SUPERIOR COURT

(Class action)

CANADA
PROVINCE OF QUEBEC
DISTRICT OF MONTREAL

No.: 500-06-001081-203

DATE: June 15, 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

JUDGMENT
(On the Applicant's Pre-Approval Application)

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[1] The Applicant asks the Court to:

(1) Grant permission to amend the application for authorization;

(2) Authorize the class action for settlement purposes;

(3) Approve the class notices and notice plan.

CONTEXT

[2] On June 30, 2020, the Applicant filed an *Application to Authorize the Bringing of a Class Action and to Appoint the Status of Representative Plaintiff*. He wished to represent Quebec residents who had used Tim Hortons® mobile app (the "**Mobile App**") and whose geolocation information was collected through the Mobile App between April 1, 2019, and September 30, 2020.

JS 1699

[3] On May 26, 2022, the Applicant filed an *Amended Application to Authorize the Bringing of a Class Action and to Appoint the Status of Representative Plaintiff* (the "**Amended Application**"). The main purpose of the amendment was to seek a Canadian as opposed to a Quebec class.

[4] Defendants agree with the proposed modification.

[5] In fact, the parties have reached a settlement (the "**Transaction**") and have advised the Court that all parties now support the authorization of a Canadian class for settlement purposes.

ANALYSIS

1. The Amendment

[6] With regard to the request to modify the application, the general conditions governing amendments of pleadings (article 206 C.C.P.) also apply to class action proceedings. The right to amend is interpreted broadly and liberally and an amendment will not be refused as long as the amendment: i) does not delay the proceedings; ii) is not contrary to the interests of justice; and iii) does not result in an entirely new application, unrelated to the initial application.[1]

[7] None of these restrictions apply here. The application for authorization proceeded as planned. The amendment is related to the original application and is not contrary to the interests of justice. Thus, the application for leave to amend is granted.

[8] The merits of the application, especially with regard to the opportunity of authorizing a national class, will be discussed below.

2. The Authorization of the Class Action for Settlement Purposes

[9] A class action is a procedure by which a person, the class representative, sues on behalf of all members of a group that have a similar claim. Because the class representative is not specifically mandated to act on behalf of these members, prior authorization of the Court is required before a class action can be filed.[2]

[10] According to article 575 C.C.P., the Court must authorize the class action if it is of the opinion that:

(1) the claims of the members of the class raise identical, similar or related issues of law or fact;

(2) the facts alleged appear to justify the conclusions sought;

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1 *Pellemans* v. *Lacroix*, 2009 QCCS 1530, para. 25.

2 *L'Oratoire Saint-Joseph du Mont-Royal* v. *J.J.*, 2019 SCC 35, para. 6.

(3) the composition of the class makes it difficult or impracticable to apply the rules for mandates to take part in judicial proceedings on behalf of others or for consolidation of proceedings; and

(4) the class member appointed as representative plaintiff is in a position to properly represent the class members.

[11] The Court's role at the authorization stage has been described as "screening". It must weed out those untenable and frivolous cases that clearly do not meet the requirements for the issuance of class action (article 575 C.C.P.). The threshold is low. The requirements must be interpreted in a broad and liberal fashion designed to give effect to the social goals of class actions (facilitating access to justice, modifying harmful behaviour and preserving scarce judicial resources). When all four criteria are met, the Court has no discretion to refuse the authorization. Moreover, if a doubt remains at the end of the analysis, this doubt should benefit the applicant and the authorization should be granted.[3]

[12] When the authorization of the class action is sought for settlement purposes, the criteria set out in article 575 C.C.P. must be applied with even more flexibility.[4]

[13] Given this low threshold, the criteria are met.

[14] Applicant alleges that, after he downloaded the Mobile App, Defendants illegally tracked or allowed the tracking of his movements even when the Mobile App was closed. Thus, the alleged facts "appear" to justify the conclusions sought.

[15] The Amended Application raises common questions.

