Translated from the original French

SUPERIOR COURT

(Class actions)

CANADA
PROVINCE OF QUEBEC
DISTRICT OF MONTREAL

No.: 500-06-001243-233

DATE: April 17, 2024

PRESIDING: THE HONOURABLE PIERRE NOLLET, J.S.C.

DAPHNA OHAYON
Plaintiff
v.
DOLLARAMA S.E.C.
DOLLARAMA INC.
DOLLARAMA G.P. INC.

ET AL.

Defendants

JUDGMENT

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[1] The plaintiff, Ohayon, seeks the approval of a national agreement to settle a class action (the "**Settlement**") concerning the way the defendants ("**Dollarama**") displayed the prices of certain items subject to ecofees. Ohayon alleges that they emphasized the price of the item without including the ecofees, which were indicated separately.

1. SHOULD THE SETTLEMENT BE APPROVED?

1.1 RELEVANT FACTS

[2] On May 23, 2023, the plaintiff, Ohayon, filed an application for authorization of a class action, which was subsequently amended three times (the "**Application for Authorization**").

[3] She alleges that during the class period, Dollarama displayed and charged the environmental handling fees ("**ecofees**") to the public by fragmenting the price of the items sold, such that the labels indicated only the lower price of the product, while the additional ecofees were indicated separately in much smaller print.

[4] The plaintiff argues that this conduct violates sections 223, 223.1, and 224(c) of the *Consumer Protection Act* ("**CPA**"), section 1(1)(b) of the *Order in Council respecting the Policy on accurate pricing for merchants who use optical scanner technology*,[1] articles 6, 7, 1375, or 1458 CCQ, and sections 36 and 54 of the *Competition Act.*

[5] Under the *Order in Council respecting the Policy on accurate pricing for merchants who use optical scanner technology*, every merchant must apply an accurate pricing policy. Pursuant to this policy, the price at the check-out must be the same as the one displayed on the shelf or on the product.

[6] Where the price of the good rung in at the check-out is higher than the price advertised on the product or on the shelf, the lower price must be honoured. If the accurate price of the good is $10 or less, the merchant must give the good to the consumer free of charge. If the accurate price of the good is higher than $10, the merchant must grant a discount of $10 on the price of the good.

[7] Dollarama's business model is based on the retail sale of goods at a fixed price that varies between $0.25 and $5, identical across Canada. Two types of products are likely to have ecofees: batteries and electronic devices. Ecofees can vary from one product to another and from one province to another.[2]

[8] Before the Application for Authorization was filed, the fixed retail price (without the ecofees) was printed directly on the packaging of each of the products sold at Dollarama stores in Canada. At Dollarama's request, the product manufacturers applied a "**sticker**" with Dollarama's distinctive logo and colours, except in cases where the manufacturer did not allow it.

[9] Dollarama's fixed price was also printed onto the shelf-label pertaining to each product, with the applicable ecofees in smaller print for the products subject to such fees.

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1 CQLR c. P-40.1, r-2.

2 R-5 Affidavit of Peter Daley, Senior Vice-President, Replenishment and Planning, dated April 4, 2024.

[10] Dollarama did not ask its suppliers to indicate the ecofees on the stickers. According to Peter Daley, it is impossible do so as the ecofees for a same product vary depending on the province or territory in which it is sold. They are revised every year, and the retailers are only told what the revised prices are a few months before they come into force.[3]

[11] After she had filed the Application for Authorization, Ohayon gave a bailiff the mandate to establish the facts on the way Dollarama displays and charges ecofees. The bailiff visited 25 Dollarama stores. All of them, without exception, displayed the price of the item on the product without the ecofees. The price of the product was indicated on the shelf and emphasized. The ecofees were indicated separately. At the check-out, the ecofees increased the price of each product.[4]

[12] In his statement of facts, the bailiff states that he spoke to the cashier at every location to raise the non-compliance with the accurate pricing policy and ask for the item to be given to him free of charge. Such request was refused every time.

[13] In the examples provided in the statement of facts prepared by the bailiff for Dollarama, the ecofees varied between $0.08 and $0.60.

[14] Ohayon initially wanted the defendants to be condemned to pay $10 to each class member (pursuant to the accurate pricing policy), reimburse the ecofees, and pay $40 million in punitive damages.

[15] The total value of the Settlement, including lawyers' fees and administrative fees, is $2,500,000.

