

CANADA

PROVINCE OF QUÉBEC
DISTRICT OF MONTRÉAL

N° (C.A.):
N° (S.C.): 500-06-000885-174

COURT OF APPEAL

EQUIFAX INC.

-and-

EQUIFAX CANADA CO

APPELLANTS - Defendants

v.

DANIEL LI

RESPONDENT - Applicant

**APPLICATION OF EQUIFAX INC. AND EQUIFAX CANADA CO
FOR LEAVE TO APPEAL DATED JUNE 18, 2018**
(art. 31(2) and 357 C.C.P.)

TO ONE OF THE HONOURABLE JUDGES OF THE COURT OF APPEAL, DISTRICT OF MONTRÉAL, THE APPELLANTS RESPECTFULLY SUBMIT AS FOLLOWS:

1. On May 7, 2018, a judgment was rendered in the course of proceeding (the "**Judgment**") by the Honourable Donald Bisson S.C.J. of the Superior Court from the district of Montréal (the "**Judge**") in case number 500-06-000885-174, as appears from a copy of the Judgment attached hereto as **Schedule 1**.
2. The Judgment dismissed the *Application by the Defendants to Stay the Class Action* ("**Application to Stay**"), copy of which is attached hereto as **Schedule 2**.

A. BACKGROUND

3. On September 11, 2017, Merchant Law Group ("**MLG**") on behalf of the Respondent Daniel Li (the "**Respondent**"), filed the *Application for Authorization to Institute a Class Action and to Appoint a Representative Plaintiff* (the "**Québec**

Action”), copy of which is attached hereto as **Schedule 3**, on behalf of the following class¹:

“All persons in Quebec who had, at any time prior to September 7, 2017, personal or credit data collected and stored by Equifax and who were subject to risk of data loss as a result of the breach which occurred between May and July 2017 (hereinafter the “Data Breach”) or any other Class(es) or Sub-Class(es) to be determined by the Court;” (the “**Class Members**”)

4. The Québec Action stems from an incident involving unauthorized access to personal information that occurred in 2017 (the “**Incident**”). The Respondent alleges that his private information, and the private Information of the Class Members, was compromised by said Incident as a result of the Appellants’ failures to maintain said private information in a reasonably secure manner, causing them moral and material damages.
5. The Appellants proposed to suspend the Québec Action due to the existence of five class action proceedings throughout Canada raising the same facts and issues, four of which are proposing a national class action overlapping with the Québec Action, as described below.
6. On September 8, 2017, before the Québec Action was filed, MLG on behalf of Dwight Johnson, commenced an action in the Court of the Queen’s Bench of Saskatchewan (the “**Saskatchewan Action**”) on behalf of all individuals resident in Canada who had, at any time prior to September 7, 2017, personal or credit data collected and stored by Equifax and who were subject to risk of data loss as a result of the data breach that occurred between May and July 2017, a copy of the *Statement of Claim*, dated September 8, 2017, and the *Amended Statement of Claim*, dated September 19, 2017, being attached hereto as **Schedule 4**.
7. The claim alleges negligence, breach of confidence, breach of fiduciary duty, intrusion upon seclusion, breach of contract and warranty, unjust enrichment,

¹ It is to be noted that the Québec Action specifies, at para. [46]: “Members of the Class consist of individuals whose personal and/or financial information was lost by and/or stolen from the Defendants as a result of a data breach that occurred around May 2017.”

breach of privacy legislation and, on behalf of all class members who are domiciled in Québec, breach of the *Civil Code of Québec*² (“**CCQ**”) and interference with rights under the *Québec Charter of Human Rights and Freedoms*³ in connection with the Incident, including a claim for punitive damages. The Saskatchewan Action relies on common law and the *Personal Information Protection and Electronic Documents Act*⁴ (“**PIPEDA**”).

