SUPERIOR COURT

CANADA
PROVINCE OF QUEBEC
DISTRICT OF MONTREAL

N°: 500-06-000841-177
N°: 500-06-000842-175

DATE : September, 19, 2017

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presiding: THE HONORABLE MICHELINE PERRAULT, J.S.C.

MICHEL DEMERS
Applicant

v

YAHOO! INC
and
YAHOO ! CANADA CO.
Defendants

JUDGMENT ON DEFENDANTS' APPLICATION TO DISMISS FOR WANT OF JURISDICTION

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1. INTRODUCTION

[1] Applicant Michel Demers seeks the Court's authorization to bring a class action on behalf of a proposed class of persons residing in Québec, whose personal and financial information was allegedly lost by and/or stolen from the Defendants as a result of two data security incidents that occurred in August 2013 and in late 2014 (the "**Data Security Incidents**''), as well as all other persons who purportedly suffered damages as a result of said Data Security Incidents (the "**Class Members**'').

[2] The Defendants Yahoo! Inc. and Yahoo! Canada Co. ("**Yahoo! Canada**") are asking the Court to decline jurisdiction over this matter by way of an *Application to Dismiss for Want of Jurisdiction or, Subsidiarily, to Decline Jurisdiction Over or Stay the Originating Application for Authorization to Institute a Class Action and to Appoint a Representative Plaintiff* (the "**Motion(s) to Dismiss**").

[3] The Defendants submit that the originating proceedings fail to confer any jurisdiction to the Québec courts over the Defendants. Hence, they are asking the Court to dismiss the *Application for Authorization to Institute a Class Action and to Appoint a Representative Plaintiff* (the **"Motion for Authorization"**).

[4] Subsidiarily, in the event the Court finds that the Québec courts have jurisdiction in respect of Yahoo! Inc. alone, the latter is seeking an order declining any such jurisdiction based on the doctrine of *forum non conveniens*.

[5] Finally, should the Court conclude that it has jurisdiction over both Defendants, the latter request an order based on *lis pendens* and in conformity with article 577 of the *Code of Civil Procedure* (the "**CCP**").

[6] Applicant has instituted two separate actions, one for each Data Security Incident and thus the Defendants have filed two Motions to Dismiss. Since, other than the date of each Data Security Incident, the facts alleged are identical for the most part, the Court will analyse both Motions to Dismiss in a single judgment.

2. BACKGROUND

[7] The Defendant Yahoo! Inc. is an internet company that provides internet-based services to users worldwide, including North America. As part of its business, Yahoo! Inc. collects and stores large volumes of sensitive personal and/or financial information about its users, including, *inter alia*, the users' names, email addresses, telephone numbers, birth dates, passwords, and security questions linked to a user's account. This information is required in order to create an account.

[8] On September 22, 2016, the Defendants issued a press release in which they announced that a recent investigation confirmed that sensitive personal account information associated with at least 500 million user accounts was stolen from the company's network in late 2014. The stolen information included users' names, email addresses, telephone numbers, dates of birth, hashed passwords and in some cases, encrypted or unencrypted security questions and answers.

[9] In November 2016, the Defendants issued an email to Yahoo account users in which they announced that a recent investigation by law enforcement confirmed that

sensitive personal account information associated with at least 500 million user accounts was stolen from the company's network in August of 2013.

[10] It is alleged that Applicant and Class Members are all individuals who communicated personal and financial information to the Defendants and who as a result of that confidential information being illegally accessed, have experienced inconveniences, mental distress, economic loss, or other losses associated with having their private data accessed and intruded upon.

3. QUESTIONS IN ISSUE

1. Do the courts of Québec have jurisdiction over the Defendants?

2. Subsidiarily, should the courts of Québec decline jurisdiction over Yahoo! Inc. based on the doctrine of *forum non conveniens*?

