

Ascribe the Status of Representative, on behalf of the following proposed Group, of which he is a member:

All physical persons (including their estates, executors, or personal representatives), corporations, and other entities, who:

- a) *were subject to misrepresentation and other wrongful practices by the Respondent in regards to their personal information as described herein;*
 - b) *were subject to a breach of privacy and in the addition or alternative, an invasion of privacy and in the addition or alternative, a breach of confidence in regards to their personal information; or*
 - c) *were subject to the conversion of said personal information for unauthorized use.*
7. In essence, the present Court file relates to a proposed class action in relation to misrepresentations, breach of privacy, invasion of privacy and/or breach of confidence or other wrongful practices or misappropriations of the class members' personal information which was lost and/or disclosed by the Respondent to third parties without the knowledge or consent of the said class members;
8. The coordinating Judge for the Class Actions Division of the Superior Court of Quebec assigned the present matter to the Honourable Justice Michel Déziel J.C.S. for case management and hearing purposes;
9. On or about November 19, 2010, the Respondent Facebook Inc. filed a Motion for Declinatory Exception, arguing that the Superior Court of Quebec lacked subject matter jurisdiction, territorial/personal jurisdiction and subsidiarily, that it was not the proper forum for the adjudication of the present proceedings;
10. On or about February 16, 2011, the Appellant filed a Motion for Permission to Amend the Motion to Authorize the Bringing of a Class Action and to Ascribe the Status of Representative, which was granted by the Superior Court of Quebec on February 21, 2011. The proposed Group mentioned above was modified by this amended motion (hereinafter the "**Motion to Authorize**") as follows:

"All physical persons (including their estates, executors, or personal representatives), corporations, and other entities, in the Province of Québec, who were subject to either misrepresentations, breach of privacy, invasion of privacy, breach of confidence, or other wrongful practices or misappropriations by the Respondent in regard to their personal information, including the loss of or

unauthorized disclosure of said personal information by the Respondent to third parties, or any other Group to be determined by this Honourable Court."

11. On or about February 19, 2011, Respondent Facebook Inc. filed a *De Bene Esse* Amended Motion for Declinatory Exception. This Motion requested the dismissal of the present proceedings based on the allegations that that the Superior Court of Quebec did not have subject matter jurisdiction, territorial/personal jurisdiction, and, subsidiarily, that Quebec was not the proper forum to adjudicate this legal dispute;

12. By Judgment dated April 1st, 2011, the Honourable Justice Michel Déziel J.C.S. granted the *De Bene Esse* Amended Motion for Declinatory Exception in the present matter as follows:

"FOR THESE REASONS, THE COURT:

GRANTS the *De Bene Esse* Amended Motion for Declinatory Exception;

DISMISSES the Amended motion to authorize the bringing of a Class Action and to Ascribe the status of representative filed by the Petitioner Patrice St-Arnaud;

THE WHOLE WITH COSTS."

B. Grounds of Appeal

13. The Honourable Judge in the first instance committed manifest errors in law and in fact in rendering the Judgment under Appeal for the reasons set forth below;

The allegations must be "tenues pour avérées":

14. Concerning motions to authorize the bringing of class actions filed in the Province of Quebec, the jurisprudence has confirmed that the allegations of such a motion are deemed to be true ("*les allegations sont tenues pour avérées*"). In the present proceedings, there is no proof that the Appellant St-Arnaud had read or had been made aware of or that he had even agreed to an exclusive jurisdiction clause in favour of the Courts of California, which is the basis of Respondent's motion for declinatory exception (cited below). In fact, the Appellant specifically states the following at paragraph 4.1. of his Motion to Authorize:

"4.1. At no time did the Petitioner give his consent to submitting any litigation that may arise between him and Respondent to another jurisdiction (other than Quebec), nor did he agree that any such litigation would be governed by the laws of another jurisdiction (other than the Laws of Quebec). Furthermore, Petitioner was not made aware of (and therefore did not consent to) any so-called Governing Law or Venue clauses on the Respondent's website when he signed up or used said website, and Petitioner respectfully submits that any such clauses would not apply to the present proceedings in any case. In fact, Petitioner respectfully submits that his (and the Group Members') dispute and cause of action against Respondent herein fall within the jurisdiction of this Honourable Court and are governed by the Laws of Quebec, including but without limitation the laws concerning consumers contracts and contracts of adhesion, for the reasons detailed hereinbelow.";

15. Respondent argued that the jurisdiction clause purportedly affects all Facebook users, therefore the Appellant St-Arnaud as well as all of the Group members. The jurisdiction clause (the "**Jurisdiction Clause**") reads as follows::

"You will resolve any claim, cause of action or dispute ("claim") you have with us arising out of or relating to this Statement or Facebook exclusively in a state or federal court located in Santa Clara County. The laws of the State of California will govern this Statement, as well as any claim that might arise between you and us, without regard to conflict of law provisions. You agree to submit to the personal jurisdiction of the courts located in Santa Clara County, California for the purpose of litigating all such claims.";

16. There has been very little (and very fact specific) jurisprudence dealing with situations arising from websites on the Internet, even more so in regards to class actions. That being said, there is no established law or jurisprudence directing the Courts on how to adjudicate legal actions arising from use of websites on the Internet, especially in the context of a class action motion;
17. Against this uncertain legal backdrop, and presented with the allegations of the Appellant, which are "*tenués pour avérées*" at the authorization stage in the present matter, the Honourable Justice Déziel erred in law and in fact when he simply stated and concluded the following at paragraphs 35, 43, 44, and 48 of the Judgment under Appeal (Annex 1):

[35] It is obvious that all Users agreed to be continually bound by Facebook's Terms of Use.;

[43] The Jurisdiction Clause unequivocally signals the agreement of St-Arnaud- as well as every Member of the Group he defines in paragraph 1 of the Motion for Authorization – to provide the courts in Santa Clara County with exclusive jurisdiction over the present dispute.

[44] The Jurisdiction Clause is binding upon St-Arnaud and the Members of the Group. It has the effect of removing jurisdiction from the Superior Court of Quebec over the dispute presented in the Motion for Authorization.

[48] *It is therefore obvious that St-Arnaud and all Users are bound by the changes.*

18. By reaching such a conclusion, the Honourable Justice Déziel mistakenly applied the Jurisdiction Clause, which the Appellant submits is not applicable in this case, and to which he never agreed, as he stated in his Motion to Authorize, which was also mentioned by the Honourable Justice Déziel in paragraph 32 of this Judgment under Appeal as follows:

"[32] St-Arnaud alleges that he never agreed to the jurisdiction clause."

19. In fact, if this is to remain the rule going forward, which it should not, anytime a Quebec-resident registers himself on a website, he would be at risk of only being able to exercise his legal rights in the jurisdiction set out in a jurisdiction clause, and would therefore give up his right to exercise his legal rights in Quebec, the jurisdiction in which he resides. It is evident that such jurisdiction clauses have the practical effect of preventing Quebec litigants from exercising their rights, limits the access to justice of Quebec litigants, and therefore strips Quebec residents from the protections offered to them by *the Civil Code of Quebec, the Quebec Code of Civil Procedure, the Consumer Protection Act*, and other Quebec legislation;
20. Appellant respectfully submits that the conclusion by the Honourable Justice Déziel at paragraph 49 of the Judgment under Appeal, that, *"...according to article 3148 C.C.Q., the Superior Court of Quebec must decline its jurisdiction"* constitutes a manifest error in law and in fact which warrants this Honourable Court's intervention on appeal;
21. Appellant also respectfully submits that the Honourable Justice Déziel erred in law when he concluded at paragraph 45 of his Judgment that, *"(t)his jurisdiction clause is not an external clause as provided for by the Civil Code of Quebec (...)"*.