8. On September 12, 2017, Sotos LLP, on behalf of Bethany Agnew-Americanano, filed an action (the “**Agnew-Americanano Action**”) in the Ontario Superior Court of Justice, a copy of the *Statement of Claim*, dated September 12, 2017, and the *Amended Statement of Claim* dated February 20, 2018 being attached hereto as **Schedule 5**.
9. The Agnew-Americanano Action seeks compensation on behalf of the proposed national class of (1) all persons in Canada whose personal information was stored on Equifax databases and which was accessed without authorization between May 1, 2017 and August 1, 2017 (or such further or different period that is specified as investigation of this case progresses), and (2) all persons in Canada who purchased from the defendants, their subsidiaries or related companies (i) Equifax Complete Advantage; (ii) Equifax Complete Premier; (iii) Equifax Complete Friends and Family; (iv) or any other Equifax products offering credit monitoring and identity theft protection, and whose personal information stored on Equifax databases was accessed without authorization between May 1, 2017 and August 1, 2017 (or such further or different period that is specified as investigation of this case progresses).
10. The claim alleges negligence, breach of contract, intrusion upon seclusion and breach of provincial privacy legislation in connection with the Incident and seeks aggregate damages in the amount of \$500 million and punitive damages in the amount of \$50 million. The claim relies on common law and the PIPEDA.

² *Civil Code of Québec*, CQLR c CCQ-1991.

³ *Charter of Human Rights and Freedoms*, CQLR c C-12.

⁴ *Personal Information Protection and Electronic Documents Act*, SC 2000, c 5.

11. On the same day, September 12, 2017, MLG on behalf of Laura Ballantine, also filed an action (the "**Ballantine Action**") in the Ontario Superior Court of Justice, the *Statement of Claim*, dated September 12, 2017, and the *Amended Statement of Claim*, dated October 24, 2017, being attached hereto as **Schedule 6**.
12. On January 24, 2018, the Ontario Superior Court of Justice stayed the Ballantine Action after awarding carriage over the Ontario proceedings to the plaintiff in the Agnew-Americanano Action (the "**Ontario Action**"). Accordingly, the Ontario Action is proceeding on behalf of a proposed national class and a certification hearing is scheduled for February 4-6, 2019.
13. Finally, on September 18, 2017, MLG on behalf of Yaseen Azam and Khyati Sujai Patel, filed an action with the Supreme Court of British Columbia, the *Notice of Civil Claim* being attached hereto as **Schedule 7**. To this date, it has remained inactive.

B. THE APPELLANTS' RIGHT TO SEEK PERMISSION FOR LEAVE TO APPEAL

14. The Appellants are entitled to apply for leave to appeal the Judgment as it causes them irreparable prejudice.
15. As described at greater length below, the trial Judge erred in finding that:
 - a) The conditions of article 3137 CCQ were not met because the Québec Action was filed before the Ontario Action;
 - b) The protection of the rights and interests of Québec residents is better served by dismissing the Application to Stay.
16. If the present *Application for Leave to Appeal* is granted, the Appellants intend to demonstrate that these errors are overriding and contradict recent decisions rendered in the context of overlapping multi-jurisdictional class actions.

1) The Judge Erred in Ruling that the Filing of the Québec Action Before the Ontario Action is a Bar to Grant a Stay of Proceedings

17. In his reasons, the Judge held that a stay could not be granted because the Ontario Action, to the benefit of which the Appellants wished to obtain the stay, was not already pending when the Québec Action was filed.
18. The Judge evaluated the criteria set out in art. 3137 and 3155 CCQ⁵: He recognized that the Québec Action and the Ontario Action share common parties, facts and purpose, thus creating a situation of *lis pendens* and the risk of contradictory judgments on decisive issues.⁶ The Judge also confirmed, in *obiter*, that the proceedings in Ontario could also give rise to a judgment that may be recognized in Quebec, thus meeting the fifth criterion.⁷
19. As stated by the Judge, the Application to Stay was dismissed on the sole basis that the Ontario Action did not predate the Québec Action.⁸ However, while courts have held that the "first-to-file" rule may have benefits for intra-provincial class actions in Québec to avoid carriage battles that are common elsewhere in Canada, the "first-to-file" rule should not be dispositive in dealing with overlapping inter-provincial class actions, and specifically in applying the conditions of art. 3137 CCQ.⁹
20. The Appellants respectfully submit that where all of the other criteria are satisfied, the mere fact that the the Québec Action was filed slightly before the Ontario Action, to the benefit of which the Appellants wish to be granted a stay in the context of multiple inter-provincial class actions, is not a bar to staying a class action under art. 3137 CCQ.