3. Subsidiarily, should the present proceedings be stayed based on *lis pendens* and in conformity with article 577 CCP?

4. ANALYSIS AND JUDGMENT

1. Do the courts of Québec have jurisdiction over the Defendants?

1.1. The primacy of Yahoo! Canada's choice of forum and law clause in favour of Ontario

[11] Defendants submit that article 3148 *in fine* of the *Civil Code of Québec* ("**CCQ**'') trumps any other factor that confers jurisdiction to the Québec courts. In other words, even when the Québec courts have jurisdiction, article 3148 CCQ *in fine* allows the case to be heard by a foreign authority:

> **3148.** In personal actions of a patrimonial nature, Québec authorities have jurisdiction in the following cases:
>
> (…)
>
> However, Québec authorities have no jurisdiction where the parties have chosen by agreement to submit the present or future disputes between themselves relating to a specific legal relationship to a foreign authority or to an arbitrator, unless the defendant submits to the jurisdiction of the Québec authorities.

[12] The Defendants argue that the terms of service of a Yahoo user account contain a choice of forum and law clause in favour of Ontario which is binding upon Applicant and the Class Members. In other words, Québec users have chosen by agreement to submit

any future disputes to the courts of Ontario and to determine those disputes on the basis of the laws of Ontario.

[13] According to the affidavit of Seema Reddy, General Counsel of Yahoo! Canada, filed by the Defendants, in order to create a Yahoo account, Québec users are required to agree to the *Conditions d'utilisation* (the "**Conditions**''). Specifically, on the Yahoo Québec website, Québec users can only create an account by clicking on the icon *S'inscrire*. After clicking on that icon, the Québec users are taken to a sign-up page where it is written *J'accepte les Conditions d'utilisation et de Confidentialité de Yahoo*. The words *Conditions d'utilisation* are highlighted in blue and contain a hyperlink to the Conditions. As well, each version of the Conditions from at least 2010 to the present contains a choice of law and forum selection clause that reads as follows:

> " Choix de la loi applicable et du territoire compétent. Les présentes conditions d'utilisation ainsi que vos rapports avec Yahoo sont régis par les lois de la province de l'Ontario et du Canada, sans égard aux dispositions relatives aux conflits de lois. Vous et Yahoo convenez de vous soumettre à la compétence exclusive des tribunaux de la province de l'Ontario, au Canada. ''

[14] In addition to agreeing to the Conditions when creating an account, an icon *Conditions* is displayed on every page of the Yahoo Québec website. This icon contains a persistent hyperlink to the Conditions and enables Québec users to access the Conditions at any time.

[15] Finally, in addition to the Conditions, Québec users are required to agree to additional terms of service that relate to the use of certain Yahoo Canada products and services. For example, since 2010 Québec users using the Yahoo Mail and Yahoo Messenger services consented to the *Conditions d'utilisation supplémentaires (ATOS) Yahoo Global Communications pour Yahoo courriel et Yahoo Messenger* (the "**ATOS**'').

[16] All versions of the ATOS from 2010 to the present contain a choice of law and forum that reads as follows:

> ''Canada: si vous utilisez les Services canadiens, l'accord vous lie à Yahoo! Canada Co., 207 Queen's Quay West, Suite 801, Toronto, ON, M5J 1A7 pour la fourniture des Services. Les lois du Canada régissent l'interprétation des présentes Conditions d'utilisation additionnelles, y compris leurs violations, quelles que soient les règles de conflit de lois applicables, et également toute autre réclamation, y compris les réclamations liées au droit de la consommation, au droit de la concurrence et au droit de la responsabilité civile délictuelle. Yahoo Canada et vous-même reconnaissez de manière irrévocable la compétence exclusive des tribunaux situés dans la province de l'Ontario (Canada) pour tout différend résultant des présentes Conditions d'utilisation additionnelles ou associé à celles-ci, ou bien résultant des

> relations que vous entretenez avec Yahoo ou associé à celles-ci, quelle que soit la nature du différend.''