[16] Each class member that files a valid claim will receive a gift card with a maximum value of $15 that can be used in any one of the 1,400 Dollarama stores across Canada.

[17] The gift card can be transferred using the Dollarama mobile application.

[18] The Settlement provides that Dollarama will send, at its expense, a gift card on a physical support to the Settlement class members that request that a physical card be sent to them by mail.

[19] In the Settlement agreement, Dollarama states that: (i) on June 13, 2023, it issued a memorandum in Quebec to modify the shelf-labels for products subject to ecofees to display the total price; a similar memorandum was issued on June 23, 2023, in Alberta, Manitoba, New-Brunswick, Newfoundland, Nova Scotia, Ontario, Prince Edward Island, Saskatchewan, and Yukon, and on July 4, 2023, in British Columbia; (ii) it has taken all reasonable means to ensure that, henceforth, the price expressed, indicated, or advertised for any product subject to ecofees will display the total price payable; and (iii) on June 2, 2023, and July 30, 2023, Dollarama made the necessary arrangements to

[3] R-5 at para.17.
[4] R-9.

remove the Dollarama preprinted price from its packaging before the first quarter of 2024 and to stop adding a price sticker on the products subject to ecofees (see paragraphs 10 and 11 of the Settlement, Schedules F and G).

[20] On February 15, 2024, the Court approved the class action against Dollarama for Settlement purposes only and appointed the plaintiff Ohayon as the representative plaintiff of the class.

[21] The Court also approved the form and content of the notice to class members that determines the time limit for opting out of the class action or objecting to the Settlement, appointed Concilia Services Inc. as the Settlement Administrator, and decided that the Settlement approval hearing would take place on April 9, 2024.

[22] The class members are as follows:

All persons who purchased a product subject to an Environmental Handling Fee ("EHF") from Dollarama in Quebec between December 11, 2019, and July 4, 2023, or elsewhere in Canada between April 29, 2021, and July 4, 2023. (the "**Dollarama Settlement Class**").	Toutes les personnes qui ont acheté un produit soumis à des écofrais de Dollarama au Québec entre le 11 décembre 2019 et le 4 juillet 2023, ou ailleurs au Canada entre le 29 avril 2021 et le 4 juillet 2023. (le « **Groupe de règlement Dollarama**»).

[23] The report prepared by the Settlement Administrator explains the way the notices were sent to the class members and the results of the distribution plan.[5]

[24] Between February 20 and 22, 2024, an email was sent to the 202,691 individuals that had registered on the website of Class counsel. More than 98.7% of these emails were delivered.

[25] On February 20, 2024, a 30-day social media campaign was launched. Over 1,874,914 people saw the announcement at least once.

[26] Dollarama confirms that it sent 37,300 short-form notices approved by the Court to everyone who had a Dollarama account and who had accepted to receive communications from Dollarama. It also added a banner on its website announcing the Settlement.[6]

[27] A notice was posted on class counsel's website and entered in the registry of class actions. An email containing the short-form notice was also sent to those subscribed to class counsel's mailing list.

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5 R-2.

6 R-5.1 Affidavit of Jasmine Adhami dated April 8, 2024.

[28] On February 20, 2024, a press release was published.[7] It caught the attention of numerous media and social networks.[8]

[29] The Settlement requires those who wish to file a claim to provide their email address to the Settlement Administrator, no later than the opt-out or objection deadline. The deadlines are all before the date of the Settlement approval hearing.

[30] As of April 9, 2024, 1,282,052 potential class members had provided their email address to the Settlement Administrator to be able to file a claim in due course.

[31] The total number of potential members remains unknown as the action concerns purchases made in store, for which Dollarama does not systematically collect consumer data.

[32] According to Mr. Daley's affidavit, all the amounts collected in Quebec were remitted to management organizations recognized by Recyc-Québec chosen according to the nature of the product. In the rest of Canada, similar programs exist, and the same remittances were made.

1.2 APPLICABLE PRINCIPLES

[33] Pursuant to article 590 CCP, the Court must approve the Settlement if it is fair and just and if it is in the fundamental interests of the members who will be bound by it:

> **590.** A transaction, acceptance of a tender, or an acquiescence is valid only if approved by the court. Such approval cannot be given unless notice has been given to the class members.
>
> In the case of a transaction, the notice must state that the transaction will be submitted to the court for approval on the date and at the place indicated. It must specify the nature of the transaction, the method of execution chosen and the procedure to be followed by class members to prove their claim. The notice must also inform class members that they may assert their contentions before the court regarding the proposed transaction and the distribution of any remaining balance. The judgment approving the transaction determines, if necessary, the mechanics of its execution.

