

CANADA

**PROVINCE OF QUEBEC
DISTRICT OF MONTREAL**

No.: 500-09-

No.: 500-06-000777-157

COURT OF APPEAL OF QUEBEC

MARTIN ROBICHAUD, domiciled and residing at 119, Bord de l'eau street, City of Sainte-Catherine-de-Hatley, District of Saint-François, Province of Quebec, Canada, J0B 1W0

APPLICANT – Plaintiff

v.

INTRAWEST ULC, a legal person having one of its place of business at 1000, chemin des Voyageurs, City of Mont-Tremblant, District of Terrebonne, Province of Quebec, Canada, J8E 1T1

and

DIAMOND RESORTS CORPORATION, a legal person having its place of business at 10,600 West Charleston Boulevard, City of Las Vegas, State of Nevada, USA, 89135

and

DIAMOND RESORTS INTERNATIONAL INC., a legal person having its place of business at 10,600 West Charleston Boulevard, City of Las Vegas, State of Nevada, USA, 89135

and

DIAMOND RESORTS IW HOLDING COMPANY, a legal person having its place of business at 10,600 West Charleston Boulevard, City of Las Vegas, State of Nevada, USA, 89135

and

DIAMOND RESORTS CANADA, LTD., a legal person having its place of business at 326-375, Water St., City of Vancouver, Province of British Columbia, Canada, V6B 5C6

RESPONDENTS - Defendants

APPLICATION DE BENE ESSE FOR LEAVE TO APPEAL
FROM A JUDGMENT RENDERED IN THE COURSE OF A PROCEEDING
(Articles 31 and 357 C.C.P.)
Dated October 18, 2024

TO ONE OF THE HONOURABLE JUDGES OF THE COURT OF APPEAL, THE APPLICANT SUBMITS:

1. On September 12, 2024, the Honourable Donald Bisson, of the Superior Court, District of Montreal (the “**Judge**”), dismissed the application of the applicant Mr. Martin Robichaud (“**Mr. Robichaud**”) for leave to amend the originating application (the “**Judgment**”) (**TAB 1**).
2. The leave sought by Mr. Robichaud arose in the context of a class action authorized by the Honourable Anne Jacob, of the Superior Court, District of Montreal, on March 20, 2018, against the respondent Intrawest ULC (“**Intrawest**”) (“**Authorization Judgment**”) (**TAB 2**). The Applicant sought to add defendants, namely the respondents Diamond Resorts Corporation (“**Diamond Corporation**”), Diamond Resorts International Inc (“**Diamond International**”), Diamond Resorts IW Holding Company (“**Diamond Holding**”) and Diamond Resorts Canada, Ltd. (“**Diamond Canada**”) (collectively, “**Diamond**”).
3. The hearing, held on September 6, 2024, lasted approximately 4 hours.
4. On September 23, 2024, the notice of judgment was issued.

5. The value of the subject matter of the dispute is indeterminate.
6. The record does not contain any confidential information.

I. THE FACTS

7. The Authorization Judgement and the Judgement summarize the relevant facts, and these facts are not disputed. For the purposes of this application, it suffices to lay out the salient points of the procedural history and provide an overview of the facts specific to the addition of Diamond as a defendant.

A. Procedural History

8. On March 20, 2018, Mr. Robichaud was authorized to bring the following class action against Intrawest (the “**Class Action**”):

An action in reduction of price and compensatory and punitive damages in order to sanction the defendant for its use of prohibited trade practices relating to membership in Club Intrawest, and a claim relating to costs, the amount of which was not precisely indicated in the contract.

9. The Authorization Judgment grants Mr. Robichaud the status of representative on behalf of the members of the following group (the “**Class**” or “**Members**”):

All natural persons who purchased Club Intrawest points in Quebec from Intrawest ULC, or from one of its subsidiaries or related companies, with the exception of those who had divested themselves of the points before a mandatory fixed minimum resale price for the points was introduced in 2007, which had to be respected for all of the advantages related to the points and to participation in Club Intrawest to be transferred.