[17] Applicant does not contest the validity of the choice of forum and law clause but argues that it is inapplicable for the following reasons :

i) it is a contract of adhesion and the choice of forum and law clause does not apply because of article 41 CCP;

ii) ii) it is a consumer contract and the choice of forum and law clause does not apply because of article 3149 CCQ and section 22.1 of the Québec *Consumer Protection Act*[1] (the "**CPA**'').

<u>i) it is a contract of adhesion and the choice of forum and law clause does not apply because of article 41 CCP.</u>

[18] A contract of adhesion is defined in article 1379 CCQ:

> **1379.** A contract of adhesion is a contract in which the essential stipulations were imposed or drawn up by one of the parties, on his behalf or upon his instructions, and were not negotiable.
>
> Any contract that is not a contract of adhesion is a contract by mutual agreement.

[19] Article 41 CCP reads as follows:

> **41.** The court having territorial jurisdiction in Québec to hear a judicial application is the court of the domicile of the defendant, or of one of the defendants if there are two or more defendants domiciled in different districts.
>
> If the defendant has no domicile in Québec, the court that has territorial jurisdiction is the court of the defendant's residence or, in the case of a legal person, the court of the place where the defendant has an establishment, or the court of the place where the defendant has property.
>
> So far as public order permits, the court of the defendant's elected domicile, or the court designated by an agreement between the parties <u>other than an adhesion</u> <u>contract</u>, also has territorial jurisdiction. (Emphasis added)

[20] The Defendants have not alleged, nor attempted to demonstrate, that the contract between Applicant and Yahoo! Canada is not a contract of adhesion. The argument presented by the Defendants is that the choice of forum and law clause is enforceable despite the fact that it is contained in a contract of adhesion, as stated by our Court of Appeal in the case of *United European Bank and Trust Nassau Ltd* v*. Duchesneau*[2]*:*

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[1] CQLR c. P-40.1
[2] 2006 QCCA 652, para 48-49; 52-54

« [48] Deuxièmement, les parties ont convenu par une clause de for de conférer jurisdiction aux tribunaux des Bahamas. L'article 3148 C.c.Q. reconnaît la validité d'un tel choix et son deuxième alinéa précise que les autorités québécoises sont alors sans compétence. Parlant de ce genre de clause, la Cour suprême dit dans GreCon précité, qu'elle a pour objectif «la prévisibilité et la sécurité des transactions juridiques internationales».

[49] Le législateur n'a pas voulu, dans les règles de droit international privé, rendre inopposable aux parties une pareille clause d'élection de for parce qu'elle est d'adhésion. La protection en matière de contrat d'adhésion de ce genre ne s'applique donc que lorsque le droit québécois est le droit substantiel du contrat. Puisque le contrat en litige, par sa nature, n'est pas de ceux où une disposition impérative québécoise exige l'application du droit local, le choix de la loi des Bahamas est valide et l'exercice devrait alors se terminer.

[…]

[52] Les dispositions du Code civil en matière de contrat de consommation et de contrat d'adhésion sont d'ordre public de protection puisqu'elles visent à rétablir une certaine équité contractuelle. (References were omitted)

[53] Le fait que le législateur ait adopté une règle particulière de droit international privé qui rend inopposable aux consommateurs sa renonciation à la compétence des autorités québécoises (Art. 3117 et 3149 C.c.Q.) et qu'il n'ait pas jugé utile ou nécessaire d'en faire autant pour protéger l'adhérent à un contrat d'adhésion est un indice sérieux que le législateur a délibérément choisi de ne pas faire d'exception ou de règle particulière de droit international privé en faveur de l'adhérent. Le silence du législateur est d'autant plus frappant, voire significatif, que les dispositions du Code civil concernant la clause externe (art. 1435 C.c.Q.), la clause illisible ou incompréhensible (art. 1436 C.c.Q.) et la clause abusive (art. 1437 C.c.Q.) s'appliquent tant au contrat de consommation qu'au contrat d'adhésion. Or, le législateur adopte une règle d'exception propre au contrat de consommation sans l'imposer au contrat d'adhésion. L'omission est manifestement volontaire, ce qui impose au tribunal québécois de s'abstenir de vérifier le caractère abusif de la clause d'élection de for.