[34] The Court must [TRANSLATION] "bear in mind the main principles and objectives underlying class actions and weigh the advantages and disadvantages of the settlement, as well as the reciprocal concessions, risks of a trial, and costs to be incurred".[9]

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7 R-3.
8 R-4.
9 *A.B. v. Clercs de Saint-Viateur du Canada*, 2023 QCCA 527 at para. 34.

[35] The Court must examine the transaction from the perspective of the three main goals of class actions:[10] judicial economy, access to justice, and deterrence.[11]

[36] Judge Schrager explains that [TRANSLATION] "the assessment of the fairness and reasonableness of the transaction revolves around the following criteria imported from U.S. law":

- The likelihood that the action will succeed;
- The extent and nature of the evidence to be adduced;
- The terms and conditions of the transaction;
- The recommendations of counsel and their degree of experience;
- The anticipated cost and duration of litigation;
- The recommendations of neutral third parties, if any;
- The nature and number of objections to the transaction; and
- The good faith of the parties and the absence of collusion.[12]

[37] The Court may consider the agreement of the representative and the number of members that have opted out.[13]

[38] The Court encourages disputes to be settled by way of negotiation as this solution favours access to justice by avoiding long and costly trials, which contributes to judicial economy. "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".[14]

[39] Finally, when the settlement is akin to issuing coupons, the Court must be very vigilant and keep an open mind to assess whether it is fair and reasonable.[15] In fact, some authors question the deterrent effect of an indemnity that forces the member to purchase something else from the same retailer.[16]

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10 *Western Canadian Shopping Centres Inc. v. Dutton*, 2001 SCC 46 at paras. 27–29.

11 *Abihsira c. Stubhub inc.*, 2019 QCCS 5659 at para. 21.

12 *Ibid*.

13 *Schneider (Succession de Schneider)* c. *Centre d'hébergement et de soins de longue durée Herron inc.*, 2021 QCCS 1808.

14 Luc Chamberland et al., *Le grand collectif: Code de procédure civile: commentaires et annotations*, 5th ed. (Montreal: Yvon Blais, 2020) vol. 2.

15 *Supra* note 10 at para. 34.

16 Catherine Piché, *Le règlement à l'amiable de l'action collective* (Montreal: Yvon Blais, 2014) at 38–39.

1.3 PRELIMINARY DISCUSSIONS

1.3.1 The informal intervention of the FAAC

[40] The Fonds d'aide aux actions collectives ("**FAAC**") wishes to comment on certain aspects of the application for approval of the Settlement and the application for approval of class counsel fees.

[41] In a 2021 decision, Morrison J.S.C. confirmed that the FAAC had the right to address the Court at the hearing of the application to approve the settlement under both the *Act respecting the Fonds d'aide aux actions collectives*[17] and article 593 CCP.[18] He insisted, however, as have other judges,[19] that this right to intervene may be exercised only when specifically authorized by law.[20]

[42] This right primarily concerns legals costs, class counsel fees, the reimbursement of the amount of assistance the representative received from the FAAC, the fees the FAAC may collect, and the remittance of the remaining balance to a third person.

[43] In *Asselin c. AB SKF*, in the context of an interim judgment on an application for directives, Clément Samson J.S.C. reiterated certain comments made by the Honourable Pierre Gagnon J.S.C. in *Patterson c. Ticketmaster Canada Holdings*[21] when accepting the possibility that the FAAC could make comments on an application for approval of a transaction in certain circumstances, as follows:

> [TRANSLATION]
>
> - The statute with which the FAAC seeks compliance is a public interest statute in Quebec;
> - It can be very difficult for a person from Quebec to truly understand the scope of a settlement agreement submitted to the Court;
> - The absence of consumers reduces the inconsistencies as the plaintiff and the defendant are of the same view; and
> - The intervention of the FAAC is not untimely.[22]

[44] The Court of Appeal seems to have acknowledged the FAAC's power to intervene in certain aspects of a transaction as it granted the FAAC permission to appeal Judge

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17 F-3.2.0.1.1.

