

# SUPERIOR COURT

CLASS ACTION

CANADA  
PROVINCE OF QUEBEC  
DISTRICT OF MONTRÉAL

No: 500-06-000686-143

DATE: March 23, 2015

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**PRESIDING: THE HONOURABLE MICHEL A. PINSONNAULT, J.S.C.**

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**EVAN ZUCKERMAN**

Petitioner

vs.

**TARGET CORPORATION**

Respondent

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**JUDGMENT ON MOTION FOR DECLINATORY EXCEPTION AND SUBSIDIARILY  
FOR FORUM NON CONVENIENS**

(Art. 163, 164 CCP; Art. 3148, 3135 CCQ)

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[1] The Court is seized with a Motion of Target Corporation ("**Target**") seeking to dismiss the *Amended Motion to Authorize the Bringing of a Class Action Suit and to Ascribe the Status of Representative* (the "**Motion**") filed by Petitioner, Mr. Evan Zuckerman ("**Zuckerman**"), given that this Court would lack jurisdiction. Subsidiarily, Target is requesting that this Court declines jurisdiction in favour of the United States District Court of Minnesota.

[2] Target's head office is located in Minneapolis, Minnesota, in the United States of America ("**USA**").

[3] Pursuant to his Motion filed on March 13, 2014, Petitioner Zuckerman is seeking damages resulting from the theft in the USA of Target's customer information after hackers gained access to Target's data network sometime between November 27, 2013 and December 15, 2013 (the "**Data Breach**").

[4] In his Motion, Zuckerman alleges that Target is one of the largest discount retailers in the USA with approximately 1,800 retail stores and estimated annual sales exceeding \$73.8 billion, and over 120 retail stores in Canada, either directly or through its wholly owned subsidiary Target Canada Co. ("**Target Canada**").

[5] At paragraphs 4 and 5 of his Motion, Zuckerman also alleged the following:

"4. As a national retail chain with Point-of-Sale ("**POS**") computer systems that store credit card and bank card ("**ATM**") information, Target must ensure that its customers' personal and financial information is safeguarded from theft. When a data breach affecting customers occurs, a national retail chain must immediately and accurately notify its customers to prevent such customers from incurring financial losses, loss of time, expenses, and/or inconvenience as a result of the actual or threatened fraudulent use of stolen personal and financial information. These proceedings stem from Target's faults and/or negligence in this regard;

5. Beginning on or about November 17, 2013 and continuing until on or about December 15, 2013, the POS computer network that processes transactions for all Target retail stores in the U.S.A. was breached by unknown attackers. The breach resulted in one of the (if not the) largest theft of personal and financial information in history and affected at least 40 million credit card and ATM accounts and the personal and financial information of at least 70 million individuals, including approximately 700,000 Canadians. The lost information included, without limitation, the names, phone numbers, home addresses, credit and debit card numbers, PIN numbers, expiration dates, magnetic strip information, and passwords;"

[6] In his Motion, Zuckerman also alleges that he shopped in USA Target stores using an American issued credit card (Bank of America). The USA Target stores where he allegedly shopped are not identified nor are the date when the alleged purchases were made with his USA issued credit card. In fact, the Motion does not reveal either whether Zuckerman made any purchases at USA Target stores between November 17<sup>th</sup> and December 15<sup>th</sup>, 2013, when the Data Breach occurred.

[7] Zuckerman claims to have become aware of the Data Breach when he received an email from Target Canada on January 20<sup>th</sup>, 2014 (**R-6**) that stated the following:

"Dear Target Guest,

As you may have heard or read, Target learned in mid-December that criminals forced their way into our systems and took guest information, including debit and credit card data from our U.S. stores; Target Canada stores were not impacted

by the payment card breach. In early January, as part of our ongoing investigation, we learned that guest contact information - separate from the payment card data - was also taken, including name, mailing address, phone number or email address. I am writing to make you aware that your name, mailing address, phone number or email address may have been taken during the intrusion.

We have retained a leading third party forensics firm who is conducting a thorough investigation of this incident. Additionally, Target alerted authorities immediately after we discovered and confirmed the initial unauthorized access. We are investing in the internal processes and systems needed to reduce the likelihood that this ever happens again.

I am truly sorry this incident occurred and sincerely regret any inconvenience it may cause you. Because we value you as a guest and your trust is important to us, Target is working on a credit monitoring offer for impacted Canadian guests. We will send you information about that offer when it becomes available in the coming days, so there is no need for you to contact us at this time.

To guard against possible scams, always be cautious about sharing personal information, such as social insurance number, passwords, user IDs and financial account information.

Here are some tips that will help protect you:

- Never share information with anyone over the phone, email or text, even if they claim to be someone you know or do business with. Instead, ask for a call-back number.
- Delete texts immediately from numbers or names you don't recognize.
- Be wary of emails that ask for money or send you to suspicious websites. Don't click links within emails you don't recognize.