[16] The composition of the class makes it difficult or impractical to proceed otherwise than by virtue of a class action.

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[3] *Desjardins Cabinet de services financiers inc.* c. *Asselin*, 2020 SCC 30, paras. 27, 55, 116 and 156; *L'Oratoire Saint-Joseph du Mont-Royal* v. *J.J.*, *supra*, note 2, paras. 6, 8, 18, 19, 20, 42, 56 and 58; *Vivendi Canada Inc.* v. *Dell'Aniello*, 2014 SCC 1, paras. 1, 37, 55 and 67; *Infineon Technologies AG* v. *Option Consommateurs*, 2013 SCC 59, paras. 59 to 61; *Apple Canada inc.* c. *Badaoui*, 2021 QCCA 432, para. 25; *Benamor* c. *Air Canada*, 2020 QCCA 1597, para. 35; *Godin* c. *Aréna des Canadiens inc.*, 2020 QCCA 1291, paras. 49 and 50; *Tenzer* c. *Huawei Technologies Canada Co. Ltd.*, 2020 QCCA 633, para. 20; *Belmamoun* c. *Ville de Brossard*, 2017 QCCA 102, paras. 73 and 74; *Charles* c. *Boiron Canada inc.*, 2016 QCCA 1716, paras. 40 to 43 (Motion for leave to appeal to the Supreme Court dismissed with dissent (Can C.S., 2017-05-04) 37366); *Union des consommateurs* c. *Bell Canada*, 2012 QCCA 1287, para. 117 (Motion for permission to appeal to the Supreme Court of Canada dismissed (S.C. Can., 2013-01-17) 34994).

[4] *Benabu* c. *Bell Canada*, 2019 QCCA 2174, para. 16; *Preisler-Banoon* c. *Airbnb Ireland*, 2019 QCCS 3942, para. 8; *Fogelman* c. *Sony Corporation*, 2019 QCCS 3243, para. 16; *Michaud* c. *Sanofi-Aventis Canada Inc.*, 2019 QCCS 797, para. 10; *Dupuis* c. *Polyone Canada inc.*, 2016 QCCS 2561, para. 9; *Option Consommateurs* c. *Banque Toronto-Dominion*, 2015 QCCS 1259; *Vallée* c. *Hyundai Auto Canada Corp.*, 2014 QCCS 3778, paras. 28 to 31; *Option consommateurs* c. *Virgin Atlantic Airways Ltd.*, 2012 QCCS 3213, paras. 16 to 22.

[17] The proposed representative is: i) interested in the suit; ii) competent; and iii) has no demonstrated conflict of interest with the group members.[5]

[18] The only issue that warrants discussion is whether it is permissible for the Superior Court of Quebec to authorize the issuance of the class action on behalf of a national class.

[19] In common law provinces, the decision to assert jurisdiction over non-resident class members is based on an analysis of the class action as submitted by the prospective representative plaintiff, as opposed to considering the real and substantial connection between the foreign jurisdiction and all of the non-resident class members.[6]

[20] In Quebec, the prevalent view is that jurisdiction must be demonstrated vis-à-vis each of the proposed class members.[7]

[21] Article 3148 C.C.Q. provides that Quebec courts can exercise jurisdiction over personal actions of a patrimonial nature in any of the following circumstances:

> (1) the defendant has his domicile or his residence in Quebec;
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> (2) the defendant is a legal person is not domiciled in Quebec but has an establishment in Quebec, and the dispute relates to its activities in Quebec;
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> (3) a fault was committed in Quebec, injury was suffered in Quebec, an injurious act or omission occurred in Quebec or one of the obligations arising from a contract was to be performed in Quebec;
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> (4) the parties have by agreement submitted to the jurisdiction for present or future disputes between themselves arising out of a specific legal relationship;
>
> (5) the defendant has submitted to their jurisdiction.

[22] With regard to Quebec residents, jurisdiction is not an issue. Their location was tracked while they were, for the most part, in the province and the injury they suffered was in Quebec. Thus, Quebec courts have jurisdiction under article 3148(3) C.C.Q.

