden the judicial system and promote imperatives of access to justice.[50] These are fundamental public interests.

[65] Thus, the Court finds that there exists a serious risk to an important public interest, that the order sought is necessary to address this serious risk and that the benefits of a sealing order outweigh its negative effects.

[66] The Court notes that sealing orders have been issued to protect similar information filed in support of motions to approve settlements of class actions.[51]

1.2.3.4 Discussion on the Terms of the Settlement

[67] The value of the compensation offered is set at a maximum of $8.58. It may be lower depending on the specific Hot Beverage or Baked Good chosen by individual Class Members.

[68] This amount is well within the range of privacy class action settlements across Canada. In 2021, Justice Perell[52] conducted a thorough review of class actions alleging privacy breaches. He concluded that these sample settlements reflect very modest *per capita* recoveries for class members and that the motivation of defendants appears mostly to maintain good commercial relationships with their clients.[53] Damages were more significant when private information was stolen by third parties or misused.

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50 *Union Carbide Canada Inc.* v. *Bombardier Inc.*, *supra*, note 45, paras 3, 32, 33, 49, 50 and 51.

51 *Leung* c. *DoorDash Technologies Canada inc.*, 2022 QCCS 1603, para. 8; *Abicidan* c. *Turo inc.*, 2022 QCCS 1222, para. 8e); *Abihsira* c. *Stubhub inc.*, *supra*, note 10, para. 44e); *Abihsira* c. *Stubhub inc.*, 2019 QCCS 5659, paras. 41c) and 81.

52 *Karasik* v. *Yahoo! Inc.*, 2021 ONSC 1063, paras. 125 and following.

53 *Ibid*, para. 139.

[69] Given these precedents, the amount of the credit offered by the Defendants in the present case can be considered reasonable. As discussed above, the Privacy Commissioner concluded that the collected information was not misused. Furthermore, it was not stolen or shared with unauthorized third parties.

[70] It is true that the credit is not transferable and non-refundable.

[71] However, the period during which it can be used is reasonable. Moreover, the facts set out in the Fera Affidavit convince the Court that the redemption rate should be high. The Authorization Notices reached over 98% of Class Members. Many App users purchase hot beverages within a twelve-month period and that period can be extended in certain circumstances. The redemption rate of prizes awarded during Tim Hortons promotions is also very high.

[72] Of particular importance here is the fact that redemption is not conditional upon the purchase of other products and does not require re-establishing a contractual relationship with Defendants. A Class Member may pick up a free beverage and baked good and leave without further obligation. The value of the credit represents 100% of the value of the good on which it is applied.

[73] The compensation mechanism is also very simple. There is no obligation for Class Members to produce invoices or a proof of purchase. The compensation will be credited directly into their active App account or else by email to those who do not have an active account. Class Members who no longer have an account and do not receive an email with a credit[54] will be able to contact the Defendants' guest services to claim a credit. Class Members may redeem their credit at any participating Tim Hortons location across Canada (which includes 89% of all Tim Hortons restaurants).

[74] Defendants are responsible for managing the distribution of the credits and they will assume the costs of the dissemination of Settlement Approval Notices.

[75] The compensation comes with a change of the Defendants' business practice and an undertaking to permanently delete any geolocation information collected from Class Members.

[76] Defendants undertake to provide a report on the implementation of the settlement. Class counsel have also deferred their fee request until the Court has a better indication of the redemption rate.

[77] No one has put into doubt that Tim Hortons will have the financial means to fully honour all issued credits.

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[54] There are 339 Class Members (representing 0.02% of the National Class) who do not have an active account and for whom the Defendants do not have an email address.

[78] While the release is quite verbose, counsel have confirmed that the intent of the parties is to release the Defendants (as well as their subcontractor and BK Canada Service ULC ("**Burger King**") who is a defendant in one of the Other Class Actions)[55] from all liability resulting from collection of geographical data.