⁵ (1) Both actions are between the same parties, (2) based on the same facts, (3) have the same subject, (4) the other action is already pending before the foreign authority, and (5) the foreign action may result, or has already resulted, in a decision that may be recognized in Quebec.

⁶ Par. 45 of the Judgment.

⁷ Par. 61 of the Judgment.

⁸ Par. 47-52 of the Judgment.

⁹ *Chasles c. Bell Canada Inc.*, 2017 QCCS 5200, at par. 42.

21. In fact, it is common in the class action context in Canada to have quasi simultaneous filing of class proceedings before different jurisdictions (four in the course of five days, in this particular case), and courts have held that this occurrence is not an impediment to staying a proceeding in the context of overlapping multi-jurisdictional or inter-provincial class actions.
22. In the recent decision *Chasles c. Bell Canada Inc.*¹⁰, the statement of claim in Ontario was filed two days after the application for authorization to bring a class action in Québec. In staying the Québec class action proceeding, Justice Stephen W. Hamilton, J.S.C., stated that the conditions of art. 3137 CCQ were designed for the typical litigation where one or more plaintiffs sue one or more defendants and do not apply readily to class actions.¹¹ He held that courts have thus recognized that *lis pendens* must be analysed with a view to the particular rules of class actions¹² and that the conditions of art. 3137 CCQ should be applied more liberally in the class action context. He noted that in the context of class actions, the courts have frequently stayed Québec class actions in favour of national class actions in other provinces on the basis of *lis pendens*.¹³
23. In *Boehmer c. Bard Canada inc.*¹⁴, a Québec action was filed 22 days before an Ontario action and 43 days before a British Columbia action. Justice Pierre-C. Gagnon, J.S.C., nevertheless granted the stay of the Québec action. Similarly, in *9085-4886 Québec inc. c. Visa Canada Corporation*¹⁵, the application for authorization to bring a class action in Québec was filed on December 10, 2010, months before similar actions were brought before the Ontario and British

¹⁰ *Chasles c. Bell Canada Inc.*, 2017 QCCS 5200.

¹¹ *Chasles c. Bell Canada Inc.*, 2017 QCCS 5200, at par. 26.

¹² *Chasles c. Bell Canada Inc.*, 2017 QCCS 5200, at par. 26, citing *Conseil pour la protection des malades c. Biomet Canada Inc.*, 2016 QCCS 4574, par. 19; and *Boucher c. Boston Scientific Corporation*, 2014 QCCS 6395, par. 12.

¹³ *Chasles c. Bell Canada Inc.*, 2017 QCCS 5200, at par. 26, citing *Conseil pour la protection des malades c. Biomet Canada Inc.*, 2016 QCCS 4574, par. 19; and *Boucher c. Boston Scientific Corporation*, 2014 QCCS 6395, par. 12.

¹⁴ *Boehmer c. Bard Canada inc.*, 2016 QCCS 4702.

¹⁵ *9085-4886 Québec inc. c. Visa Canada Corporation*, 2012 QCCS 2572.

Columbia courts. Justice Chantal Corriveau, J.S.C., nevertheless granted a stay of the proceedings in Québec.

24. In those two cases, the criteria provided by art. 3137 CCQ ought to be examined by the judges¹⁶ albeit all the parties agreed that the application to stay should be granted. In both cases, the “first-to-file” rule was not analysed in the reasons written by the judges, thus demonstrating that Justice Gagnon and Justice Corriveau applied the fourth criterion liberally. Indeed, if applied strictly, the fourth criterion would require nothing more from the opposing party than the filing of a stamped procedure in Québec to obtain the dismissal of an application to stay.
25. In other cases still, the courts have not hesitated to grant a stay of class action proceedings in Québec where the foreign action was filed simultaneously, on the same day, in multiple jurisdictions¹⁷.
26. However, the Judge adopted *as his own* the reasons for the decision of Justice Marie-Anne Paquette, J.C.S., in *Garage Poirier & Poirier Inc. v. FCA Canada Inc.*¹⁸, stating that in the context of overlapping multi-jurisdictional class actions which create a situation of *lis pendens* and entail the risk of contradictory judgments on decisive Issues, the Court's discretionary power does not allow it to waive what the Judge held to be non-compliance with the conditions of art. 3137 CCQ. Justice Paquette's reasons are clearly in stark contrast with Justice Hamilton's reasons in *Chasles c. Bell Canada Inc.*¹⁹ and create a dangerous precedent.
27. Indeed, the Appellants submit that where more than two actions are filed in different provinces, the liberal approach described by Justice Hamilton in

¹⁶ 9085-4886 *Québec inc. c. Visa Canada Corporation*, 2012 QCCS 2572, par. 15.