[54] En somme, en présence d'une clause compromissoire ou de for claire, l'examen du tribunal québécois consiste essentiellement à qualifier la nature du recours et à vérifier si des règles particulières de droit international privé trouvent application en fonction de la qualification juridique retenue. S'il ne se trouve aucune règle particulière, l'analyse est, en principe, terminée. »

[21] As for article 41 CCP, it is a rule of internal procedure, whereas article 3148 CCQ is a rule of substantive law. Article 41 CCP will apply once the conditions of article 3148 CCQ have been fulfilled[3].

[22] Therefore, the fact that the Applicant has entered into a contract of adhesion does not prevent the application of the choice of forum and law clause in the present case.

ii) it is a consumer contract and the choice of forum and law clause does not apply because of article 3149 CCQ and section 22.1 of the Québec *Consumer Protection Act.*

[23] Applicant argues that article 3149 CCQ gives jurisdiction to the Québec courts when dealing with a consumer contract. In other words, article 3149 CCQ can override article 3148 CCQ if Applicant is deemed to have entered into a consumer contract. As for section 22.1 CPA, it prohibits a choice of forum clause in a consumer contract.

[24] Article 3149 CCQ and section 22.1 of the CPA read as follows:

> **3149**. Québec authorities also have jurisdiction to hear an action based on a consumer contract or a contract of employment if the consumer or worker has his domicile or residence in Québec; the waiver of such jurisdiction by the consumer or worker may not be set up against him.
>
> **22.1.** An election of domicile with a view to the execution of a juridical act or the exercise of the rights arising therefrom may not be set up against the consumer, except if it is made by notarial act.

[25] The Defendants reply that the internet-based services offered to users are free of charge. Hence, there is no consumer contract because a consumer contract requires payment or the exchange of valuable consideration, and article 3149 CCQ and section 22.1 of the CPA cannot override the choice of forum clause in favour of Ontario.

[26] The Defendants refer to the case of *St-Arnaud v Facebook inc.*[4] where the Superior Court faced with a declinatory motion in the context of a class action brought against Facebook for similar internet-based services, held that article 3149 CCQ was not applicable since its users did not pay for the use of the services provided, thereby precluding the possible existence of a consumer relationship.

[27] Me Luc Thibaudeau in an article entitled "*Le I-consommateur à la recherche de la protection adéquate*"[5] commented on the nature of the contract in similar circumstances:

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[3] *Droit de la famille – 162443,* para 38-42.
[4] 2011 QCCS 1506, para 51-56.
[5] Volume 380, Colloque national sur les recours collectifs - Développements récents au Québec, au Canada et aux États-Unis (2014) pp. 571-613

> " On pourrait croire que le contrat d'adhésion à un réseau social sur Internet serait aussi un contrat conclu à distance au sens de la *Lpc*. Mais il faudrait en premier lieu qu'il s'agisse d'un contrat de consommation. Or, dans une décision de 2011, la Cour supérieure, rejetant une demande d'autorisation d'exercer un recours collectif, a statué que le contrat conclu avec Facebook n'est pas un contrat de consommation parce que l'utilisation de Facebook est gratuite[6]. Pourtant, dans *Albilia c. Apple inc.,* la gratuité du service fourni n'a pas semblé empêcher le tribunal de permettre l'autorisation d'exercer un recours collectif basé sur de fausses représentations contraires à la *Lpc.* Dans une autre décision plus récente, le tribunal a autorisé un recours collectif dont le fondement contractuel semblait à première vue à titre gratuit. La décision dans le dossier Facebook a été portée en appel, mais le dossier a fait l'objet d'une transaction. Dans un autre dossier où l'on attaquait les termes et conditions d'un programme de loyauté, le caractère gratuit de l'adhésion à ce programme n'a pas empêché la demande d'autorisation de recours collectif d'être autorisée.
>
> La question de la gratuité d'un I-service comme constituant un obstacle à l'exercice d'un recours collectif resterait donc non résolue. Il pourrait être débattu que le contrat à titre gratuit conclu sur le Web, si le contrat de Facebook en est un, demeure un contrat de consommation, surtout si l'on se fie au libellé des articles 1381 et 1384 du *Ccq* :
>
> > **1381.** Le contrat à titre onéreux est celui par lequel chaque partie retire un avantage en échange de son obligation.
> >
> > Le contrat à titre gratuit est celui par lequel une des parties s'oblige envers l'autre pour le bénéfice de celle-ci, sans retirer d'avantage en retour.
> >
> > **1384.** Le contrat de consommation est le contrat dont le champ d'application est délimité par les lois relatives à la protection du consommateur, par lequel l'une des parties, étant une personne physique, le consommateur, acquiert, loue, emprunte ou se procure de toute autre manière, à des fins personnelles, familiales ou domestiques, des biens ou de services auprès de l'autre partie, laquelle offre de tels biens ou services dans le cadre d'une entreprise qu'elle exploite. (The emphasis was in the article)