[23] With regard to out of province residents, jurisdiction is less evident. Defendants do not have their head office in Quebec. While some of the Defendants have establishments in Quebec, it cannot be said that the class action relates to their activity in Quebec. According to the Amended Application, Defendants used a New York company, Radar Labs Inc. for the location-tracking services. No fault or injury is alleged to have occurred

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5 *L'Oratoire Saint-Joseph du Mont-Royal* v. *J.J.*, *supra*, note 2, para. 32; *Infineon Technologies AG* v. *Option consommateurs*, *supra,* note 3, para. 149; *Tenzer* c. *Huawei Technologies Canada Co. Ltd.*, *supra*, note 3, para. 30; *Sibiga* c. *Fido Solutions inc.,* 2016 QCCA 1299, para. 97.

6 *Airia Brands Inc.* v. *Air Canada*, 2017 ONCA 792, paras. 107 and 108; *Meeking* v. *Cash Store Inc.* et al., 2013 MBCA 81, para. 84.

7 *Youngrana* v. *Air Algérie*, 2016 QCCS 2311, para. 70 (Motion for leave to appeal to the Supreme Court dismissed (S.C. Can., 2017-02-16) 37190).

in Quebec for non-Quebec residents. The terms and conditions of the Mobile App[8] do not contain an agreement to submit disputes to Quebec Courts.

[24] However, Defendants submit that the Quebec Superior Court has jurisdiction because Defendants have submitted to the jurisdiction of Quebec courts (article 3148(5) C.C.Q.). Indeed, Defendants intent in this regard is clear. Both the preamble of the Transaction and paragraph 65 of same leave no doubt as to Defendants' intention:

> **WHEREAS** the Parties submit themselves to the jurisdiction of Québec authorities, including the Court as defined herein [defined as the Superior Court of Québec sitting in the District of Montreal in the definitions' section], for the purposes of the Settlement and with respect to the personal actions of Group Members, whether they are residents or non-residents of the province of Québec;
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> 65. The Parties submit to the jurisdiction of the Court, and agree that the Court shall have exclusive and continuing jurisdiction over the Parties for all purposes relating to the implementation, effectuation, interpretation, administration, monitoring and enforcement of this Transaction and its Schedules, any litigation or dispute that may arise therefrom, and all provisions thereof with respect to all Parties hereto and all beneficiaries hereof, including the Plaintiffs, Class Counsel, the Defendants, BKC, Group Members, the Releasees, the Releasors, the Released Claims, the BKC Releasees, the BKC Releasors, and the BKC Released Claims. The Transaction and its Schedules will be governed and construed in accordance with the laws in force in the Province of Québec and the Parties submit to the exclusive jurisdiction of the Superior Court of Québec in this regard;

[25] Some may argue that the submission by Defendants to the jurisdiction of Quebec courts in a class action context could cause prejudice to members who reside outside the province of Quebec. Indeed, it must be remembered that, unlike regular applicants who seek reparation before Quebec courts, putative class action members did not specifically instruct class action counsel to file in Quebec. Similarly, the class action representative was not specifically mandated by the potential members to do so.

[26] The situation is further complicated by the existence of three other proposed class actions which stem from the same facts as those alleged in the Amended Application:

(1) *Wai Lam Jacky Law* v. *Restaurant Brands International Inc. and Radar Labs, Inc.* (British Columbia Supreme Court No. VLC-S-S-207985), on behalf of a putative national class;

(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 No. CV-20-00648562-00CP), on behalf of a putative national class excluding residents of Quebec;

(3) *Ashley Sitko and Ashley Cadeau* v. *Restaurant Brands International Inc.* (Ontario SCJ No. CV-20-00643263-00CP), on behalf of a putative national class (process to commence claim not completed).

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[8] Exhibit T-5.

[27] These concerns are valid. However, they are answered by article 577 C.C.P. which states that 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".