18 *Zouzout c. Canada Dry Mott's Inc.*, 2021 QCCS 1815.

19 See e.g., *Union des consommateurs c. Telus Communications inc.,* 2021 QCCS 2681, https://www.canlii.org/fr/qc/qccs/doc/2023/2023qccs2270/2023qccs2270.html?resultIndex=1&resultId=7bfdccee1b704488afba6d8eba995f04&searchId=2024-04-10T12:24:32:300/b2256396a3f047538c1643c9990d2b52&searchUrlHash=AAAAAQBWIkZvbmRzIGQnYWlkZSBhdXggYWN0aW9ucyBjb2xsZWN0aXZlcyIgIHRyYW5zYWN0aW9uIHLDqGdsZW1lbnQgInRyYWR1Y3Rpb24gZnJhbsOnYWlzZSIAAAAAAQ - _ftn6 2021 QCCS 2681; *Handicap-Vie-Dignité c. Résidence St-Charles-Borromée, CHSLD Centre-ville de Montréal,* 2018 QCCS 2159.

20 *Supra* note 18 at para. 63.

21 2022 QCCS 3203 at paras. 47–49.

22 2023 QCCS 2270.

Samson's decision approving a settlement which, according to the FAAC, was not valid due to substantive defects.[23]

1.3.2 The time limit for notification of the application for approval

[45] The FAAC received a copy of the application for approval of the Settlement and of counsel's fees on Friday, April 5, less than five days prior to the date it was presented before the Court.

[46] The FAAC takes exception to this way of proceeding and insists that all future applications of the like be notified within the time limit set out in article 527 CCP, as follows:

> 527. An application for authorization, approval or homologation is, when there is a dispute, presented before the court on the date specified in the attached notice of presentation. The presentation date cannot be less than five days after notification of the application.

[47] Counsel for Ohayon responded that the Settlement pre-approval judgment and its schedules (the notices) were sent to the FAAC on February 20, 2024. The FAAC therefore had the essence of what it needed to analyze the transaction for two months.

[48] This response does not completely satisfy the Court. The FAAC is entitled to receive a copy of the pleadings. The *Regulation of the Superior Court of Québec in civil matters* states that every application for approval must be served on the FAAC.[24] Once such obligation exists, it must be fulfilled in accordance with article 527 CCP. That is not the case here. The plaintiffs would be well advised to comply with this time limit in the future to avoid the postponement of the hearing and having to publish new notices.

[49] The fact that the FAAC received the preauthorization judgment and its schedules several weeks in advance minimizes the prejudice suffered, if any. In addition, the FAAC is not asking for the hearing to be postponed, but only for an additional time period to refine its written comments.

[50] The Court refused the request from the bench, simply because the FAAC was able to file written comments that were sufficiently detailed and make its submissions orally at the hearing. Counsel for the FAAC are not novices on the subject and were, in this case, able to adequately respond to the issues raised. Some of these issues have in fact been raised before in a few other cases.

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[23] 2023 QCCA 704. However, the file was never argued on the merits as the defendants-respondents agreed to a partial acquiescence of the conclusions sought by the FAAC [2023 QCCA 1592].

[24] CQLR c. C-25.0.1, r 0.2.1. s. 58.

1.4 DISCUSSION ON THE MERITS OF THE AGREEMENT

1.4.1 Is the transaction fair, reasonable, and in the interest of the class members?

[51] The relevant points of the transaction were described above.

[52] If the Court were to accept the application filed by class counsel for their fees and disbursements, they would amount to $952,441.87. The fees of the Settlement Administrator are estimated to be $201,206.25, which is not the maximum amount.

[53] Thus, approximately $1,153,648.13 will be subtracted from the amount distributed to the members, leaving a balance of approximately $1,346,351.87. The notice given to the members in anticipation of the approval indicates that each member will receive a maximum of $15.

[54] The number of class members is unknown. After the publication of the notices in anticipation of the approval of the Settlement, 1,282,052 individuals provided their email address for the purposes of completing a claim form.[25] The Settlement limits the possibility of filing a claim to those who provided their email address before the hearing of the application for approval.