[28] There is no definition of a "consumer contract" or of a "merchant" in the CPA. In the case of *Caza* c. *Derisca*[7]*,* the Court of Appeal, referring to a previous decision[8], proposed the following in order to identify a merchant :

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[6] The author is referring here to the decision of *St-Arnaud c. Facebook*, referred to at note 4.
[7] 2015 QCCA 368, para 17.
[8] *Lac Express inc*. c. *Laliberté,* J.E. 96-47, (C.A.).

> [17] «Commerçant» n'est pas défini dans la *L.p.c.* Par contre, notre Cour a identifié deux éléments essentiels à la qualité de commerçant soit : 1) l'exercice d'une activité en vue de faire un profit et 2) le caractère de permanence de l'activité, sans que cette activité constitue nécessairement l'activité principale ou exclusive de la personne en autant que la personne exerce cette activité de façon «habituelle plutôt qu'occasionnelle».

[29] The fact that the internet-based services rendered by the Defendants, i.e. internet search and communication through email, constitute their primary activity is not disputed. Also, the sheer number of these free applications that bring fortunes to their inventors leads us to believe that the latter have exercised their activities with a view to making a profit.

[30] The counsel for the Applicant does not dispute the fact that there is no charge to the user for the services rendered by the Defendants. He adds however, that the latter receive an advantage from the "affluence" on their website. In other words, the more users Yahoo has the more income it is likely to receive from advertisers, etc. Therefore, each party draws an advantage from the contract they have entered into. The Defendants earn more advertising revenue the more users they have, while the users get an email address free of charge.

[31] Finally, Applicant also argues that the Supreme Court of Canada, in the recent case of *Douez* v. *Facebook,Inc.*[9] rendered in the context of a class action (the "**Facebook Decision**"), found that the contract between Facebook users and Facebook, Inc. was a consumer contract and that the choice of forum clause was not enforceable against Facebook users despite the fact that Facebook was free to join and use:

> [33] But commercial and consumer relationships are very different. Irrespective of the formal validity of the contract, the consumer context may provide strong reasons not to enforce forum selection clauses. For example, the unequal bargaining power of the parties and the rights that a consumer relinquishes under the contract, without any opportunity to negotiate, may provide compelling reasons for a court to exercise its discretion to deny a stay of proceedings, depending on the other circumstances of the case (see e.g. *Straus v. Decaire*, 2007 ONCA 854, at para. 5 (CanLII)). (…)
>
> (…)
>
> [50] (…) More importantly, <u>the claim involves a consumer contract of adhesion</u> and a statutory cause of action implicating the quasi-constitutional privacy rights of British Columbians. (…) (Emphasis added)

[32] In the Facebook Decision, the Supreme Court listed the elements to be considered when determining whether there exists a strong cause not to enforce a forum selection clause within a consumer context, namely, the inequality of bargaining power of the

[9] 2017 SCC 33.

parties in a consumer contract of adhesion and the local court's interest in adjudicating claims involving constitutional or quasi-constitutional rights.

