

# COURT OF APPEAL

CANADA  
PROVINCE OF QUEBEC  
REGISTRY OF MONTREAL

No: 500-09-025191-156  
(500-06-000686-143)

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## MINUTES OF THE HEARING

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DATE: November 6, 2015

CORAM: THE HONOURABLE MARIE-FRANCE BICH, J.A.  
MANON SAVARD, J.A.  
MARK SCHRAGER, J.A.

APPELLANT	COUNSEL
<b>EVAN ZUCKERMAN</b>	Mtre DAVID ASSOR <i>(Lex Group Inc.)</i>
RESPONDENT	COUNSEL
<b>TARGET CORPORATION</b>	Mtre SYLVAIN LUSSIER <i>(Osler, Hoskin &amp; Harcourt, S.E.N.C.R.L./s.r.l.)</i>

On appeal from a judgment rendered on 23<sup>rd</sup> March 2015 by the Honourable Justice Michel A. Pinsonnault of the Superior Court District of Montreal

DESCRIPTION:

**Class action – Motion for declinatory exception  
granted – *forum non conveniens***

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Clerk: Mihary Andrianaivo

Courtroom: Pierre-Basile Mignault

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HEARING

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9:30 Commencement of the hearing.  
Continuation of November 3rd 2015 hearing. The presence of the parties at the Court is not required today.  
BY THE COURT: Judgment – See page 3.

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9: 35 End of the hearing.

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Mihary Andrianaivo

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Clerk

**BY THE COURT**

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**JUDGMENT**

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[1] This is an appeal from the judgment dated March 23, 2015, of the Superior Court, District of Montreal (the Honourable Michel Pinsonnault), which granted Respondent's motion for declinatory exception and dismissed Appellant's motion to authorize a class action.

[2] In essence, the judge agreed with Respondent that the fact pattern is a United States situation involving a cyber attack in that country where personal information of consumers having provided their contact information or purchased from Respondent in the United States using a credit or debit card, was compromised.

[3] The judge's analysis of the criteria of jurisdiction set forth in article 3148 *C.C.Q.* led him to the following analysis. Respondent is not domiciled in Quebec. The judge agreed that it does not have an establishment or any activities here despite that notice of the cyber attack was communicated to Canadian consumers through Target Canada's web address as argued by Appellant. The judge also held that no fault was committed in this jurisdiction as any failings of Respondent to safeguard consumers' personal information occurred in the United States.

[4] Regarding article 3148 (3) *C.C.Q.* and the place where injury ("prejudice") was suffered, Appellant was candid that he has not been the victim of identity theft or any other fraud stemming from the cyber attack. However, Appellant claimed \$1,000 as moral damages because as stated in his proceedings, he has:

... experienced fear, inconvenience, loss of time and expense dealing with the issues stemming from the loss of information in question, and said inconvenience and loss of time will continue in terms of monitoring his accounts and the delays involved with the security measures posted on his credit file.

The judge analyzed this claim in light of the dictum of the Supreme Court in *Mustapha v. Culligan of Canada Ltd.*<sup>1</sup> to hold that these "inconveniences" fall in the category of "ordinary annoyances, anxieties and fears that people living in society routinely, if sometimes reluctantly, accept."

[5] The judge also referred to recent case law in the Superior Court applying this reasoning to the refusal to authorize a class action arising from the theft of personal financial information.<sup>2</sup> It is at this notional juncture that we feel that the judge in first instance erred.

[6] In the present matter, the judge was tasked to adjudicate a declinatory exception. Whatever might have been an appropriate inquiry on the sufficiency of the damages claimed to satisfy article 1003 *C.C.P.* for authorization of a class action, it was not appropriate on an inquiry into jurisdiction under article 3148 *C.C.Q.* The allegation of

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<sup>1</sup> *Mustapha v. Culligan of Canada Ltd.*, [2008], 2 S.C.R. 114, para. 9.