10. On June 20, 2018, Mr. Robichaud commenced the Class Action against Intrawest (**TAB 3**), which can be summarized as follows.
11. From 1993 until 2015, Intrawest operated a “time-sharing” program known as Club Intrawest (the “**Club**”) whose members can exchange points for stays at various resorts (“**Points**”). To become a Club’s member, a consumer must enter a contract

with Intrawest to acquire Points; the consumer may then finance this purchase within the same transaction (the “**Members’ Contracts**”) (TAB 4). Prospective Club’s members receive no other document before joining the Club, save a “Summary of Key Elements of Your Membership” (TAB 5).

12. Mr. Robichaud alleges that Intrawest’s representations and the documents provided before joining the Club failed to properly disclose: a) the disadvantageous restrictions on the reselling of Points; and b) the amount of the annual fee that Members must pay to redeem their Points for vacation time (the “**Fee**”).
13. In doing so, Intrawest breached various provisions of the *Consumer Protection Act* (“**CPA**”), including in that: a) the contractual documents provided to Members before joining the Club deliberately omit the terms and conditions for the resale of Points and gave a general impression that is not in keeping with reality, in violation of ss. 216, 218, 219 and 228 CPA, and b) the amount of the Fee is not disclosed and can be unilaterally changed by Intrawest in violation of ss. 11.2 and 12 CPA.
14. Mr. Robichaud seeks remedies under s. 272 CPA, namely: a) a reduction in the payment of the purchase price of Points; b) reimbursement of the Fees they paid as a member of the Club; and c) punitive damages.

B. Facts relevant to the Addition of Diamond to the Class Action

15. As further appears from the proceedings, Mr. Robichaud became aware of the transfers of assets from Intrawest to Diamond and on January 12, 2023, he sought to add Diamond to the Class Action by filing an *Application for Authorization to carry out a Class Action and for the Grant of representative status, as well as for the amendment of the Application initiating the proceedings*. This application was amended on November 3, 2023 (the “**Diamond Application**”) (TAB 6). The amendments Mr. Robichaud sought to make appear in the draft *Demande introductive d’instance modifiée* in support of the Diamond Application (TAB 7).

16. In the Diamond Application, Mr. Robichaud advanced two causes of action for adding Diamond to the Class Action: a) Diamond is responsible for misrepresentations made by Intrawest to Members regarding the Points' resale, whether because of an assignment of the relevant contracts or pursuant to Art. 103 CPA; and b) Diamond took over the collection of Fees from Members.
17. The grounds for adding Diamond to the Class Action primarily arise from transactions between Intrawest and Diamond, which resulted in the transfer of assets related to the Class Action, along with elements indicating that Diamond has been operating the time-sharing program (*i.e.*, the Club).

i. The Purchase Agreement

18. On November 24, 2015, Intrawest and its parent company, Intrawest U.S. Holdings Inc., entered a transaction with Diamond Corporation and its parent company, Diamond International, for the sale and purchase of the principal assets of the Club, as evidenced by a redacted copy of the Purchase Agreement (**TAB 8**).¹
19. The Purchase Agreement provides that Intrawest sells to Diamond Corporation several assets (the "**Purchased Assets**") (TAB 8, section 2.01(a)), including:
 - a) The Restated Management Agreement between Intrawest and the Club, dated March 26, 2009 (**TAB 9**) (TAB 8, Section 2.01(a)(ii));
 - b) "*All right, title and interest*" of Intrawest ULC as a "Declarant" under the Nineteenth Amended and Restated Master Declaration between the Club and Intrawest, dated May 30, 2012 (TAB 8, Section 2.01(a)(iv));
 - c) "*All right, title and interest*" of Intrawest as a secured party under all purchase agreement providing for financing to the member of the Club (TAB 8, Section 2.01(a)(vi)(i)); and
 - d) The Resort Points (TAB 8, Section 2.01(a)(xxi)).

¹ Judgment, Tab 1, para. 38(1).