Target's email communication regarding this incident will never ask you to provide personal or sensitive information.

Thank you for your patience and loyalty to Target. If you have further questions, you may call us at 800-776-4444 or visit [Target.ca/support](http://Target.ca/support)."

[Emphasis added]

[8] A second email (R-5) was received by Zuckerman on January 24<sup>th</sup>, 2014:

"Dear Target Guest,

As we shared with you earlier this week, your contact information, such as your name, mailing address, phone number or email address may have been taken during the recent data intrusion at Target. This is generally publicly available

information, so the primary risk is increased exposure to consumer scams, such as phishing, web scams and social engineering. (As a reminder, the payment card data that was also stolen during the incident only impacted our U.S. stores; Target Canada stores were not impacted by the payment card breach.)

Because we value you as a guest and your trust is important to us, Target is offering you one year of free credit monitoring through the Equifax Complete™ Advantage Plan, which includes identity theft insurance where available. If you wish to sign up for this free credit monitoring service, please go to [myservices.equifax.ca/enroll](http://myservices.equifax.ca/enroll). During enrollment, you will be asked to provide payment type. Do not enter your payment information unless you would like to purchase other services or coverage beyond this first year of free credit monitoring. Instead, use the promotional code 850461588954 in the promotion code field to receive the first year for free. Any product pricing information for the EquifaxComplete™ Advantage Plan will not apply to you for the first year if you use the promotional code. Please note that submitting your Social Insurance Number in the enrollment process is also optional. You must register by April 30, 2014, as the offer expires after this date. By enrolling in this service, you will receive:

- Comprehensive view of your Equifax Credit Report
- Equifax Credit Score™ to see how lenders may perceive you
- 24/7 credit monitoring with email notification of key changes to your file
- Quarterly credit updates of your Equifax Credit Report and Score
- Dedicated fraud specialists
- Up to \$25,000 identity theft insurance\*

We are truly sorry this incident occurred and sincerely regret any inconvenience it may cause you. If you have further questions, please visit [Target.ca/support](http://Target.ca/support).

(signed) Scott Kennedy, President, Target Financial and Retail Services

\*Identity theft insurance underwritten by subsidiaries or affiliates of Chartis Inc. The description herein is a summary and intended for informational purposes only and does not include all terms, conditions and exclusions of the policies described. Coverage may not be available in all jurisdictions."

[9] In light of the foregoing emails, Zuckerman claims that Target, through Target Canada, has clearly admitted that "*primary risk*" of Target's loss of its guests' personal information "*is increased exposure to consumer scams, such as phishing, web scams, and social engineering*", that Target was responsible towards its guests to pay for (and offered to pay for) one year of credit monitoring (which included, only in some

jurisdictions, identity theft insurance) and that Target was once again *"truly sorry this incident occurred and sincerely regrets any inconvenience"* caused to its guests.

[10] Zuckerman blames Target for:

- having been negligent by not having the proper security measures and protocols in place to prevent the intrusions of hackers in the first place, nor monitoring its systems in order to be alerted once the intrusions had first occurred; in fact, the hackers were able to harvest data from Target's systems daily, over the course of several weeks between November 27<sup>th</sup> and December 15<sup>th</sup>, 2014; and
- having failed to prevent the Data Breach adding that it could have been avoided as Target had ample prior warnings of an impending attack by hackers who gained access to Target's data network and stole the credit and debit card information of about 40 million Target shoppers and the personal information of 70 million people, including approximately 700,000 Canadian Class Members;
- having offered inadequate credit monitoring for an insufficient period of time with a \$25,000 identity theft insurance offered to Canadian guests as opposed to \$1 million for the USA guests; and
- failing to notify its guests promptly and accurately as the Data Breach only became public on December 18<sup>th</sup>, 2013 in the USA and on January 20<sup>th</sup>, 2014 in Canada to the Canadian guests who received Target Canada's first email (R-6); in that context, Target failed to properly notify all Canadian guests, thus leaving an untold number vulnerable to attack.

[11] Zuckerman claims that the lost information included, without limitation, the names, phone numbers, home addresses, credit and debit card numbers, PIN numbers, expiration dates, magnetic strip information, and passwords.

[12] In short, the Court understands that Zuckerman claims that while he has not been the victim of fraud (i.e. identity theft) so far, he has experienced and continues to experience fear, stress, inconvenience and loss of time due to the necessity of monitoring more closely his monthly statements of accounts, all of which are compensable damages according to him.

[13] In its Motion to Dismiss, Target argues that this Court does not have jurisdiction to hear Zuckerman's Motion as Target is a USA corporation with its head office in Minneapolis, Minnesota, USA. Moreover, Target does not have any establishment in Quebec.