¹⁷ *Parker c. Apotex*, 2015 QCCS 1210; *McComber c. Glaxosmithkline Inc.*, 2005 CanLII 40679 (QC CS).

¹⁸ 2018 QCCS 107 (application for leave to appeal before the Court of Appeal referred to a three-judge panel, 2018 QCCA 490): a Québec Action and an Ontario Action had been filed on the same day.

¹⁹ *Chasles c. Bell Canada Inc.*, 2017 QCCS 5200.

*Chasles c. Bell Canada Inc.*²⁰ is of the greatest importance, as the extra-provincial action filed before a Québec Action will not necessarily turn out to be the action in favour of which the defendants ask for a stay of the proceedings. Where multiple national class actions are brought in different jurisdictions within a few days, it is possible that the best action to pursue a national carriage in the light of the best interest of the group members and with respect of the good administration of justice comes out not to be the one predating the filing in Québec, even though a predating action does exist.

28. In this day and age of scarce judicial resources, it would be counterproductive for the courts to allow a stay of proceedings only in favour of an action predating a filing in Québec, where a better national carriage vehicle meeting all the other requirements is offered in another jurisdiction, like in the present case.
29. Finally, and importantly, the Judgment causes irremediable prejudice to the Appellants by creating a situation where they are forced to defend themselves against the very same action in multiple jurisdictions, to incur significant costs in doing so and to unnecessarily multiply their use of judicial resources, which is inconsistent with the principles of proportionality and the good administration of justice enshrined in the *Code of Civil Procedure* ("**CCP**").
30. Indeed, the courts have recognized that staying a Québec class action when there is a national class action in another province prevents a multiplicity of proceedings and thereby saves precious time, energy and judicial resources, while avoiding the risk of conflicting judgments on decisive issues, and is therefore consistent with the principle of proportionality.²¹
31. It is thus in the interest of justice that the Court of Appeal be seized with this controversial issue and dispel the confusion with regards to the application of art. 3137 CCQ in the context of overlapping multi-jurisdiction class actions.

²⁰ *Chasles c. Bell Canada Inc.*, 2017 QCCS 5200.

²¹ *Canada Post Corp. v. Lépine*, 2009 SCC 16, at par. 57; *Chasles c. Bell Canada Inc.*, 2017 QCCS 5200, at par. 27.

2) ***The Judge Erred in Finding that the Rights and Interests of Québec Residents is Better Served by Dismissing the Application to Stay***

32. While the Judge dismissed the Application to Stay on the sole basis that the Québec Action predated the Ontario Action, the Judgment nonetheless addresses art. 577 CCP with regard to the Ontario Action, in *obiter* only, and concludes in favour of the continuation of the Quebec proceedings.²²
33. The Appellants respectfully submit that the Judge's *obiter* is ill-founded as he puts aside the spirit of mutual comity that is required between the courts of different provinces, and that requires for a court to assume that any superior court in Canada will protect the rights and interests of Québec residents in the same fashion as would a Québec Court.²³
34. The Judge cannot imply from the absence of a specific portion for Québec members in the Ontario Action nor from the peculiarities with respect to the concept of a consumer contract as defined in the CCQ and the *Consumer Protection Act*, that the rights and interests of the Québec members will not be adequately protected.²⁴ On the opposite, the Ontario court can apply the *Civil Code of Québec*, the *Québec Charter of Human Rights and Freedoms*, and the *Consumer Protection Act*.²⁵ Moreover, many actions in favour of which the Québec courts granted a stay never included a specific portion for the Québec members, and this mere fact did not preclude the judges from recognizing the ability of the superior courts to protect their rights and interests.²⁶
35. The Appellants also respectfully submit that the Judge disregarded his obligation to observe the principles of proportionality and good administration of justice laid

²² Paragr. 70 of the Judgment.