[55] Initially, the parties estimated that the standard take-up rate was between 10% and 20%. In support of these anticipated rates, the parties referred to evidence and arguments made and accepted in other cases, such as *Apple Canada Inc. c. St-Germain,* which states:[26]

> [130] If the take-up rate in settled class actions in the United States is any indication, then the numbers reveal that claims-based settlements in class actions typically reach low take-up rates. In *Strong v. BellSouth Telecomm., Inc*, only 4.3% of class members participated in a claims process offering payments of $12 to $20. Even when significantly higher minimum payments are offered, participation remains low. In *Sylvester v. Cigna Corp.*, it was noted that because take-up rates are generally below 10%, the take-up rate of 19% was "above average".
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> [Citations omitted.]

[56] The amount paid to each member of the class does not vary, but the individual amount that each member receives could be less than $15 if there are more than 89,756 claimants.[27]

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25 See the context of this prerequisite in sections 1.18, 1.21(f), 1.41, 19.3, and 19.5 of the National Settlement Agreement (R-1).

26 2010 QCCA 1376 at para. 130.

27 $1,346,351.87/$15.

[57] Applying the estimated take-up rate, the parties calculated that between 128,205 and 256,410 members would file a claim. Therefore, using their own estimate, each member would receive between $10.67 and $5.33.

[58] No evidence was adduced regarding the take-up rate. Some factors suggest that the basis for calculating it could be much higher than the parties think. Let me explain.

[59] The Court does not question that the take-up rate could be between 10 and 20%. It is rather the basis on which it is applied that seems erroneous. In the Court's view, it would be more accurate to consider that the 1,282,052 individuals that provided their email address represent the portion of the members that will file a claim and that they account for between 10 and 20% of the total members. Only a little over 5 million members are needed to confirm this hypothesis.

[60] The result obtained by the parties seems to be skewed by the Settlement class members' obligation to preregister their email address in order to file a claim. This preregistration requires a positive action by class members, which acts as an initial filter and indicates the members' interest. In *Apple*, cited above, and the other cases to which it refers, there is no mention of an eliminatory preregistration step before an agreement is approved.

[61] I complete my reasoning using the facts of the case and certain hypotheses.

[62] During the class period, Dollarama collected **$8,452,802.72** in ecofees.

[63] The products sold by Dollarama generally cost between $0.25 and $5.

[64] As stated in the bailiff's statement of facts, ecofees paid to Dollarama vary between $0.08 and $0.60.

[65] Depending on whether the ecofees were $0.08, $0.12, $0.15, $0.25, $0.50, or $0.60,[28] there would have been between **14 and 105 million** transactions involving ecofees.

[66] How many class members made these transactions? It is impossible to precisely determine as no evidence was adduced in this regard.

[67] Accepting the parties' hypothesis that there are 1,282,052 members would mean that each member made between 14 and 100 transactions with ecofees.

[68] During the class period, any member could have made multiple transactions with ecofees. The ecofees vary for each transaction; their average is therefore neither the lowest rate of $0.08, nor the highest of $0.60. The ecofees can change every year. The

[28] The most frequent amounts on the packaging adduced in evidence. The amounts per item may be lower, but batteries, for example, are rarely sold individually.

bailiff's statement of facts refers only to May 2023. The class period goes back three years before then.

[69] It would not be reasonable to use the highest rate or the lowest. If it is assumed that the average ecofees per transaction during the class period were $0.25,[29] there would have been **34 million** transactions.

[70] Some of these transactions were made by regular clients, and others, by very occasional clients or even one-time clients. The 34 million transactions could have been made by 5, 10, 15, or even 20 million members.

[71] Using the lowest of these numbers (5 million), the number of people who indicated their intention to file a claim (1,282,052) would indeed represent 10 to 20% of the total members and would correspond to the take-up rate that class counsel deem to be the norm.[30]

[72] The Court took into account only the transactions for products with ecofees.[31] If the same clients also made other transactions for products that are not covered, which is likely, this was not taken into account here.

[73] Thus, the parties' hypothesis that between only 128,000 and 256,000 Settlement class members will file a claim, for which they would receive between $5.33 and $10.67, does not seem realistic, and seems less probable than the analysis made by the Court.

[74] Furthermore, the parties are of the view that the indemnity is as close to cash as possible. The Court disagrees. A gift card requires another purchase at the same retailer. Moreover, the Dollarama mobile application must be used to transfer a card.

[75] In *Holcman*,[32] Martin F. Sheehan J.S.C. noted that settlements that issue vouchers or credits may be controversial. He suggested weighing the following factors:

> 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.
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> 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.