[28] Thus, the existence of non-Quebec members does not constitute a bar to authorization when jurisdiction is anchored through a valid connecting factor under article 3148 C.C.Q. The preservation of members' rights (resident and non-residents alike) will be guaranteed by the existence of the opt-out mechanism and the adequacy of the notices.[9]

[29] Indeed, it is trite law that such notices play a crucial role in class actions. The preservation of prospective and existing members' rights depends on the timely transmission of relevant information. This is especially true in the case of notices sent to protect the right to opt out of a class action. "Although it does not have to be shown that each member was actually informed, the way the notice procedure is designed must make it likely that the information will reach the intended recipients."[10]

[30] When these safeguards are in place, the principle of comity justifies Quebec courts to both: a) expect that its judgments will be recognized and enforced by foreign jurisdictions; and b) recognize that, in appropriate cases, they must give effect to foreign class action judgments. When notices are adequate and other jurisdictional criteria are met, failure to opt out may be regarded as a form of passive attornment which vindicates the jurisdiction of the Quebec court over foreign class action members or the jurisdiction of a foreign court over Quebec class action members.[11]

[31] Based on these principles, this court has not shied away from approving national class action settlements even when defendants were domiciled outside Quebec.[12]

[32] Furthermore, the existence of class actions in other provinces does not present a risk of conflicting judgments as the Transaction provides that they will be dismissed in the event the Transaction is approved (paragraph 6).

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9 *Brito* c. *Pfizer Canada inc.*, 2008 QCCS 2231, paras. 125, 129, 130 and 131 (Motion for Approval of an agreement granted, 2021 QCCS 4562).

10 *Canada Post Corp.* v. *Lépine*, 2009 SCC 16, paras. 42 and 43; *Meubles Léon ltée* c. *Option consommateurs*, 2020 QCCA 44, para. 78 (Applications for leave to appeal to the Supreme Court dismissed (S.C. Can., 2020-10-22) 39132); *Hocking* c. *Haziza*, 2008 QCCA 800, para. 119, justice Chamberland in dissent but approved by the majority as to the principle, para. 229; *Lévesque* c. *Vidéotron s.e.n.c.*, 2015 QCCS 3561, para. 10; Yves LAUZON et Anne-Julie ASSELIN, «Article 579», in Luc CHAMBERLAND and al., *Le grand collectif: Code de procédure civile: commentaires et annotations*, 6th ed., volume 2, Montréal, Éditions Yvon Blais, 2021, EYB2019GCO591.

11 *McLean* v. *Cathay Pacific Airways Limited*, 2021 BCSC 1456, paras. 80 to 84; *Chasles* c. *Bell Canada inc.*, 2017 QCCS 5200, para.79; Currie v. *McDonald's Restaurants of Canada Ltd.*, [2005] O.J. No. 4795 (Q.L.) paras. 15, 27 and 30.

12 *Tegegne* v. *Henkel Consumer Goods Canada Inc.*, 2021 QCCS 5; *Attar* v. *Red Bull Canada ltd.*, 2019 QCCS 3219 (Motion for approval a settlement agreement granted, 2020 QCCS 500); *Licari* v. *Johnson & Johnson inc.*, 2018 QCCS 2033; *Petit* v. *New Balance Athletic Shoe Inc.*, 2013 QCCS 3569.

3. NOTICES AND DISSEMINATION PLAN

[33] With regard to the notices and the dissemination plan, they respect the best practices approved by this court. The notices are "clear and concise".[13] The language is simple and accessible to the average reader.[14] Dissemination is proposed through individual notification of members which should be preferred when circumstances allow it.[15]

[34] Here, users must provide an email address to access the Mobile App. It must be presumed that Defendants have access to this information[16] and that this method is the best way to reach potential members.

[35] Therefore, the notices and dissemination plan are approved.