[14] In light of the foregoing, Target claims that the provisions of Article 3148 of the *Civil Code of Quebec* ("CCQ") do not apply herein and as such, Petitioner has not discharged his burden of establishing the jurisdiction of the Quebec Courts over Target under said Article 3148 CCQ.

[15] Article 3148 CCQ stipulates:

“3148. In personal actions of a patrimonial nature, a Québec authority has jurisdiction where

- (1) the defendant has his domicile or his residence in Québec;
- (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, damage was suffered in Québec, an injurious act 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 it all existing or future disputes between themselves arising out of a specified legal relationship;
- (5) the defendant submits to its jurisdiction.

However, a Québec authority has no jurisdiction where the parties, by agreement, have chosen to submit all existing or future disputes between themselves relating to a specified legal relationship to a foreign authority or to an arbitrator, unless the defendant submits to the jurisdiction of the Québec authority.”

[16] In paragraph 2 of his Motion, Zuckerman alleges that Target is a USA corporation with its head office in Minnesota, USA. This fact is also confirmed in an affidavit of Mr. Jason K. Walbourn, Target’s in-house Senior Counsel, Litigation, attached to the Motion to Dismiss.

[17] Article 3134 CCQ sets forth the general rule applicable to the international jurisdiction of Quebec Courts, namely, the domicile of the defendant:

“3134. In the absence of any special provision, the Québec authorities have jurisdiction when the defendant is domiciled in Québec.”

[18] With respect to a legal person, Article 307 CCQ states that *“the domicile of a legal person is at the place and address of its head office”*.

[19] The Court finds that Target is not domiciled in Quebec within the meaning of Article 3148(1) CCQ.

[20] Article 3148(2) CCQ deals with legal persons that are not domiciled in Quebec but have an establishment in this province and who are defendants in a dispute relating to their activities in Quebec.

[21] In his Motion, Zuckerman alleged that Target also has “over 120 retail stores in Canada, either directly or through its related entity Target Canada”. However, in his amended Motion, Petitioner added “According to Respondent’s own allegations in the present proceedings, Target Canada is an “indirect, wholly owned subsidiary of Respondent”, although Respondent has not provided the details in this regard”. So far, this allegation has not been contradicted.

[22] Zuckerman also stated in the footnote 8 of paragraph 70 of his Motion that he had “no knowledge of Target Canada’s possible implication in relation to the Data Breach (if any).” But, he reserved “his right to amend these proceedings in this regard should new information be discovered inter alia in order add in Target’s wholly owned subsidiary Target Canada as an additional Respondent/Defendant.”

[23] Until now, Zuckerman never added Target Canada as co-respondent to the present proceedings. Moreover, the Court understands that on January 15<sup>th</sup>, 2015, Target Canada has sought protection under the *Companies’ Creditors Arrangement Act* (the “**CCAA**”) and announced its intention to discontinue its operations in Canada and liquidate its assets.

[24] In his affidavit, Mr. Walbourn also stated that Target does not have any establishment in Quebec.

[25] The Court is satisfied that the stores that used to be operated by Target Canada in Quebec do not constitute establishments of Target and that Respondent does not have any establishment in Quebec within the meaning of Article 3148(2) CCQ.

[26] In the present instance, the dispute arose in the USA and relates exclusively to Target’s activities in that country and not in Canada, by Zuckerman’s own admission. The latter already mentioned that he had no knowledge of Target Canada’s implication herein and in paragraph 83 of his Motion, Petitioner stated “considering the particular facts of this case involving a Data Breach and fraud occurring in the U.S.A., not in Canada”

[27] In his amended Motion, Zuckerman modified paragraph 83 as follows, but without any significant consequences for the purposes hereof, although the words “not in Canada” after “the U.S.A.” were deleted:

*“a Data Breach and fraud occurring in and/or passing through the U.S.A., ~~not in~~ Canada Eastern Europe, Russia, and Brazil (...);”*

[28] In paragraph 89 of his Motion, Zuckerman provided the following additional particulars:

*“89. Since the credit card that Petitioner used when shopping at the U.S. Target stores was an American issued credit card (namely from the Bank of America) and since the Data Breach occurred in the U.S. (...)”*

[Emphasis added]

[29] The Court finds that the present dispute relates to Target's activities in the USA exclusively and that Target has no activities in Quebec.

[30] However, if a fault was committed in Quebec, a damage was suffered in Quebec, an injurious act occurred in Quebec or one of the obligations arising from a contract was to be performed in Quebec, a person, natural or legal, not residing or domiciled in this province could nevertheless be subject to the jurisdiction of the Courts of Quebec (Article 3148(3) CCQ).

[31] In the present case, Petitioner's Motion leaves no doubt that Target's fault was committed in the USA where the Data Breach occurred (paragraphs 83, 89 and 95). If damages were actually sustained, they would stem from the loss by Target of personal information as a result of the Data Breach in the USA to the extent that the information in question included Zuckerman's, a fact that has been alleged.