[33] The counsel for the Defendants submits that the Court should not rely on the Facebook Decision given the distinct legislative framework that exists in Québec, which already responds to many of the policy concerns raised in the Facebook Decision.

[34] The Court is aware that many distinctions can be made between the present case and the Facebook Decision, namely, that in the Facebook decision, the Supreme Court applied the common law test for forum selection clauses set out in *Z.I. Pompey Industrie* v. *ECU-Line N.V.*[10], which does not apply in this case.

[35] However, the Supreme Court nevertheless stated that the contract between Facebook, Inc. and its users was a consumer contract of adhesion. In conducting its analysis, the Court found this statement to be persuasive.

[36] As appears from the foregoing, it would seem that we are dealing with a merchant who has concluded contracts with consumers, be it under the CPA or the CCQ.

[37] As seen above, the Québec legislature has chosen to except consumer contracts from its standard jurisdictional rules. In conclusion, the Court finds that the contract between Yahoo! Canada and the Applicant is a consumer contract and thus the waiver of the Québec jurisdiction does not apply in the present case.

1.2. Subsidiarily, the proposed class action has no jurisdictional connection to Québec

[38] Article 3148 CCQ sets out the conditions under which a Québec court can lawfully assert jurisdiction over personal actions of a patrimonial nature in the absence of an express choice by the parties:

> **3148.** In personal actions of a patrimonial nature, Québec authorities have jurisdiction in the following cases:
>
> (1) the defendant has his domicile or his residence in Québec;
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> (2) the defendant is a legal person, is not domiciled in Québec but has an establishment in Québec, and the dispute relates to its activities in Québec;
>
> (3) a fault was committed in Québec, injury was suffered in Québec, an injurious act or omission occurred in Québec or one of the obligations arising from a contract was to be performed in Québec;
>
> (4) the parties have by agreement submitted to them the present or future disputes between themselves arising out of a specific legal relationship;

[10] 2003 SCC 27, [2003] 1 S.C.R. 450.

(5) the defendant has submitted to their jurisdiction.

(…)

[39] In the context of a class action, the Supreme Court of Canada has established that the presence of any of the four factors listed in article 3148(3) CCQ is sufficient to confer jurisdiction to the Québec courts[11].

[40] Have these conditions been met in the present case?

a) Neither Yahoo! Inc. nor Yahoo! Canada are headquartered or domiciled in Québec.

[41] The Defendants allege that Yahoo! Inc. is a company incorporated under the laws of the State of Delaware, U.S.A. Its corporate headquarters are situated in Sunnyvale, California. As for Yahoo! Canada, it is a company formed under the laws of the Province of Nova Scotia and its headquarters are in Toronto, Ontario.

[42] These facts are not contested by the Applicant.

b) Neither Yahoo! Inc. nor Yahoo! Canada have an establishment in Québec.

[43] The Defendants allege that Yahoo! Inc. has no physical presence in Canada. It has no establishments, offices or resident staff in Canada. It does not provide any services to residents of Canada, including to residents of Québec. All Yahoo-branded services provided to Quebecers are provided by its wholly-owned subsidiary Yahoo! Canada.

[44] As for Yahoo! Canada, it has no physical presence in Québec either. It has no establishments or offices in Québec and none of its computer servers are located in Québec.

[45] These facts are not contested by the Applicant.

c) No fault or injurious act was committed in Québec and no damages were suffered in Québec.

[46] The Defendants argue that the Motions for Authorization do not allege that any fault or injurious act was committed in Québec. In fact, the Motions for Authorization, and more specifically the notices (Exhibit P-4), do not identify where the Data Security Incidents occurred.

[47] Furthermore, the allegations of future and hypothetical out-of-pocket expenses, inconveniences and economic losses are too vague and do not amount to veritable losses or damages.

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[11] *Infineon Technologies AG* v. *Option consommateurs*, [2013] 3 SCR 600, para 43 and 45.