20. The Purchase Agreement also provides that Diamond Corporation must assume some liabilities with respect to “*Canadian Purchased Assets*”, including “all Liabilities of any Seller arising under the contracts comprising Purchased Assets located in Canada to be performed after the Closing (whether accrued before or after the Closing)” (TAB 8, Section 2.02(a)(ii)(A)).

ii. Further Assignments of Contracts from Intrawest to Diamond

21. On January 28, 2016, Diamond Corporation assigned its right to acquire the Purchased Assets under the Purchase Agreement to Diamond Holding and Diamond Canada pursuant to an Assignment Agreement. Mr. Robichaud has no copy of this agreement.²
22. On January 29, 2016, Intrawest and Diamond Holding executed an Assignment and Assumption of Restated Management Agreement assigning to Diamond Holding the Restated Management Agreement.³

iii. The Role of Diamond in the Club’s Activities

23. On February 20, 2018, Diamond International confirmed to Mr. Robichaud the sale of his Points to third parties (**TAB 10**). Diamond International also operated the electronic platform of the Club, now named Embarc Members Association (**TAB 11**).

II. THE JUDGMENT

24. The Judge correctly identified the only question to be decided, *i.e.* whether Mr. Robichaud demonstrated an appearance of right against Diamond within the meaning of Art. 575(2) CCP.⁴ He further framed this issue as whether the agreements between Diamond and Intrawest transferred to Diamond the liability

² Judgment, Tab 1, para 45.

³ Judgment, Tab 1, para 43.

⁴ Judgment, Tab 1, para 6 (which the Judge reiterates to paras 28 and 29 of the Judgment).

under the Class Action.⁵ He conducted this analysis for each of the Diamond entities.

25. Regarding Diamond Corporation, the Judge found that the Members' Contracts (TAB 4, referred to as R-8 in the Judgment) were excluded from the assets transferred to this entity pursuant. As such, he did not deem necessary to examine Mr. Robichaud's argument under Art. 103 CPA, which addresses the liability of a debt-assignee.⁶
26. Regarding Diamond Holding, the Judge similarly determined that this entity was not assigned any liability under the Members' Contracts. He recognized that Restated Management Agreement was transferred ultimately transferred to this entity. However, he further found that, when acting under this agreement, Diamond Holding only acts as the Club's agent for collecting fees and that it cannot, in this capacity, be liable to the Members regarding the Fees.⁷
27. Regarding Diamond Canada, he notes that this entity is not any of the relevant agreement and cannot, therefore, have any liability towards the Members.⁸
28. More generally, the Judge concluded that even if Diamond Corporation had assigned its rights to acquire the Purchased Assets to Diamond Holding and Diamond Canada under the January 28, 2016 Assignment Agreement, this was irrelevant. Diamond Corporation could not assign assets, including Members' Contracts, that it had never received.⁹
29. Regarding Diamond International, the Judge found that it did not acquire any of Intrawest's assets, and could not therefore have any liability. Additionally, he noted that Diamond International was later merged into the Hilton group.¹⁰

⁵ Judgment, Tab 1, par. 32.

⁶ Judgment, Tab 1, paras 41-42.

⁷ Judgment, Tab 1, par. 43.

⁸ Judgment, Tab 1, par. 44.

⁹ Judgment, Tab 1, par. 45.

¹⁰ Judgment, Tab 1, par. 46.

30. The Judge concluded, however, that the Amendment Agreement dated January 28, 2016, which seeks to exclude Diamond's liability concerning the Class Action, is unenforceable against the Members.¹¹
31. In *obiter dictum*, he suggests that Mr. Robichaud's claim against Diamond is not statute-barred.¹²

III. GROUNDS OF THE APPLICATION FOR LEAVE TO APPEAL

32. Since the Judgment prevents Mr. Robichaud and the other Members to pursue their claims against Diamond, the Judgment is final and no leave to appeal is required. Indeed, a judgment dismissing a claim against one of the parties at a preliminary stage "terminates the proceedings" as understood under Art. 30 CCP.¹³ That the Diamond Application was dismissed in the context of a class action has no bearing: when put into context, the Judgment is analogous to a decision granting a motion to dismiss *vis-à-vis* some of the parties.
33. Mr. Robichaud nonetheless notes that some cases of this Court seem to characterize judgments refusing to add a defendant to a class action as judgments governed by Art. 31 CCP.¹⁴ This case law would therefore require that Mr. Robichaud first obtain leave to appeal. Should this be the case, the requirements for obtaining leave are met:¹⁵ the Judgment causes irreparable harm to Mr. Robichaud and the Members in that they deprive them of the right to commence proceedings against Diamond. Furthermore, it is in the interests of justice to grant the leave sought because the Judgment is, on the face of it, afflicted with errors that require an intervention by this Court.