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29 A simple hypothesis that has not been proved.

30 See para. 31 of the application for approval.

31 The Court assumes in this case that the clients may go to Dollarama regularly to purchase products that are not subject to ecofees.

32 *Holcman c. Restaurant Brands International inc.*, 2022 QCCS 3428 at para. 52.

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. 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.

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. 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.

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. 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.

[76] The Court will consider each of the points set out above and, after analysis, indicate if each factor is in favour of approval of the Settlement or not.

76.1. The individual value is low: in favour of the Settlement.

76.2. The possibility to choose other compensation or to transfer the voucher: neutral – not in favour of the Settlement (gift card can be transferred, requires using the Dollarama mobile application, no other compensation).

76.3. The investment required to use the credit: in favour of the Settlement as Dollarama only sells products with a low value, some of which may

represent the total value of the coupon.

76.4. The likelihood that the credit will be redeemed: neutral, given its low value.

76.5. The restrictions or conditions that apply: not in favour of the Settlement given the prerequisite of registering before the Court approves the Settlement; a claim cannot be filed without registering.

76.6. A change of practice: not in favour. While the parties acknowledge that Dollarama changed its commercial practice after receiving the application for authorization, it did not undertake in the Settlement to maintain this practice.

76.7. The obligation to provide a report: not in favour of the Settlement. There is no mention of this in the Settlement.

76.8. The financial means of Dollarama: neutral. There is no reason to believe that Dollarama's financial means would differ if the payment had to be made after the judgement.

[77] There is one last point that was not mentioned. What information will be set out in the claim form and how will this information be used?

[78] The Settlement states that the gift cards will be issued by Dollarama.[33] To do so, it will need to have access to the claim forms or the information they contain. In an era where the data of current and potential clients have intrinsic value for a company and can sometimes be used as a bargaining chip, this aspect must be considered in the value of the Settlement. Is this information worth more than the $1 or $2[34] that may be credited from a future purchase? What information pertaining to this should have been included in the notice?

1.4.2 Chance of success

[79] The plaintiff maintains that her action is well founded, but Dollarama continues to deny any fault.

[80] When the FAAC finances an application for authorization of a class action, like in this case, section 23 of the *Act* respecting the FAAC states that it must consider the probable existence of the right the applicant intends to assert and the probability that the class action will be brought. The FAAC therefore seems to have concluded that the application has some chance of success.

[81] Among other things, the hearing on the merits would have concerned the issue of whether ecofees should be included in the price displayed. At the hearing, Dollarama

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33 R-1 at para. 13.

34 By accepting the hypothesis that more than one million members will file a claim.

submitted an interesting theory: ecofees are more like [TRANSLATION] "duties payable to a public authority" within the meaning of section 91.8 of the *Regulation respecting the application of the Consumer Protection Act*,[35] a deposit, or another tax. According to Dollarama, in all these cases, the fees do not need to be included in the price displayed.

[82] Section 91.8 of the *Regulation respecting the application of the Consumer Protection Act* reads as follows:

> **91.8** The merchant, manufacturer or advertiser is exempt from the obligation arising from the second paragraph of section 224 of the Act to include, in the advertised price, the duties chargeable under a federal or provincial Act where, under that Act, the duties must be charged directly to the consumer to be remitted to a public authority.
>
> The merchant, manufacturer or advertiser is also exempt from the obligation of including in the advertised price the deposit payable by a consumer, for recycling purposes, on the purchase of containers, packaging, materials or products and that is refunded on their return.

[83] The suggestion that it could be a deposit does not withstand scrutiny as deposits are, by definition, refundable. For the rest, the arguments can certainly be defended.

[84] Furthermore, counsel rightly note that some judgments dismiss claims under section 224(c) of the *Consumer Protection Act* when the class fails to prove that it suffered damage.[36]

[85] The right to punitive damages is also highly contested. It must first be established that the CPA is applicable. Then, before awarding such damages, the Court should consider the whole of the merchant's conduct at the time of and after the violation. However, the merchant's practice was changed very shortly after it received the application for authorization.

[86] Evidence of "intentional, malicious or vexatious" violations or of conduct by merchants or manufacturers "in which they display ignorance, carelessness or serious negligence with respect to their obligations and consumer's rights" could be difficult to establish.[37]

[87] There was no unlawful collection of ecofees. Consumers did not pay more than they should have. The ecofees were not hidden. Dollarama did not get richer, and the consumer was not impoverished. Any claim based on unjust enrichment would be met with great opposition.