[48] The Court finds that the allegations of damages stemming from mental distress (par. 38) are sufficient to fulfill the condition of article 3148 (3) CCQ. Let us be reminded that at this stage the Court does not consider the merits of the case, but rather, is to take as averred the facts alleged in the Motion for Authorization.

d) There is no agreement submitting the dispute to the courts of Québec and no attornment to the jurisdiction of Québec.

[49] These facts are not contested by the Applicant.

[50] In conclusion, the proposed class action has a jurisdictional connection to Québec.

2. Should the courts of Québec decline jurisdiction over Yahoo! Inc. based on the doctrine of *forum non conveniens*?

[51] As a subsidiary argument, the Defendants submit that should the Court conclude that it has jurisdiction over Yahoo! Inc. alone, it should nevertheless decline such jurisdiction in favour of the courts of Ontario. In view of its previous conclusion, the Court will not analyse this subsidiary argument.

3. Should the present proceedings be stayed based on *lis pendens* and in conformity with article 577 CCP?

[52] Prior to the service of the present proceedings, a proposed class action had already started in Ontario against Yahoo! Inc. and Yahoo! Canada in the matter of *Natalia Karasik v. Yahoo! Inc., et al.,* Court file No. CV-16-566248-00CP (the "**Ontario Proceeding**"). In fact, Mr. Justice Paul Perell of the Ontario Superior Court of Justice has already been assigned to hear the case. The Defendants are therefore asking the Court to stay the present proceedings in favour of the Superior Court of Justice of Ontario.

[53] Article 3137 CCQ allows the Court to stay its ruling on an action brought before it if there is a situation of *lis pendens* with another action pending before a foreign authority:

> **3137.** On the application of a party, a Québec authority may stay its ruling on an action brought before it if another action, between the same parties, based on the same facts and having the same subject is pending before a foreign authority, provided that the latter action can result in a decision which may be recognized in Québec, or if such a decision has already been rendered by a foreign authority.

[54] Article 3137 CCQ prevents a multiplication of actions and the risk of contradictory judgments. However, the exception of *lis pendens* does not apply automatically. The Court has a discretion that must be exercised by taking into account all of the circumstances of the case at bar.

[55] The Court of Appeal has summarized the conditions to be met when applying article 3137 CCQ:

> [18] (…):
>
> 1. l'existence d'une action pendante au Québec et d'un recours à l'étranger dont la décision pourrait être reconnue au Québec;
>
> 2. une demande de surseoir aux procédures par l'une des parties;
>
> 3. une identité de parties, de faits et d'objet;
>
> 4. une discrétion exercée par le juge. [12]

[56] The approach to be taken to *lis pendens* in the context of private international law was confirmed by the Supreme Court of Canada in *Canada Post Corporation v. Lépine*[13]*;*

> [51] […] The conditions for *lis pendens* are well established in the domestic context in Quebec civil law. Like *res judicata*, *lis pendens* depends on identity of the parties, identity of the cause of action and identity of the object (J.-C. Royer, *La preuve civile* (4th ed. 2008), Nos. 788-89, at p. 635; *Rocois Construction Inc. v. Québec Ready Mix Inc.,* [1990] 2 S.C.R. 440). However, in private international law matters, the nature of the required identities is altered somewhat in the *Civil Code of Québec* in the case of *lis pendens.* In particular, in art. 3137, as in art. 3155(4), the Code retains identity of the parties and identity of the object but substitutes identity of the facts on which the action is based for identity of the cause of action.

[57] The 2013 and 2014 security breaches referred to in the Ontario Proceeding are the same 2013 and 2014 Data Security Incidents referred to in the Motions for Authorization filed by the Applicant Demers.

[58] Therefore, the same causes of action as well as contractual breaches are alleged in both the Ontario Proceeding and in the present case. The object of the Motions for Authorization and the Ontario Proceeding are the same. Both seek the authorization/certification of a class action.

[59] In addition, the Court is satisfied that a final decision in the Ontario Proceeding is capable of recognition and enforcement in Québec.

[60] Are we dealing with the same parties?