¹¹ Judgment, Tab 1, par. 48-49.

¹² Judgment, Tab 1, par. 51-54.

¹³ *Lauzon c. Gagnon*, [2023 QCCA 1034](#), paras 7 and 8.

¹⁴ *Turgeon c. Pharmacie Francis Gince inc.*, [2023 QCCA 971](#), paras 19-24; *Lambert (Gestion Peggy) c. 2993831 Canada inc. (Écolait ltée)*, [2018 QCCA 1088](#) (the first-instance judgment had refused to add defendants to an already authorized class action: [2018 QCCS 2431](#)).

¹⁵ *Ibid.*

IV. GROUND OF APPEAL

34. The Judge erred in concluding that Mr. Robichaud failed to establish an appearance of right against Diamond Corporation, Diamond Holding, and Diamond Canada.¹⁶ This erroneous conclusion was based on the following: a) the determination that the Members' Contracts had not been assigned to them and that they bore no responsibility for Intrawest's misrepresentations concerning the resale of Points by the Members, and b) the assertion that Diamond Holding was merely acting as an agent of the Club in collecting the Fees.
35. Mr. Robichaud intends to demonstrate the following:
36. The Members' Contracts constitute consumer contracts that encompass both the sale of Points, the currency within the Club's time-sharing program, and a credit agreement to finance the Members' acquisition of said Points. Consequently, these contracts are governed by the CPA, including its provisions pertaining to credit agreements and some provisions pertaining to timeshare accommodation rights.¹⁷
37. The Members' Contracts were fully assigned to Diamond Corporation pursuant to sections 2.01(a) and 2.02(a)(ii)(A) of the Purchase Agreement. As a result, Diamond Corporation and its subsequent assignees, Diamond Holding and Diamond Canada, may be held liable for obligations arising from these contracts, including Intrawest's misrepresentations regarding the resale of Points by Members.
38. The "exclusion" clauses cited by the Judge¹⁸ are inapplicable to the present matter and warrants the intervention of this Court: at best, the Judgment offers one of many interpretations of the contractual arrangement and, in light of this, the Judge had to authorize the Class Action against Diamond. More specifically, it is apparent

¹⁶ Mr. Robichaud does not appeal from the dismissal of the Diamond Application against Diamond International.

¹⁷ Art.187.10 and ff. CPA; art. 66 and ff. CPA (see also: Purchase Agreement, Tab 9, s. 2 to 2.5 and 9).

¹⁸ Judgment, Tab 1, par. 41.

that the first exclusion mentioned is limited to Points sold prior to the Closing, where the rescission period remains in effect as of the Closing Date.¹⁹ The second provision referenced to does not constitute an exclusion but merely delineates the “*Material Contracts*” [our emphasis] to be disclosed pursuant to Section 3.17(a) of the “Disclosure Schedule” within the Seller’s “Representations and Warranties”.²⁰ Accordingly, this provision cannot be construed to narrow down the scope of “Purchased Assets” as set forth in Section 2.01(a) of the Purchase Agreement.

39. That the Fee payments must be made at the Club’s request and to its benefit does not alter the legal relationships pursuant to which these requests are made, *i.e.* those between the Members, on the one hand, and Intrawest, now Diamond, on the other hand.
40. Members retain the right to pursue their claims against both their original co-contractor, Intrawest and the Member Contracts’ assignee, Diamond. This is because the CPA specifically prevents an assignee from opposing to the consumer that liability under the contract is unbundled between various companies by virtue of a complex contractual structure.²¹ The legislator is clear in stating that any contract formed, even with a third-party, on the making of or in relation to a contract relating to timeshare accommodation rights forms a whole,²² the primary contract being inseparable from the ancillary contract.
41. In any event, the mere fact that Diamond Corporation has acquired “all right, title, and interest” of Intrawest as a secured party under “all purchase agreements providing for financing to the members of Club Intrawest” constitutes at the very least an assignment of the debt owed by Members to Intrawest under the Members’

¹⁹ Purchase Agreement, Tab 8, Section 2.01(b)(xiii).