[79] Thus, this criterion supports approval of the Settlement Agreement.

1.2.4 The Recommendation of Counsel and their Experience

[80] The Settlement Agreement was negotiated through experienced counsel in British Columbia, Ontario and Quebec.

[81] All of the counsel involved support its approval.

1.2.5 The Anticipated Costs and Duration of Litigation

[82] Pursuing the present litigation on the merits would undoubtedly involve considerable costs from all parties as well as significant judicial resources especially given the multiplicity of class actions in different provinces.

[83] The specificity of damages may have required many mini trials.

[84] Furthermore, without a settlement, the resolution of the various class actions would have required significant time making it more difficult to reach and indemnify individual Class Members.

1.2.6 The Recommendation of a Neutral Third Party

[85] This criterion is not applicable here.

1.2.7 The Number and Nature of Objections to the Transaction

[86] On July 29, 2022, Authorization Notices were sent to approximately 1.8 million Class Members identified in the Settlement Agreement.[56]

[87] 98.79% of the emails were delivered. The Authorization Notices provided a hyperlink to Class Counsel's bilingual webpages dedicated to this class action[57] which includes copies of the Application for Authorization of the Class Action, copies of the Settlement Agreement, the Judgment dated June 15, 2022 (as rectified on July 4, 2022), and copies of the Authorization Notices.

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55 Though Burger King is a party to the Settlement Agreement and was named as one of the defendants in the Jung class action, there is no evidence that geographical location data was collected through the use of the Burger King mobile application.

56 Schedule A to the Fera Affidavit; Exhibit T-2.

57 LPC AVOCAT INC., "Tim Hortons – National Class Action Settlement Regarding the Collection of Geolocation Data from Users of the Tim Hortons App", online: <https://www.lpclex.com/timhortons>; CONSUMER LAW GROUP, "Tim Hortons Mobile Application Privacy Class Action", online:

[88] The relatively low portion of emails that remain undeliverable (i.e. 1.21%) does not justify putting in place other measures given the media coverage that the settlement received.[58] Class Members who become aware of the settlement can contact Tim Hortons and receive their credit by email. The Settlement Approval Notices explain this process.

[89] 93 Class Members requested their exclusion prior to the exclusion deadline.[59]

[90] 38 Class Members objected to the Settlement Agreement.[60]

[91] Most of the objections relate to the value of the compensation. The Court has already observed that this value is in line with precedents. None of the objections or exclusions mentions that the person suffered a financial loss as a result of the alleged privacy breach.

[92] The total objections/opt-outs represent 0.0069% of Class Members, which can be considered a minor percentage. Such percentages do not prevent the approval of the Settlement Agreement.[61]

1.2.8 The Good Faith of the Parties and the Absence of Collusion

[93] The Settlement Agreement was negotiated at arm's length, in utmost good faith and without collusion between the parties.

CONCLUSION

[94] The Settlement Agreement is fair, reasonable and in the best interest of Class Members.

<https://www.clg.org/Class-Action/List-of-Class-Actions/Tim-Hortons-Mobile-Application-Privacy-Class-Action>.

58 For example: CBC News Online - Tim Hortons proposes settlement in class-action suits over data-tracking app (estimated audience 16M); CTV News Online - Proposed Tim Hortons app settlement raises questions about the future of consumer privacy (estimated audience 14.7M); Global News Online - Tim Hortons to offer free coffee, doughnut to app users involved in privacy lawsuit (estimated audience 7.8M); CTV National News with Lisa LaFlamme (live broadcast estimated audience 5.8M); Toronto Star Online - Tim Hortons reaches proposed settlement in class action lawsuit involving mobile app (estimated audience 5.6M). The news was also disseminated in the following francophone media: LaPresse, Radio-Canada, Le Devoir, TVA Nouvelles and Journal de Montréal.