[61] The Applicant describes the proposed class as being composed of :

> All persons residing in Quebec whose personal and/or financial information was lost by and/or stolen from The Defendants as a result of a data breach that

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[12] *Cormier, Cohen, Davies, Architectes, s.e.n.c.* c. *Bizotto*, 2009 QCCA 513, para 18; see also *CBS Canada Holdings Co.* c. *Canadian National Railway Company,* 2013 QCCS 471, para 46.

[13] [2009] 1 S.C.R. 549.

> occurred in August 2013[14] (hereinafter the "**Data Breach"**), and all other persons, businesses, entities, corporations, financial institutions or banks who suffered damages or incurred expenses as a result of said Data Breach, or any other Class(es) or Sub-Class(es) to be determined by the Court; (herein after, "Class Member(s)", the "Class", the "Member(s)";

[62] Applicant Karasik in the Ontario Proceeding proposes to certify the following class:

> 10. The plaintiff brings this action on behalf of all persons residing in Canada whose Yahoo account information was stolen in the 2013 Breach, the 2014 Breach and/or through the use of forged cookies in 2015 and/or 2016, excluding the defendants and the defendants' executives (the "**Class"** or "**Class Members**").[15]

[63] The Ontario Proceeding proposes a national class that would include the Québec residents who are the subject of each Motion for Authorization. However, in the present case, the Applicant also seeks recovery on behalf of "…all other persons, businesses, entities, corporations, financial institutions or banks who suffered damages or incurred expenses as a result of said Data Breach…". Counsel for the Applicant submits that the proposed Class Members in the present case are not the same as in the Ontario Proceeding since they also include "collateral victims", i.e. persons other than a Yahoo user whose personal and/or financial information was lost and/or stolen in the Data Security Incidents.

[64] The Defendants submit that not a single "collateral victim" has been identified and that this is a feeble attempt on the part of the Applicant to thwart a forcible stay based on *lis pendens.*

[65] It may well be that this particular sub-group of "collateral victim" may prove to be artificial, however, the Court, at this stage, has no alternative but to conclude that the Class Members in the Ontario Proceeding and those in the present case are not the same parties and thus that the conditions of article 3137 CCQ have not been met.

[66] Article 577 CCP states that the Court, in deciding a request for a stay of proceedings, must take into consideration the protection of the rights and interests of Québec residents.

[67] Article 577 CCP reads as follows:

> **577.** The court cannot refuse to authorize a class action on the sole ground that the class members are part of a multi-jurisdictional class action already under way outside Québec.

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[14] The date of the data breach in the Court file bearing no. 500-06-000842-175 is ''in late 2014'' instead of ''August 2013''.
[15] Statement of Claim filed in the Ontario Proceeding, Exhibit R-2(e).

> If asked to decline jurisdiction, to stay an application for authorization to institute a class action or to stay a class action, the court is required to have regard for the protection of the rights and interests of Québec residents.
>
> If a multi-jurisdictional class action has been instituted outside Québec, the court, in order to protect the rights and interests of class members resident in Québec, may disallow the discontinuance of an application for authorization, or authorize another plaintiff or representative plaintiff to institute a class action involving the same subject matter and the same class if it is convinced that the class members' interests would thus be better served.

[68] In view of the Court's previous conclusion that the conditions of article 3137 CCQ have not been met, it would be superfluous to analyse this last question.

FOR THESE REASONS, THE COURT:

[69] **DISMISSES** the Defendants' *Application to Dismiss for Want of Jurisdiction or, Subsidiarily, to Decline Jurisdiction Over or Stay the Originating Application for Authorization to Institute a Class Action and to Appoint a Representative Plaintiff;*

[70] **THE WHOLE WITH LEGAL COSTS** againt Defendants.

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MICHELINE PERRAULT, J.S.C.

Mtre Erik Lowe
MERCHANT LAW GROUP
Attorneys for the Plaintiff

Mtre Laurent Nahmiash
DENTONS CANADA
Attorneys for the Defendants

Hearing Date: August 31, 2017