²⁰ Purchase Agreement, Tab 8, Section 3.17(a)(xv).

²¹ Art. 187.24(2) CPA; [Journal des débats \(Hansard\) of the Committee on Citizen Relations - National Assembly of Québec](#), vol. 44, no 110, 1st Session., 41st Legislature, May 29, 2018.

²² Art. 187.24(1) CPA (Bill 178, [An Act to amend various legislative provisions concerning consumer protection](#), assented to June 6, 2018, chapter 4, art. 26).

Contracts in favor of Diamond Corporation. This assignment of debt is sufficient to invoke the application of Art. 103 CPA, which provides that “the assignee of a debt owed to a merchant under a contract to which the latter is a party (...) is sodarily responsible with the merchant for the performance of the merchant’s obligations up to the amount of such debt at the time it is assigned to him”. Consequently, Diamond Corporation, Diamond Holding, and Diamond Canada may be held liable for obligations arising from these contracts, as well as for Intrawest’s misrepresentations concerning the resale of Points by Members.²³

42. Those errors are overriding because had it not been for these errors, the Court would inevitably have concluded that Mr. Robichaud had demonstrated an appearance of right against Diamond Corporation, Diamond Holding and Diamond Canada on both causes of action raised in the Diamond Application.
43. In accordance with Art. 31 para. 3 CCP, it is also in the interests of justice to stay the proceedings until the appeal Judgment is rendered because Diamond’s presence will be needed to complete the next stages of the Class Action.

V. CONCLUSIONS SOUGHT

44. Mr. Robichaud will ask the Court of Appeal to:
 - a) **ALLOW** the appeal;
 - b) **REVERSE** the judgment in first instance;
 - c) **AUTHORIZE** Mr. Robichaud to amend the *Demande introductive d’instance* to add Diamond Resorts Corporation, Diamond Resorts IW Holding Company and Diamond Resorts Canada, Ltd. as defendants;
 - d) **CONDEMN** the respondent to pay the legal costs both in first instance and on appeal.

²³ *Caisse populaire Desjardins du Village huron c. Desrosiers*, [2012 QCCA 195](#), par. 32-41 (see also : Pierre-Claude LAFOND, « Moyens de protection contractuelle : contrôle des obligations nées du contrat de crédit », dans *Droit de la protection du consommateur : Théorie et pratique*, 2^e éd., 2021, EYB2021PCO40, para 902-903; *Comitini c. G.M.A.C. Leaseco Ltd.*, J.E. 93-1080, p. 10-14 (C.S.); *Dubuc c. Banque Nationale du Canada*, [2006 QCCQ 6530](#), para 19-22; *Doucet c. Banque Nationale du Canada*, [2006 QCCQ 402](#), para 18-20; *Pelletier c. Climatisation et Chauffage Bon-Air Inc.*, [2004 CanLII 34004](#), para 28-34 (QC CQ)).

FOR THESE REASONS, MAY IT PLEASE THE COURT TO:

45. **GRANT** this application;
46. **GRANT** the applicant leave to appeal from the judgment rendered on September 12, 2024, by the Honourable Donald Bisson of the Superior Court in file number 500-06-000777-157.
47. **ORDER** a stay of proceedings in first instance until the appeal Judgment is rendered;
48. **THE WHOLE**, with costs to follow the outcome of the appeal.

Montreal, October 18, 2024

Woods s.e.n.c.r.l./LLP

Woods LLP

Attorneys for the Applicant-Plaintiff

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CANADA

**PROVINCE OF QUEBEC
DISTRICT OF MONTREAL**

No.: 500-09-

No.: 500-06-000777-157

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INTRAWEST ULC, a legal person having one of its place of business at 1000 chemin des Voyageurs, City of Mont-Tremblant, District of Terrebonne, Province of Quebec, Canada, J8E 1T1

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RESPONDENTS - Defendants

AFFIDAVIT

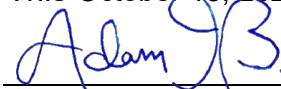
Applicant

Dated October 18, 2024

I, the undersigned, Adam Jeffrey Beauregard, lawyer, practising with the firm Woods LLP, located at 2000 McGill College Avenue, Suite 1700, in the City and District of Montreal, Province of Quebec, do solemnly affirm the following:

1. I am one of the Applicant-Plaintiff's attorneys.
2. All of the facts alleged in the application for leave to appeal from a judgment rendered in the course of a proceeding are true.