[32] In his amended Motion, Zuckerman has attempted to link Target Canada to the damages that he allegedly sustained in that the latter's two emails to certain Canadian guests constituted inadequate notices. Yet, Zuckerman does not seek any condemnation against Target Canada<sup>1</sup>.

[33] As to the notion of an injurious act within the meaning of Article 3148(3) CCQ, the Court echoes the view of Justice Guthrie in *Bouchard c. Ventes de véhicules Mitsubishi du Canada inc.*<sup>2</sup>:

***"Injurious Act ("un fait dommageable") Occurred in Québec***

[41] The Supreme Court of Canada has already interpreted the phrase "injurious act" ("un fait dommageable") found in article 3148(3) C.C.Q. as being limited to "a damage-causing event that attracts no-fault liability".<sup>3</sup> Clearly, this criterion is not relevant to the present case."

[34] In any event, the damages claimed by Zuckerman must be compensable. There is no doubt that if a guest of Target was a victim of identity theft as a direct result of the Data Breach, the damages incurred could be and should be compensated by Target. In fact, there appears to be many occurrences of identity theft in the USA where more than 80 class actions have already been instituted as a result of the Data Breach.

[35] In the present instance, the Court agrees with Target's attorney that the Motion contains no factual allegations that any compensable damages were actually sustained by anyone in Quebec or elsewhere in Canada.

[36] With respect to the Petitioner, there is not even an allegation that his personal information was part of the Data Breach and if so, what information it was.

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<sup>1</sup> Paragraph 128 of the Amended Motion.

<sup>2</sup> 2008 QCCS 6033.

<sup>3</sup> *Spar Aerospace Ltd v. American Mobile Satellite Corp.*, *supra* note 1 at para. 42.



[37] In paragraph 75 of his Motion, Zuckerman sets out as follows the “*inconveniences*” suffered by himself and the Class Members:

“75. The Petitioner and the Class Members have suffered certain inconveniences including but not limited to the following:

- a) Having to set up the proper credit monitoring and security alerts on their credit files;
- b) Delays in the processing of any future requests or applications for credit in the future;
- c) The obligation to closely monitor their accounts looking for possible fraud for all periods subsequent to the loss of information;
- d) The obligation to be even more attentive than normally necessary concerning the communication of their personal information, due to the higher possibility of fraudulent activity caused by Respondent's loss of the information;
- e) The obligation to inform certain financial institutions or credit card companies of the loss of the information by the Respondent and to deal with said financial institution in order to reduce risk of fraud as much as possible;
- f) Obtaining their credit report in order to look for unauthorized transaction or fraud.”

[38] It is interesting to note that these “*inconveniences*” are very similar to the “*inconveniences*” suffered by petitioner Anna Mazzonna in the case of *Mazzonna c. DaimlerChrysler Financial Services Canada Inc./Services financiers DaimlerChrysler inc.*<sup>4</sup> and are identical to those experienced by petitioner Steve Larose in the case of *Larose c. Banque Nationale du Canada*<sup>5</sup>.

[39] Incidentally, both petitioners were represented by the same lawyer who now represents Zuckerman. It is interesting to note that, to all intents and purposes, they all experienced the very same series of prejudice.

[40] In the *Mazzonna* affair, Mrs. Anna Mazzonna proposed to be the representative of persons whose personal information was stored or saved on a data tape, which was lost by DaimlerChrysler while in transit on or about March 12, 2008.

[41] Mr. Justice Lacoursière concluded as follows on the issue of compensable damages and in doing so discussed the *Larose* case:

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<sup>4</sup> 2012 QCCS 958.

<sup>5</sup> 2010 QCCS 5385.

"[47] The conclusion that the Court draws both from the allegations of the Motion and from these extracts of her examination out of Court is that the Petitioner has felt anxiety upon and after learning that her personal information had been lost and that, as a consequence, she modified some habits in the manner in which she managed her bank account.

[48] The attorney for Petitioner argues that the Court should not assess, at this stage of the proceedings, the weight of the evidence on damages and that this should be done at trial. He invites the Court to draw a comparison with the facts leading to a recent judgment where Madam Justice Beaugé authorized the institution of a Class action.<sup>6</sup>

[49] In that case, an individual stole three computers, locked with a steel cable, owned by the National Bank, one of which contained the personal information on some 225,000 of its clients.

[50] The thief was tried but the computer never found.