<sup>2</sup> *Sofio v. Organisme canadien de réglementation du commerce des valeurs mobilières (OCRVCM)*, 2014 QCCS 4061; see also *Mazzonna v. DaimlerChrysler Financial Services Canada Inc./Services financiers DaimlerChrysler inc.*, 2012 QCCS 958; *Larose v. Banque Nationale du Canada*, 2010 QCCS 5385.

damage was sufficient upon which to base jurisdiction; an analysis of the quality of the damage applying *Mustapha* was not appropriate. It could have been an appropriate inquiry had the declinatory been heard together with the authorization. Be that as it may, at the declinatory stage, we think that the judge committed an error.

[7] There is more. The Appellant alleged that he spent \$19.95 on a credit monitoring service to guard against potential fraud given the possibility that his personal information in Respondent's possession may have been stolen. Respondent had indicated in an e-mail that it would arrange to provide this service but Appellant did not wish to wait and, as alleged, contracted and paid for the service. In any event, Appellant professed that the credit monitoring service offered by Respondent was inadequate. This is prejudice suffered in Quebec and is sufficient to accord jurisdiction over the proposed class action.

[8] The judge chose to analyze this damage and agreed with Respondent that the expense of \$19.95 was not "a logical, direct and immediate consequence" of Respondent's alleged fault. Again, however appropriate this analysis might have been at an authorization hearing, it was not correct on the declinatory where the parties proceeded on the basis of the allegations of Appellant's written pleading to seek a determination as to whether there was jurisdiction on application of article 3148 *C.C.Q.* The judge committed an error in taking his analysis beyond ascertaining allegations sufficient to justify exercising jurisdiction.

[9] Although this would be sufficient to dispose of the matter, it should be mentioned that the judge again, sitting on a declinatory exception, examined issues which apply at the authorization stage of the class action. In such regard, he erroneously questioned Appellant's legal interest by stating (at para. 57) that Appellant did not specify that he made purchases during the period of the data breach when what was relevant was that purchases had been made at some point prior to the data breach.

[10] The judge went so far as to say that the class action was ill founded, at least with the Appellant as Petitioner and class representative (para. 66). The judge continued to question the validity of the class action, based on article 4.2 *C.C.P.*, or considerations of proportionality. The Supreme Court has clearly stated that though proportionality is to be considered in applying each of the four criteria of article 1003 *C.C.P.* to the authorization of a class action, it is not a fifth criteria.<sup>3</sup> We would add that neither is it a criteria to determine jurisdiction in applying article 3148 *C.C.P.*

[11] The *forum non conveniens* argument advanced by Respondent as an alternative in its declinatory exception was not dealt with by the judge given his decision that the Quebec courts lacked jurisdiction. We will accordingly reserve Respondent's right to raise that argument anew in first instance.

[12] Because the judge expressed opinions on issues going to authorization of the proposed class action, it was mentioned at the hearing that perhaps the matter should be assigned to another judge of the Superior Court. Because this observation relates to file management, we include nothing to this effect in our conclusions.

#### **FOR THESE REASONS, THE COURT:**

[13] **GRANTS** the appeal;

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<sup>3</sup> *Vivendi Canada Inc. v. Dell'Aniello*, [2014] 1 S.C.R. 3; 2014 SCC 1, paras. 64-68.

- [14] **REVERSES** the judgment in first instance;
- [15] **DISMISSES** the Motion for declinatory exception and subsidiarily *forum non conveniens*, in part;
- [16] **RESERVES** Respondent's rights to raise *forum non conveniens* anew before the Superior Court.
- [17] **THE WHOLE** with costs in appeal and first instance



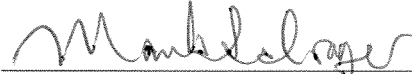
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MARIE-FRANCE BICH, J.A.



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MANON SAVARD, J.A.



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MARK SCHRAGER, J.A.