POUR CES MOTIFS, LE TRIBUNAL :	**FOR THESE REASONS, THE COURT:**
[36] **ACCUEILLE** la présente Demande;	**GRANTS** the present Application;
[37] **PERMET** la *Demande pour obtenir l'autorisation d'exercer une collective et pour obtenir le statut de représentant modifiée* datée du 26 mai 2022;	**PERMITS** the *Amended Application to Authorize the Bringing of a Class Action and to Appoint the Status of Representative Plaintiff* dated May 26, 2022;
[38] **ORDONNE** que pour l'application du présent Jugement, les définitions énoncées à la Transaction s'appliquent et y sont incorporées par renvoi;	**ORDERS** that for the purposes of this Judgment, the definitions contained in the Settlement Agreement, shall apply and are incorporated by reference;
[39] **DÉCLARE** qu'en cas de conflit entre le présent Jugement et la Transaction, ce Jugement prévaudra;	**DECLARES** that in the event of a conflict between this Judgment and the Settlement Agreement, this Judgment shall prevail;
[40] **AUTORISE** l'exercice d'une action collective contre les Défenderesses aux fins de règlement seulement;	**AUTHORIZES** the bringing of a class action against the Defendants for the purposes of the settlement only;
[41] **ATTRIBUE** au demandeur le statut de représentant du groupe ci-après décrit :	**APPOINTS** the Applicant the status of representative of the class herein described as:

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[13] Art. 581 C.C.P.

[14] Barreau du Québec, *Actions collectives : Guide sur les avis aux membres*, 2016, p. 8, online : <https://www.barreau.qc.ca/media/1335/guide-avis-membres-action-collective.pdf>, accessed on April 5, 2022; *Hocking* c. *Haziza*, *supra*, note 10, para. 116; *Boyer* c. *Agence métropolitaine de transport (AMT)*, 2010 QCCS 4984, paras. 9 and 10.

[15] *Chevalier* c. *Air Transat AT inc.*, 2022 QCCS 671, para. 26; *Huard* c. *Innovation Tootelo inc.*, 2021 QCCS 4209, para. 32; *Asselin* c. *Desjardins Cabinet de services financiers inc.*, 2021 QCCS 1340, para. 28; Y. LAUZON and A.-J. ASSELIN, *supra*, note 10.

[16] *Huard* c. *Innovation Tootelo inc.*, *supra*, note 15, paras. 30 and 31.

« *Tous Résidents au Canada utilisateurs de l'application Tim Hortons® avec des comptes enregistrés au Canada dont les informations de géolocalisation ont été collectées par l'un des Défendeurs 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"*;
[42] **FIXE** l'audition de la Demande d'approbation de la Transaction (l'« **Audience pour approuver la Transaction** ») le 6 septembre 2022 à 9 heures;	**SETS** the hearing of the Application for Approval of the Transaction ("**Hearing to Approve the Transaction**") on September 6, 2022, at 9 a.m.;
[43] **ORDONNE** que la date et l'heure de l'Audience pour approuver la Transaction soient indiquées dans l'Avis d'audience pour approuver la Transaction, mais qu'elles puissent être ajournées par ce Cour sans autre publication d'un avis aux Membres du Groupe autrement qu'en affichant une nouvelle date et heure pour cette audience sur le site web des Avocats du groupe;	**ORDERS** that the date and time of the Hearing to Approve the Transaction shall be set forth in the Notice of Hearing to Approve the Transaction, but may be subject to an adjournment by this Court without further publication of any notice to Class Members other than by posting any new date and time for that hearing on Class Counsel's website;
[44] **APPROUVE** la forme et le contenu de l'Avis d'audience pour l'approbation de la Transaction, ainsi que, l'Avis d'audience abrégé pour l'approbation de la Transaction (dans leurs versions française et anglaise) essentiellement en conformité avec les avis communiqués comme pièces R-2.1, R-2.2 et R-3;	**APPROVES** the form and content of the Notice of Hearing to Approve the Transaction, as well as, the Short Form Notice of Hearing to Approve the Transaction (both French and English versions) substantially in conformity with the notices communicated as exhibits R-2.1, R-2.2 and R-3;
[45] **ORDONNE** que l'Avis d'audience pour l'approbation de la Transaction ainsi que l'Avis d'audience abrégé pour l'approbation de la Transaction soient diffusés et publiés conformément au Plan de notification;	**ORDERS** that the Notice of Hearing to Approve the Transaction, as well as, the Short Form Notice of Hearing to Approve the Transaction be disseminated and published in accordance with the Notice Plan;
[46] **ORDONNE** que les frais du Plan de notification seront payés suivant les termes de la Transaction;	**ORDERS** that the costs of the Notice Plan will be paid for in accordance with the Settlement Agreement;
[47] **ORDONNE** aux défenderesses de produire au Tribunal, dans les 30 jours suivant l'envoi de l'avis abrégé par courriel, un rapport confirmant la dernière date à	**ORDERS** the Defendants to provide the Court, within 30 days following the dissemination of the short-form notice by email, with a report confirming the last date