[51] The Bank took measures to protect the personal information and eliminate the possibilities of fraud. The Petitioners alleged the following prejudice and claimed for their loss a sum of \$250 per person in punitive damages:

[8] Par ailleurs, ils allèguent les préjudices et inconvénients suivants pour les membres du groupe :

- retard dans le traitement d'une demande de crédit future;
- obligation de surveiller de près leurs comptes bancaires;
- obligation de faire preuve d'une vigilance accrue dans la communication de leurs renseignements personnels;
- obligation d'aviser leurs autres institutions financières de la perte de leurs renseignements personnels;
- anxiété, douleur, souffrance, peur de se retrouver victimes de fraude ou de vol d'identité;
- débours, augmentation possible des frais bancaires, pénalités;
- perte de temps.

[52] The Court had the benefit of reading the Re-amended Motion to Authorize the Bringing of a Class Action in the *Larose* case.<sup>7</sup>

[53] There is at least one very significant distinction between the facts alleged in the *Larose* case and those alleged in this instance: **Mr. Larose was the victim**

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<sup>6</sup> *Larose and Paquette v. Banque Nationale du Canada*, S.C. Montreal n° 500-06-000452-082, November 4, 2010.

<sup>7</sup> It was filed by the Petitioner's attorney, who was the attorney of record for the Petitioners in the *Larose* case.

**of three subsequent attempts to defraud him, after being a victim of identity theft.**

[54] This is not the case of Petitioner and this distinction has a crucial bearing on the question of damages.

[55] The Court has to decide whether the Petitioner herself meets the appearance of right condition on the basis of her own circumstances. In *Bouchard v. Agropur Cooperative et al*,<sup>8</sup> the Court of Appeal states:

**[109] Il faut garder à l'esprit qu'avant le jugement d'autorisation, « le recours n'existe pas, du moins sur une base collective ». Le recours individuel du requérant, à lui seul, doit donc remplir les conditions de l'article 1003 C.p.c. dont celle de l'apparence de droit, puisque tout le reste ne relève encore que du domaine de l'hypothèse.**

[56] In the Court's view, the Petitioner fails to meet the test that she has suffered damages.

[57] She did indeed suffer anxiety; she has had to change, minimally, some of her habits. However, these inconveniences were negligible, so much so that she never felt the need to take any steps to alleviate her anxiety. The most she did was to keep the minimum amount of money in the account from which her lease payments were made and to check, twice a month, rather than once a month, on the Internet, whether her account had been tampered with.

[58] This is not enough to meet the threshold, however *prima facie*, of the existence of "compensable" damages.

[59] The Supreme Court of Canada has provided guidance on the distinction between minor and transient upsets on the one hand and compensable injury on the other. In the case of *Mustapha v. Culligan of Canada Ltd*,<sup>9</sup> Mr. Mustapha, upset at the sight of a dead fly in an unopened bottle of water, sued the supplier of the bottle.

[60] In its analysis of the damages, the Court wrote:

[9] This said, psychological disturbance that rises to the level of personal injury must be distinguished from psychological upset. Personal injury at law connotes serious trauma or illness; see *Hinz v. Berry*, [1970] 2 Q.B. 40 (C.A.) at p. 42; *Page v. Smith*, at p. 189; *Linden and Feldthusen*, at pp. 425-27. The law does not recognize upset, disgust, anxiety, agitation or other mental states that fall short of injury. I would not purport to define compensable injury exhaustively, except to say that it must be serious and prolonged and rise above the ordinary annoyances, anxieties and fears that people living in society routinely, if sometimes reluctantly,

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<sup>8</sup> *Supra*, note 11.

<sup>9</sup> 2008 S.C.R. 114.

accept. The need to accept such upsets rather than seek redress in tort is what I take the Court of Appeal to be expressing in its quote from *Vanek v. Great Atlantic & Pacific Co. of Canada* (1999), 48 O.R. (3d) 228 (C.A.); "Life goes on" (para. 60). Quite simply, minor and transient upsets do not constitute personal *injury*, and hence do not amount to damage.

(emphasis added by Justice Lacoursière)

[61] While the appeal in *Mustapha* was from a judgment of the Ontario Court of Appeal and while there may be differences in the contractual and delictual (*tort*) rules of both jurisdictions, the Court finds no reason to conclude that the distinction between a compensable damage as opposed to an ordinary "annoyance" of life should not apply in Quebec Law.

[62] In the Court's view, the damages alleged by the Petitioner are prima facie of the nature of ordinary annoyances and anxieties and do not constitute "compensable" damages.