This October 18, 2024, in Montreal



Adam J. Beauregard
Lawyer

Solemnly affirmed before me this October
18, 2024

Amélie Simard no 178694

Amélie Simard
Commissioner of Oaths

NOTICE OF PRESENTATION

TO: INTRAWEST ULC

1000 chemin des Voyageurs
Mont-Tremblant (Quebec) Canada, T2P 4J8

RESPONDENT-Defendant

and

**DIAMOND RESORTS CORPORATION
DIAMOND RESORTS INTERNATIONAL INC.
DIAMOND RESORTS IW HOLDING COMPANY**
10,600 West Charleston Boulevard
Las Vegas, State of Nevada, USA, 89135

RESPONDENTS-Defendants

and

DIAMOND RESORTS CANADA, LTD.
326-375 Water St.
Vancouver (British Columbia) Canada, V6B 5C6

RESPONDENT-Defendant

and

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Attorneys for the RESPONDENT-Defendant Intrawest ULC

and

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Mtre. Marianne Batille Parent

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Attorneys for the RESPONDENTS-Defendants Diamond Resorts Corporation,
Diamond Resorts International, Inc., Diamond Resorts IW Holding Company and
Diamond Resorts Canada, Ltd.

NOTICE IS HEREBY GIVEN that the *Application for leave to appeal from a judgment rendered in the course of a proceeding* will be presented before a judge of the Court of Appeal sitting at the Ernest-Cormier Building, located at 100 Notre-Dame Street East, in Montreal, on December 6, 2024, at 9:30 a.m., in Courtroom RC-18.

DO GOVERN YOURSELF ACCORDINGLY.

Montreal, October 18, 2024

Woods s.e.n.c.r.l./LLP

Woods LLP

Attorneys for the Applicant-Plaintiff

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**TABLE OF CONTENTS FOR THE SCHEDULES IN SUPPORT OF THE
APPLICATION FOR LEAVE TO APPEAL**

Applicant

TAB 1:	Judgment rendered by the Honourable Donald Bison of the Superior Court on September 12, 2024;
TAB 2:	Judgment rendered by the Honourable Anne Jacob of the Superior Court on March 20, 2018;
TAB 3:	<i>Demande introductive d'instance</i> , dated June 20, 2018;
TAB 4:	<i>Purchase and Membership Agreement</i> between Martin Robichaud and Intrawest ULC dated May 9, 2009 (R-8);
TAB 5:	Club Intrawest document entitled <i>Summary of Key Elements of Your Membership - Acknowledgement of Terms of Agreement</i> , signed by Martin Robichaud on May 9, 2009 (R-9);
TAB 6:	<i>Modified Application for leave to amend the application initiating the proceedings</i> , dated November 3, 2023;
TAB 7:	Draft <i>Demande introductive d'instance modifiée</i> (R-4);
TAB 8:	Redacted version of the agreement entitled "Purchase Agreement," between Intrawest U.S. Holdings Inc. and Intrawest ULC with Diamond Resorts Corporation and Diamond Resorts International, Inc. dated November 24, 2015 (PM-2);
TAB 9:	Restated Management Agreement between Club Intrawest and Intrawest ULC, dated March 26, 2019 (R-12);
TAB 10:	Letter from Diamond Resorts International, Inc. to Anne-Marie Proulx and Martin Robichaud dated February 20, 2018 (R-15);

TAB 11: History of Martin Robichaud's account at Club Intrawest, generated by the Diamond Resorts International, Inc. information system (R-16).

Montreal, October 18, 2024

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COUR OF APPEAL OF QUEBEC
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MARTIN ROBICHAUD, domiciled and residing at 119, Bord de l'eau street, City of Sainte-Catherine-de-Hatley, district of Saint-François, Province of Quebec, Canada, J0B 1W0

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