²³ *Chasles c. Bell Canada inc.*, 2017 QCCS 5200, paragr. 83; *Conseil pour la protection des malades c. Biomet Canada Inc.*, 2016 QCCS 4574, paragr. 32.

²⁴ *Chasles c. Bell Canada inc.*, 2017 QCCS 5200, paragr. 83; *Conseil pour la protection des malades c. Biomet Canada Inc.*, 2016 QCCS 4574, paragr. 28-35.

²⁵ *Chasles c. Bell Canada inc.*, 2017 QCCS 5200, paragr. 83

²⁶ For example: *Conseil pour la protection des malades c. Biomet Canada Inc.*, 2016 QCCS 4574; *Parker c. Apotex*, 2015 QCCS 1210; *Boucher c. Boston Scientific Corporation*, 2014 QCCS 6395; *9085-4886 Québec inc. c. Visa Canada Corporation*, 2012 QCCS 2572.

down at paragraph 18(2) CCP. Indeed, the Appellants' arguments regarding the need to avoid an unnecessary, repetitive and costly parallel debate and to save judicial resources of the parties are not only aligned with the direct goals sought by those principles enshrined in the CCP, they are also at the core of the Application to Stay and the very irremediable prejudice caused by its dismissal.

36. For a judge to require a specific and individualized proof or demonstration²⁷ of the costs and judicial resources that will be required to move two or more class actions forward instead of one is dubious at best.
37. If any such demonstration was required in support of those arguments, the Appellants respectfully submit that the Judge could easily evaluate the full extent of the costs and judicial resources invested by the Appellants and the Courts throughout Canada by reviewing the sworn statement of Pavel Sergeyev, an associate with the law firm of Fasken Martineau DuMoulin LLP and counsel for Equifax, dated February 22, 2018, and the supplementary sworn statement of Pavel Sergeyev providing for the status of extra-jurisdictional class actions against Equifax in Canada as of April 24, 2018, both of which were submitted to the Judge, and copies of which are attached hereto as **Schedule 8**.
38. There is no factual or legal basis to support the Judge's conclusion that the continuation of the Québec Action offers a more adequate protection of the Québec members than the Ontario Action.
39. In the present case, the Appellants clearly mentioned to the Judge that they were willing to accept any accommodation deemed necessary to better protect the interests of Québec residents. The Appellants reiterate that they are seeking the stay of the Québec Action, not its dismissal.
40. Finally, the Appellants submit that an immediate stay of the Québec Action should be granted by this Honourable Court so as to avoid irremediable prejudice to the Appellants as described hereinabove.

²⁷ Paragr. 70 5) and 6) of the Judgment.

41. The Appellants Equifax Inc. and Equifax Canada Co respectfully request that this Court of appeal:
- a) **GRANT** the Appeal;
 - b) **QUASH** the judgment OF THE Superior Court rendered May 7, 2018, by the Honourable Justice Donald Bisson S.C.J. sitting in the district of Montréal, in case bearing number 500-06-000885-174;
 - c) **ORDER** the stay of the proceeding in the case number 500-06-000885-174;
 - d) **ORDER** the Respondent to bear the legal costs of the first instance and the appeal.

FOR THESE REASONS, MAY IT PLEASE THE COURT TO:

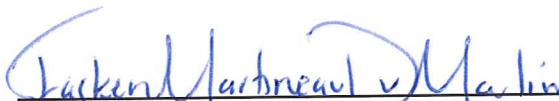
GRANT the present Application for Leave to Appeal;

AUTHORIZE Equifax Inc. and Equifax Canada Co to appeal the judgment rendered May 7, 2018, by the Honourable Judge Donald Bisson S.C.J. of the Superior Court from the district of Montréal in case number 500-06-000885-174;

ORDER the stay of the proceeding in the case number 500-06-000885-174 until the judgment on the merit is rendered in the present appeal;

THE WHOLE, with legal costs to follow depending on the outcome of the appeal.