[63] In these circumstances, the Petitioner has not satisfied her burden to show that she suffered damages. **The Court cannot, in view of the particular allegations of the Motion and of the evidence adduced, subscribe to Petitioner's argument that the Motion should be granted and that the judge, at trial, should decide of the seriousness of the damages. In granting the Motion in these circumstances, the Court would not be serving its role to discard an action that is obviously ill founded and would inappropriately initiate a class action that is not supported, at least by Petitioner's own circumstances."**

[Emphasis added]

[42] The prejudice allegedly sustained by Zuckerman does not *per se* constitute compensable damages in the present context. With the advent of computers and Internet, the ever increasing use of technology in business transactions, online or in store, the use of electronic devices to effect a payment with a credit or debit card and the proliferation of people who unfortunately use the technology and Internet in their attempt to defraud others, the "*inconveniences*" described by Zuckerman fall in the category of "*ordinary annoyances, anxieties and fears that people living in society routinely, if sometimes reluctantly, accept.*"<sup>10</sup>

[43] In *Sofio c. Organisme canadien de réglementation du commerce des valeurs mobilières (OCRCVM)*<sup>11</sup>, Justice Prévost wrote :

"[40] Mais ici, les inconvénients qu'allègue le requérant s'apparentent davantage à ceux qui font généralement partie de la vie en société au XXI<sup>e</sup> siècle.

<sup>10</sup> *Mustapha v Culligan of Canada Ltd.*, [2008] 2 R.C.S. 114, paragraph 119.

<sup>11</sup> 2014 QCCS 4061.

[41] La vérification mensuelle par une personne de ses comptes bancaires et cartes de crédit ne constitue pas une démarche exceptionnelle. Ces données étant facilement accessibles par Internet, il n'est pas inhabituel que ce genre de vérification s'effectue plusieurs fois par mois. Rappelons aussi que le requérant étant comptable, on pourrait s'attendre à ce qu'il soit particulièrement vigilant à cet égard.

[42] La surveillance de toute anomalie dans la livraison du courrier n'apparaît pas exceptionnelle non plus. Elle fait partie des habitudes de vie dans notre société."

[44] What about the expense of \$19.95 incurred by Zuckerman for credit monitoring services?

[45] The Court agrees with Target's attorney that it is not a logical, direct and immediate consequence of Target's alleged fault<sup>12</sup>.

[46] The Motion reveals that on January 23<sup>rd</sup>, 2014, not having heard from Target since Target Canada's email of January 20<sup>th</sup> (R-4), Zuckerman decided to purchase a credit monitoring package from Equifax at a cost of \$19.95 per month<sup>13</sup>. On the following day, he received Target's Canada second email (R-5) with an offer and a promotional code for one-year credit free monitoring service by Equifax Canada that he took advantage of, thus cancelling his own subscription<sup>14</sup> made on the day before.

[47] However, Zuckerman claims that the Equifax Canada service was not appropriate nor sufficient as a one year protection was, in his view, insufficient and that such a service was not only not protecting him against identity theft, but it did not cover either the monitoring of credit activities in the USA, thus giving him a false sense of security. On the length of the protection, he alleged that a one-year protection period was insufficient and that a six-year period was warranted<sup>15</sup> and that \$1 million coverage was needed as opposed to the \$25,000 coverage offered in Canada<sup>16</sup>.

[48] The Court understands that as Zuckerman alleged transactions in Target stores in the USA were conducted with a USA issued credit card, he felt that he needed protection in the USA itself via the three major USA credit bureaus (Equifax, TransUnion and Experian), not just Equifax Canada.

[49] As previously mentioned, in *Larose c. Banque Nationale du Canada*<sup>17</sup>, a class action case revolving around the loss of personal data resulting from the theft of a

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<sup>12</sup> J.-L. Baudouin, P. Deslauriers, B. Moore, *La responsabilité civile*, 8th Ed., Yvon Blais, 2014, at page 720.

<sup>13</sup> Paragraph 81 of the Amended Motion.

<sup>14</sup> Paragraph 82 of the Amended Motion.

<sup>15</sup> Paragraph 94 of the Amended Motion.

<sup>16</sup> Paragraph 93 of the Amended Motion.

<sup>17</sup> 2010 QCCS 5385.

laptop belonging to the National Bank, Madam Justice Beaugé wrote the following on the fear of eventually suffering a prejudice:

"[26] Au stade de l'autorisation, le Tribunal ne se penche ni sur le bien-fondé de ces prétentions, ni sur la force probante des supposés aveux. Il ne peut toutefois en ignorer l'apparence de droit.

[27] De plus, le Tribunal adhère aux enseignements jurisprudentiels<sup>18</sup> voulant que la crainte qu'un préjudice se manifeste un jour ne constitue pas en soi un chef de réclamation autonome, et ne suffit pas à autoriser l'exercice d'un recours collectif. Toutefois, ici les allégations des requérants dépassent la simple appréhension."

[Emphasis added]

[50] Once again, in the *Larose* case, there were allegations in the Motion for Authorization to Exercise a Class Action to the effect that petitioner Larose had actually been a victim of identity theft as a result of the loss of the laptop. This is clearly not the case here. In any event, the judge expressed the view that the fear to sustain a prejudice in the future under such circumstances did not constitute in itself a compensable damage.

[51] The Court agrees with the judge's opinion.