Registration to and use of Facebook Inc.'s website social networking services is a consumer contract

22. Without limiting the generality of the foregoing, Appellant respectfully submits that the first instance Judge also erred in law and in fact at paragraphs 51, 52 and 53 of the Judgment under Appeal when concluding that Respondent Facebook Inc. has no consumer relationship with its Users:

"[51] Although, there exists an adhesion contract, Facebook does not have a consumer relationship with its Users."

[52] Access to the Facebook website is completely free.

[53] Therefore, there exists no consumer contract when joining and accessing the website, because it's always free.”;

23. Appellant respectfully submits that, pursuant to Article 2 of the Quebec Consumer Protection Act, he and all Group Members entered into a consumer contract with Facebook Inc. upon registration on the Facebook social networking website.
24. Appellant submits respectfully that the Honourable Justice Déziel erred in law and fact when he concluded that that there was no consumer contract between the Appellant and Facebook Inc. Justice Déziel concluded that there was no consumer contract on the basis that registration and access to the Facebook social networking service was free to Users, and that these Users did not agree to do anything in counter-party to being permitted to register for and use Facebook.
25. The Honourable Justice Déziel states at paragraph 54 of his Judgment that, “a consumer contract is premised on payment and consideration”. At paragraph 55, Justice Déziel lists a non-exclusive list of six acts that Users do not have to do in order to register as a Facebook User. On the basis of this non-exclusive list, Justice Déziel then concludes in paragraph 56 that a consumer contract is not present in this case, and that Article 3149 Civil Code does not apply, based on a lack of payment or consideration from Users.
26. The Appellant submits that this conclusion is in error because the Honourable Judge did not recognize that, in the times we live in, with the present state of the Internet, the Users do in fact provide a consideration to Facebook for the right to use Facebook, namely that Users explicitly permit Facebook Inc. (within the parameters of their individual privacy settings), to collect personal information about them and their use of the website and they allow Facebook Inc. to use this information to attract advertisers. Facebook collects substantial revenues from these advertisers.
27. For example, by entering your name, age, gender and other personal information on Facebook (such movie, book, music preferences, etc.), and by using the website on whatever regular basis suits the Users, Facebook inc. is able to offer their advertisers detailed demographics of its users, per city, and is able confirm the best time of each day to reach the greatest number of the advertiser's target audience. This demographic information and usage history is what permits Facebook to be a profitable company, notwithstanding the fact that Users do not pay for the service.
28. In other words, Justice Déziel erred in not recognizing the fact that Users give Facebook Inc. an intangible but very lucrative consideration in return for access to the Facebook social networking site: the use of their personal

information and usage history. Facebook Inc. is not a charity. Facebook Inc. is a company whose goal is to make money, and one way it does so is through the information provided by its Users. Facebook Inc. uses its Users' information to generate profits. As such, Justice Déziel should have concluded that the Consumer Protection Act applies.

29. The Appellant respectfully submits that there is a consumer contract, one that is onerous, between him and the Respondent Facebook Inc. according to the definition of a consumer contract provided by Article 2 of the Quebec Consumer Protection Act. This consumer contract exists by virtue of access to Users' personal information provided as consideration for access to the Facebook social networking services. As such, we submit that the first instance Judge erred in not concluding that Article 3149 of the Civil Code applies to this case;
30. Finally, and without limiting the generality of the foregoing, Appellant respectfully submits that the first instance Judge erred in fact and in law by not concluding that the Jurisdiction Clause was abusive under the circumstances of the consumer and adhesion contract.

THE APPELLANT-PETITIONER WILL THEREFORE RESPECTFULLY REQUEST THAT THE COURT OF APPEAL:

GRANT the appeal and reverse the judgment of the Superior Court dated April 1, 2011.

DISMISS the De Bene Esse Amended Motion for Declinatory Exception presented by the Respondent Facebook Inc.

THE WHOLE with costs, in both Courts.

MONTREAL, May 2, 2011

Maxime La France J.P.

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