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35 CQLR c. P-40.1, r. 3.

36 *Fortin c. Mazda Canada inc.*, 2022 QCCA 635.

37 *Richard v. Time Inc.*, 2012 SCC 8, [2012] 1 SCR 265 at para. 180.

[88] The parties acknowledge that all these debates would lead to significant costs and delays, including the possibility of appeals. They acknowledge the challenges, the expenses, and the significant risks related to extended litigation.

1.4.3 Other points to consider

[89] According to the parties, certain aspects of the file would have required experts. The Court does not find this accurate. There is very little science in this file that needs to be explained.

[90] However, it is clear that a certain number of class members would have needed to testify.

[91] Without a settlement, even if the plaintiff were to prevail on the merits, class members should have to prove that they are eligible in a more complex way than that provided in the Settlement, which consists of providing an email address on the settlement website and completing a simplified claim form without having to provide a proof of purchase.

[92] Moreover, after lengthy litigation, it could be harder to identify class members. This risk is attenuated by the Settlement, which provides an indemnity to all class members who file a claim, whereas no one is indemnified if the case is dismissed.

[93] On the other hand, one of the pillars of these types of “consumer” class actions and their settlement is their deterrent value for the merchant. In this case, there is no real deterrent value for the merchant.

1.4.4 Change of practice: an essential condition?

[94] In this case, the change of commercial practice took place before the parties reached an agreement. The Settlement does not set out any obligation for Dollarama in this regard.

1.4.5 Opt-outs

[95] No members opted out of the class action.[38]

1.4.6 Difficulty regarding the evidence to be adduced

[96] This is not a determining factor in this case as the evidence to be adduced is relatively simple, unless the plaintiff seeks to prove the right to punitive damages.

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[38] P-7.

1.4.7 Collusion and good faith

[97] Good faith is presumed. There is no evidence of collusion.

1.4.8 Objections

[98] Only one objection to the Settlement was filed with the Court before the prescribed deadline. The parties conclude that this is proof that the Settlement satisfies more than 99.9% of potential class members. This conclusion is debatable.

[99] Jordan Haworth stated that he is a class member. He was informed of the Settlement through social media and registered on the settlement website.

[100] According to him, the possibility for members to object to the transaction was unduly restricted. The objection process is needlessly onerous and ambiguous in requiring that a written notice be mailed to the court office (including postage fees for next-day delivery) and that an electronic copy be sent to class counsel. He says the Settlement does not provide that the objection must be sent by mail.

[101] Mr. Haworth's objection on this point is moot as his objection was duly noted even though he did not send a copy by mail. The cost is irrelevant given that a person who acted within a reasonable time after the publication of the notice would not need to pay shipping fees as high as those suggested by Mr. Haworth.

[102] Mr. Haworth is of the view that the notice to members has an insurmountable defect. Class members have the right to know when the claim period begins.[39] However, according to him, the Settlement does not provide a specific start date for claims. The Settlement forces potential class members to calculate this date on the basis of the date of the judgment approving the transaction. He deems this process too complex.

[103] To illustrate this, here is the Court's analysis: potential class members (already preregistered) have 60 days following the ***Claim Form Transmission Deadline for the Settlement Administrator***[40] to submit their ***Claim Form.***

[104] The ***Claim Form Transmission Deadline for the Settlement Administrator*** "is no later than 5 Days after the ***Effective Date***".

[105] ***Effective Date*** means:

> a. if no appeal is taken from the Final Judgment Approving the Settlement, 40 Days after the Court renders the Final Judgment Approving the Settlement; or

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39 Article 581 CCP.

40 The terms in bold and italics are terms defined in the Settlement. To understand what they mean, the member may have to read and understand the Settlement.

> b. if an appeal is taken from the Final Judgment Approving the Settlement, the date on which all appeal rights have expired, have been exhausted, or have been finally disposed of in a manner that affirms the Final Judgment Approving the Settlement.

[106] All of this redactional gymnastics does not help the member know when the claim period starts and ends.

[107] As Mr. Haworth indicated, because members are required to register by email before the agreement is approved instead of once it is approved, class members that did not register (and that have not opted out) will not be able to file a claim even if the agreement is approved.