laquelle les avis ont été envoyés et le nombre total de personnes à qui les avis ont été envoyés par courriel et combien étaient non distribuables;	on which the notices were sent and the total number of persons to whom the notices were emailed and how many were undeliverable;
[48] **ORDONNE** que les Membres du Groupe peuvent s'exclure de l'action collective en envoyant une demande écrite d'Exclusion aux Avocats du Groupe ou au Greffe de la Cour supérieure du Québec à l'adresse suivante : Greffe de la Cour supérieure du Québec Division des actions collectives Palais de justice de Montréal 1, rue Notre-Dame Est Bureau 1.120 Montréal (Québec) H2Y 1B6 N° de dossier : 500-06-001081-203 La demande d'Exclusion doit contenir les informations spécifiées dans l'Avis d'audience pour l'approbation de la Transaction. Les demandes écrites d'Exclusion doivent être reçues ou postées, le cachet de la poste faisant foi, au plus tard le 31 juillet 2022;	**ORDERS** that Class Members may opt out of the class action by sending a written Request for Exclusion to either Class Counsel or the Clerk of the Superior Court of Quebec at the following address: Clerk of the Superior Court of Quebec Class Action Division Montreal Courthouse 1 Notre-Dame Street East Room 1.120 Montreal, Québec, H2Y 1B6 File No.: 500-06-001081-203 The request to opt out must contain the information specified in the Notice of Hearing to Approve the Transaction. Written requests to opt out must be received or postmarked, if mailed, no later than July 31, 2022;
[49] **DÉCLARE** que tous les Membres du Groupe qui n'ont pas demandé leur exclusion sont liés par tout jugement à rendre sur l'action collective de la manière prévue par la loi;	**DECLARES** that all Class Members who have not requested their exclusion be bound by any judgment to be rendered in the class action in the manner provided for by law;
[50] **ORDONNE** que chaque Membre du Groupe qui souhaite s'exclure de l'action collective : a) ne sera pas lié par la Transaction; b) n'aura pas le droit de recevoir une part des bénéfices payables en rapport avec celle-ci; et c) cessera d'être un Membre du Groupe;	**ORDERS** that each Class Member who wishes to opt out of the class action: a) will not be bound by the Settlement Agreement; b) will not be entitled to receive any share of benefits payable in connection with same; and c) will cease to be a Class Member;

[51] **DÉCLARE** que les Membres du Groupe peuvent s'opposer à la Transaction en informant par écrit les Avocats du Groupe de leur objection au plus tard le 19 aout 2022. Toutes les objections doivent contenir les informations spécifiées dans l'Avis d'audience pour l'approbation de la Transaction;	**DECLARES** that the Class Members may object to the Settlement Agreement by informing Class Counsel in writing of their Objection by August 19, 2022. All objections must contain the information specified in the Notice of Hearing to Approve the Transaction;
[52] **LE TOUT** sans frais de justice.	**THE WHOLE** without legal costs.

MARTIN F. SHEEHAN, J.S.C.

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Hearing date: May 27, 2022