[52] On a different note and with all due respect, the Court disagrees with Petitioner's lawyer that at this juncture, the Court should refrain from deciding on the merits of the present case.

[53] While the Court is mindful that it cannot, at the authorization stage, judge as to the merits of the case, in a Motion for Declinatory Exception, the question of jurisdiction pre-authorization must be considered in light of the Petitioner Zuckerman's case alone<sup>19</sup>.

[54] In *Bouchard c. Agropur Coopérative*<sup>20</sup>, the Court of Appeal taught us that:

"[108] Le régime de recours collectif mis en place par le législateur en est un de droit privé<sup>21</sup>. La notion d'intérêt à agir doit donc s'apprécier dans ce contexte et

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<sup>18</sup> *F.L. c. AstraZeneca Pharmaceuticals PLC*, 2010 QCCS 470. See also *Wellman c. Québec*, [2002] J. Q. no. 2993 (C.S.).

<sup>19</sup> [6] Although the petitioner purports to represent a class of investors, the question of jurisdiction must be considered in light of the petitioner's individual recourse, prior to the authorization of the class action. [References omitted], *Mouaikel c. Facebook inc.*, 2013 QCCS 4176.

<sup>20</sup> 2006 QCCA 1342.

<sup>21</sup> À ce sujet, voir notamment Pierre-Claude Lafond, *supra* note 14 à la p. 419.

non dans celui du droit public. Or, celui qui n'a rien perdu n'a pas l'intérêt requis pour agir<sup>22</sup>.

[109] Il faut garder à l'esprit qu'avant le jugement d'autorisation, « le recours n'existe pas, du moins sur une base collective »<sup>23</sup>. Le recours individuel du requérant, à lui seul, doit donc remplir les conditions de l'article 1003 C.p.c., dont celle de l'apparence de droit, puisque tout le reste ne relève encore que du domaine de l'hypothèse.

[Emphasis added]

[55] Based on the allegations of the Motion, the Court finds that the damages alleged by Zuckerman are *prima facie* of the nature of ordinary annoyances and anxieties and do not constitute "*compensable*" damages.

[56] There are no allegations that he was victim of identity theft. There are no allegations that any personal information of his was indeed part of the Data Breach as we cannot tell upon reading the Motion if Zuckerman used his credit card at Target during the Data Breach.

[57] As a matter of fact, in his Motion, Zuckerman does not mention where he made purchases at Target stores in the USA and far more importantly, when such purchases were made at USA Target stores with his USA issued credit card. Wouldn't it be relevant to know if his purchases were made during the period during which the Data Breach occurred? Such relevant information would be easily accessible to Zuckerman if it did not appear on the monthly statement issued by the credit card issuer. Maybe Zuckerman is already aware of the information and did not deem it to be relevant for the purposes hereof.

[58] Moreover, the Motion reveals that Zuckerman contacted Bank of America, the issuer of the credit card that was allegedly used in USA Target Stores and cancelled the same. He obtained a replacement card from Bank of America with a different account number.

[59] Presuming that Zuckerman used his USA issued credit card at USA Target stores during the period during which hackers committed the Data Breach, a fact that is not even alleged by the Petitioner, in all likelihood, the only information obtained would appear on the credit card itself (name, credit card number, expiry date and CVV) and possibly his PIN for that specific card. The information disclosed could only relate to the Bank of America credit card.

[60] There are no allegations in the Motion that Zuckerman was ever asked personal information of any kind whatsoever at a USA Target store and provided same to Target. His main, if not sole risk, stemmed from the unlawful use of his credit card, unless

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<sup>22</sup> *Gingras c. Québec (Procureur général)*, [1985] R.D.J. 483 à la p. 485 (C.A)

<sup>23</sup> *Thompson c. Masson*, [1993] R.J.Q. 69 à la p. 72 (C.A.).

Target had in its possession other personal information of Zuckerman that was not disclosed or alleged so far by Petitioner.

[61] Again, we do not even know whether any of Zuckerman's personal information was part of the Data Breach.

[62] At paragraph 99 of his Motion, Zuckerman alleged that to his knowledge, he has not been the victim of fraud and reserved the right to amend his proceedings or otherwise inform the Court and Target should that change before the authorization hearing, or thereafter during these proceedings.

[63] The Court has not been advised of any changes in that respect from Zuckerman. The Court must conclude that since the Data Breach was stopped in December 2013, Zuckerman has not been the victim of identity theft as a result of the Data Breach, that his USA bank issued credit card has not been cloned or unlawfully used by anyone and the risk of an unlawful use is inexistent since he got the card cancelled by the issuing bank. Again, Zuckerman has never volunteered whether he used his credit card in a USA Target store during the Data Breach period.

[64] Finally, Zuckerman's situation is far more different than those who held and used Target's own credit and debit cards, the "Red Cards". Contrary to Zuckerman, the Target cardholders had to provide to the issuer (Target) far more personal information than that offered by Zuckerman during a normal purchase using a credit card that had not been issued by Target.