[108] Contrary to what is set out in Quebec legislation, this obligation is similar to an amendment of the rights conferred by articles 581, 590, and 591 CCP.

[109] Some judgments have approved settlements containing an obligation to preregister.[41] In this case, as Morrison J.S.C. stated in *Zouzout*, the order of decisions to be made by class members has been altered. The decision to ultimately file a claim or not is to be made before the Settlement is approved or before the member has the right to file a claim.

[110] There is of course an advantage to this preregistration in that it provides an estimate of the number of potential claimants. However, like Morrison J.S.C., the Court does not consider this obligation appropriate.[42]

[111] Contrary to *Zouzout*, the Court sees no reason not to comply with [TRANSLATION] "the opt-out upon request" rule. Opting out by default is not part of our law.

[112] The FAAC also made submissions on this point. As opposed to the objector, the FAAC suggests that the Court extend the time period to file a claim and indicate it in a notice of the judgment approving the Settlement.

[113] The difficulty with this position is that it requires making significant changes to the structure of the notices published after the Settlement agreement, to the claim period, to the appropriate time for filing a claim, and it would also entail the publication of additional notices that were not planned in the Settlement.

[114] However, it is generally acknowledged that the Court does not have the power to amend a Settlement. It can only approve or dismiss it.[43]

[115] Mr. Haworth notes that the plaintiff failed to discharge its burden of establishing that the amount that would be distributed was sufficient, considering the size of the class.

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41 See e.g., *Zouzout* c. *Canada Dry Mott's inc.,* 2021 QCCS 1815.

42 *Ibid.* at para. 51.

43 *Comité d'environnement de Ville-Émard (CEVE)* c. *Stodola*, 2016 QCCS 1834; *Option Consommateurs c. Infineon Technologies, a.g.*, 2014 QCCS 4949.

The Court accepts this argument in view of the analysis of the potential class members conducted above. It was up to the plaintiff to adduce adequate evidence in this regard.

[116] Mr. Haworth also submits that the notice of the deadline for opting out and of the hearing for approval could have given the false impression that each member would receive $15.

[117] The text in the notice clearly states that the maximum value of the Settlement will be $15 per member and that the actual amount will be the division of the Distribution Fund in equal parts among all the Settlement class members. However, it is the only amount mentioned in the notice, and it does not even correspond to that assessed by counsel. The Court does not believe that the notice gives a false impression in this regard, but it seems incomplete.

1.5 Conclusion on the Settlement

[118] Based on the foregoing, the Court finds that the Settlement cannot be approved in its current state as the evidence is insufficient to establish that it will benefit the members or the sound administration of justice and that it was properly structured.

[119] Reflection is needed on the procedure followed. The application for authorization of the class action was the first communication between the plaintiff and the defendants concerning the way ecofees are represented in the price of an item. The procedure followed (the filing of an application for a class action) is taxing for the justice system.

[120] Prior formal notice, although not required by law for this type of dispute, would be an interesting step to consider before bringing legal proceedings. Given how quickly Dollarama complied, it can be assumed that formal notice could have opened the door to negotiations between the parties.

[121] The Court recalls article 1 of the *Code of Civil Procedure*:

> 1. To prevent a potential dispute or resolve an existing one, the parties concerned, by mutual agreement, may opt for a private dispute prevention and resolution process.
>
> The main private dispute prevention and resolution processes are negotiation between the parties, and mediation and arbitration, in which the parties call on a third person to assist them. The parties may also resort to any other process that suits them and that they consider appropriate, whether or not it borrows from negotiation, mediation or arbitration.
>
> Parties must consider private prevention and resolution processes <u>before referring their dispute to the courts</u>.
>
> [Emphasis added.]

[122] There is no evidence that the parties considered private dispute prevention and resolution processes.

2. SHOULD COUNSEL'S FEES BE APPROVED?

[123] Considering that the Settlement was not approved, this issue is moot.

FOR THESE REASONS, THE COURT:

[124] **DISMISSES** the application for approval of the Settlement and for approval of counsel's fees and the claim administrator's fees.

[125] **WITHOUT LEGAL COSTS** as the objector and the Fonds d'aide aux actions collectives are not entitled to them as they are not parties.

[signed]
PIERRE NOLLET, J.S.C.

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Date of hearing: April 9, 2024