59 Exhibit T-3

60 Exhibit T-4.

61 *Vitoratos* c. *Takata Corporation*, 2021 QCCS 231, para. 34; *Schachter* c. *Toyota Canada inc.*, 2014 QCCS 802, paras. 94 to 97; *Mignacca* v. *Merck Frosst Canada Ltd.*, 2012 ONSC 493, paras. 93 to 95; *Stewart* v. *General Motors of Canada Ltd.*, 2008 CanLII 57167 (ON SC), paras. 26 to 29.

POUR CES MOTIFS, LE TRIBUNAL :	**FOR THESE REASONS, THE COURT:**
[95] **ACCUEILLE** la demande en approbation de l'Entente de Règlement;	**GRANTS** the Application to Approve a Class Action Settlement;
[96] **DÉCLARE** que les définitions contenues dans l'Entente de Règlement s'appliquent et sont incorporées au présent jugement et en conséquence, en font partie intégrante, étant entendu que les définitions lient les parties à l'Entente de Règlement;	**DECLARES** that the definitions set forth in the Settlement Agreement apply to and are incorporated into this judgment, and as a consequence shall form an integral part thereof, being understood that the definitions are binding on the parties to the Settlement Agreement;
[97] **APPROUVE** l'Entente de Règlement conformément à l'article 590 du *Code de procédure civile du Québec* et **ORDONNE** aux parties de s'y conformer;	**APPROVES** the Settlement Agreement as a transaction pursuant to article 590 of the *Code of Civil Procedure* and **ORDERS** the parties to abide by it;
[98] **DÉCLARE** que l'Entente de Règlement (incluant son préambule et ses annexes) est juste, raisonnable et qu'elle est dans l'intérêt fondamental des Membres du Groupe et qu'elle constitue une transaction en vertu de l'article 2631 du *Code civil du Québec*, qui lie toutes les parties et tous les Membres du Groupe tel qu'énoncé aux présentes;	**DECLARES** that the Settlement Agreement (including its Preamble and its Schedules) is fair, reasonable and in the best interest of the Class Members and constitutes a transaction pursuant to article 2631 of the *Civil Code of Quebec*, which is binding upon all parties and all Class Members set forth herein;
[99] **ORDONNE ET DÉCLARE** que le présent jugement, incluant l'Entente de Règlement, lie chaque Membre du Groupe visé par le Règlement;	**ORDERS AND DECLARES** that this judgment, including the Settlement Agreement, shall be binding on every Class Member;
[100] **ORDONNE** aux défenderesses de notifier par courriel chaque Membre du Groupe de l'Avis d'approbation de la transaction déposé comme pièce T-5 (annexes C et D de l'Entente de Règlement) dans un délai de cent-vingt jours suivant la Date d'entrée en vigueur, afin de les informer de l'approbation de l'Entente de Règlement et de l'émission de leur compensation aux fins du règlement;	**ORDERS** the Defendants to notify each Class Member by email, within one hundred and twenty days following the Effective Date, with the Settlement Approval Notice filed as Exhibit T-5 (Schedules C and D to the Settlement Agreement), in order to inform them of the approval of the Settlement Agreement and the issuance of their compensation pursuant to the Settlement Agreement;

[101] **ORDONNE** aux défenderesses de fournir à la Cour une comptabilité de la valeur totale des Crédits échangés après 12 mois de leur émission;	**ORDERS** the Defendants to provide the Court with an accounting of the total value of the Credits redeemed after 12 months of their issuance;
[102] **PREND ACTE** que la demande d'approbation des honoraires des avocats du groupe sera présentée et entendue à une date ultérieure à confirmer par la Cour et les parties;	**PRAYS ACT** of Class Counsel's intent to file an application for the approval of class counsel fees to be heard at a later date to be confirmed by the Court and the parties;
[103] **LE TOUT**, sans frais de justice.	**THE WHOLE**, without legal costs.

MARTIN F. SHEEHAN, J.S.C.

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Hearing date: September 6, 2022.

Additional representations received September 20, 2022.