[65] The Court cannot simply find any "*compensable*" damages actually incurred by Zuckerman as a direct result of Target's Data Breach.

[66] At this stage of the proceedings, the Court has a role to play, namely discard an action that is obviously ill founded and would inappropriately initiate a class action that is not supported, at least by Petitioner's own circumstances.

[67] Moreover, as a side note, Zuckerman's lawyer provided to the Court information of people who visited his website concerning the present class action and who manifested an interest therein. The Court noted that except for a single case, no one mentioned having purchased anything in a USA Target Store or being victim of identity theft. The only person who actually stated having made a purchase with a Visa card at a Target store in Albany, New York, complained of being victim of fraud when unauthorized purchases were made at the iTunes store a few days later. However, the purchase at the Albany Target store took place according to that person, on July 31, 2013, three and one half before the Data Breach occurred.

[68] Based on the information provided by Petitioner's attorney in that respect, there is not an iota of an indication so far that anyone in Quebec sustained any damage as a direct result of the Data Breach.



[69] In conclusion, the Court finds that Zuckerman failed to satisfy the Court that any of the provisions of Article 3148 CCQ find application to Target.

[70] Target is not domiciled in Quebec (Article 3148(1) CCQ).

[71] Target did not and does not have an establishment in Quebec and the present dispute does not relate to its activities in Quebec as there are none (Article 3148(2) CCQ).

[72] Target did not commit any fault in Quebec insofar as Zuckerman is concerned. If the latter suffered any damages, a fact that has not been established *prima facie*, they were not suffered in Quebec, no injurious act occurred in Quebec or none of the obligations arising from any contract involving Zuckerman was to be performed in Quebec (Article 3148(3) CCQ).

[73] There exists no agreement between Zuckerman and Target that they would submit to the jurisdiction of Quebec all existing or future disputes between themselves (Article 3148(4) CCQ).

[74] And, obviously, Target has never agreed to submit itself to the jurisdiction of Quebec with the present Motion (Article 3148(5) CCQ).

[75] Based on Article 3148 CCQ, this Court finds that it lacks jurisdiction over the Motion of Petitioner and therefore, the Court has no choice but to also find that the Superior Court of Quebec must decline its jurisdiction in this matter given the lack of any real and substantial connection to Quebec.

[76] As a result of the foregoing, the fact that the USA class actions cover or not in their class members Canadians is irrelevant given the absence of jurisdiction over Target Corporation in Quebec with respect to the Data Breach.

[77] In light of the foregoing, the Court also finds that it is not necessary to address the subsidiary question submitted by Target on the issue of *forum non conveniens* had the Court come to a different conclusion on the issue of jurisdiction.

[78] Setting aside the question of jurisdiction, the Court nevertheless seriously wonders whether such a recourse, based on the allegations made by Zuckerman and on his personal situation as representative of the Class Members, would be warranted in light of the provisions of Article 4.2<sup>24</sup> of the *Code of Civil Procedure* when appreciated

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<sup>24</sup> 4.2. In any proceeding, the parties must ensure that the proceedings they choose are proportionate, in terms of the costs and time required, to the nature and ultimate purpose of the action or application and to the complexity of the dispute; the same applies to proceedings authorized or ordered by the judge.

in conjunction with Article 1003(d)<sup>25</sup> of the said Code. Moreover, the number of Canadians or Quebecers that, in all likelihood, have actually sustained compensable damages as a direct result of the Data Breach is highly questionable at best based on the information presently available.


**FOR THOSE REASONS, THE COURT:**

[79] **GRANTS** the Motion for Declinatory Exception and subsidiarily, for *forum non conveniens* of Respondent Target Corporation;

[80] **DECLARES** that the Superior Court of Quebec lacks jurisdiction in the present matter and therefore, **DECLINES** jurisdiction herein;

[81] **DISMISSES** the Amended Motion of Petitioner Mr. Evan Zuckerman to authorize the bringing of a class action suit and to ascribe the status of representative;

[82] **THE WHOLE** with costs.



MICHEL A. PINSONNAULT, J. S.C.

Me David Assor  
*Lex Group*  
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Me Silvana Conte  
*Osler Hoskin & Harcourt LLP*  
Attorneys for Respondent Target Corporation

Date of hearing: December 2, 2014

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<sup>25</sup> **1003.** The court authorizes the bringing of the class action and ascribes the status of representative to the member it designates if of opinion that:

- (a) the recourses of the members raise identical, similar or related questions of law or fact;
- (b) the facts alleged seem to justify the conclusions sought;
- (c) the composition of the group makes the application of article 59 or 67 difficult or impracticable; and
- (d) the member to whom the court intends to ascribe the status of representative is in a position to represent the members adequately.