Montréal, this June 18, 2018



Fasken Martineau DuMoulin LLP

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NOTICE OF PRESENTATION

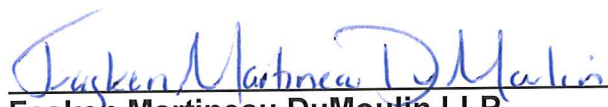
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TAKE NOTICE that the present Application of Equifax Inc. and Equifax Canada Co for leave to appeal dated June 18, 2018 will be presented for adjudication before one of the honourable judges of the Court of appeal for the district of Montréal, sitting at the Édifice Ernest-Cormier, located at 100 Notre-Dame Street East, Montréal, Quebec, H2Y 4B6, on **July 11, 2018**, at **9 h 30** or so soon thereafter as counsel may be heard, in **Room RC-18**.

DO GOVERN YOURSELVES ACCORDINGLY.

Montréal, this June 18, 2018



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Attorneys for Equifax inc. and Equifax Canada
Co

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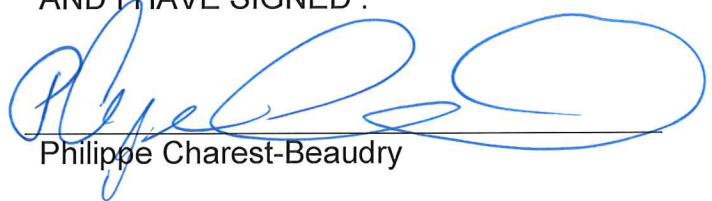
Mtre Philippe Charest-Beaudry
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SWORN STATEMENT


I, the undersigned, Philippe Charest-Beaudry, lawyer, having my professional address at 800 Victoria Square, Suite 3700, P.O. Box 242, in the city and district of Montréal, Province of Quebec, H4Z 1E9, do solemnly declare:


1. I am a duly authorized representative of the Appellants in the present case;
2. All the facts alleged in the present application are true.

AND I HAVE SIGNED :


Philippe Charest-Beaudry

Solemnly affirmed before me,
in Montréal, on June 18, 2018


Commissioner for Oaths for Québec



CANADA

PROVINCE OF QUÉBEC
DISTRICT OF MONTRÉAL

COURT OF APPEAL

N° (C.A.):
N° (S.C.): 500-06-000885-174

EQUIFAX INC.

-and-

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**LIST OF SCHEDULES IN SUPPORT OF THE
APPLICATION OF EQUIFAX INC. AND EQUIFAX CANADA CO FOR LEAVE TO
APPEAL DATED JUNE 18, 2018**

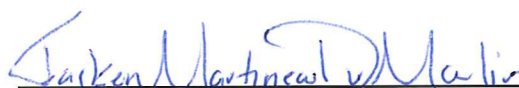
- SCHEDULE 1:** Judgment rendered on May 7, 2018, by the Honourable Donald Bisson, S.C.J., in case number 500-06-000885-174.
- SCHEDULE 2:** *Application by the Defendants to Stay the Class Action*, dated February 23, 2018.
- SCHEDULE 3:** *Application for Authorization to Institute a Class Action and to Appoint a Representative Plaintiff*, dated September 11, 2017.
- SCHEDULE 4:** *Statement of Claim, Robert Dwight Johnson v. Equifax Inc. and Equifax Canada Co.*, dated September 8, 2017; and *Amended Statement of Claim*, dated September 19, 2017.
- SCHEDULE 5:** *Statement of Claim, Bethany Agnew-Americanano v. Equifax Canada Co. and Equifax Inc.*, dated September 12, 2017, and *Amended Statement of Claim* dated February 20, 2018.

SCHEDULE 6: *Statement of Claim, Laura Ballantine v. Equifax Inc. and Equifax Canada Co.*, dated September 12, 2018, and *Amended Statement of Claim, Adele Perisol v. Equifax Inc. and Equifax Canada Co.*, dated October 24, 2017.

SCHEDULE 7: *Notice of Civil Claim, Yaseen Azam and Khyati Sujal Patel v. Equifax Inc. and Equifax Canada Co.*, dated September 18, 2017.

SCHEDULE 8: Sworn statement of Pavel Sergeyev, an associate with the law firm of Fasken Martineau DuMoulin LLP and counsel for Equifax, dated February 22, 2018, and the supplementary sworn statement of Pavel Sergeyev providing for the status of extra-jurisdictional class actions against Equifax in Canada, dated April 24, 2018.

Montréal, this June 18, 2018



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