

# SUPERIOR COURT

CANADA  
PROVINCE OF QUEBEC  
DISTRICT OF MONTREAL

No: 500-06-000961-181

DATE: February 13, 2020

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**PRESIDING: THE HONOURABLE THOMAS M. DAVIS, J.S.C.**

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**STUART THIEL**  
and  
**BRIANNA THICKE**  
Applicants

v.  
**FACEBOOK, INC.**  
and  
**FACEBOOK CANADA LTD.**  
Defendants

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## JUDGMENT

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### OVERVIEW

[1] Stuart Thiel and Brianna Thicke (the "**Applicants**") seek to represent the following class in an Application to Authorize a Class Action filed on December 19, 2018:

"all persons in Quebec whose Facebook account data commencing in 2010 and ongoing was sold to third parties by the defendants without Class Members' consent, or who gained access to Class Members account data through exemptions from the defendants' privacy rules.

or such other class definition as may be approved by the Court."

[2] Defendants Facebook, Inc. and Facebook Canada LTD. (**collectively "Facebook"**) seek a stay of proceedings in Québec, until a final judgment is rendered in one of the class actions currently pending before the Ontario Superior Court of Justice, namely *Howat and al. v. Facebook, Inc.* in court docket number CV-19-00612179-00CP (the "**Howat Action**"), and *Donegani v. Facebook, Inc.* in court docket number CV-18-596626-00CP (the "**Donegani No 1 Action**", together with the Howat Action (the "**Ontario Actions**").

[3] The Applicants oppose the stay.

### **1. THE ONTARIO ACTIONS**

[4] The Howat Action was filed by way of notice of action before the Ontario Superior Court of Justice on January 8, 2019. A statement of claim was then issued on February 8, 2019, proposing the following putative class:

"All persons residing in Canada whose Facebook account data commencing in 2010 and ongoing was accessed by third parties as a result of a data partner agreement or who gained access to Class Members account data through exemptions from the Defendants' privacy rules."

[5] The Donegani No 1 Action was filed by way of notice of action before the Ontario Superior Court on April 25, 2018. A statement of claim was then issued on May 17, 2018, proposing the following putative class:

"All persons, except for Excluded Persons who registered for Facebook accounts wherever they may be domiciled, who did not utilize, download, or otherwise access applications created by Third Parties and whose Personal Information was obtained from Facebook by Third Parties, either directly or indirectly, without authorization or in excess of authorization."

[6] Facebook posits that the proposed class in the Québec Action is included in the Howat Action's proposed class and may also be included in the Donegani No 1 Action's proposed class.

[7] As to the cause of action, Facebook takes the view that the cause of action in the Howat Action is the same as in the Québec Action. Facebook affirms that the Donegani No 1 Action is based on similar key allegations of fact and law, which relate to class members' personal information being illegally obtained by third parties; the essential fault that Facebook is allegedly guilty of is the same.

[8] Donegani No 1 seeks to represent a national class.

[9] A hearing was scheduled for February 2020, but has apparently been postponed as the plaintiff has not communicated its certification brief.

[10] It should also be noted, that the present application is further complicated by the fact that there are other Ontario actions pending against Facebook involving similar data breaches, including another involving Mr. Donegani bearing file No CV-18-599580-CP (**Donegani No 2**)<sup>1</sup> and *Simpson v. Facebook, Inc. et al.*, CV-18-597085-00CP (the “**Simpson Action**”).

[11] Charney Lawyers, the lawyers for the Applicants, have agreed to work with the Ontario lawyers Koskie Minsky in the prosecution of the Howat and Donegani No 2 Actions.

## **2. THE APPLICANTS' OPPOSITION**

[12] The crux of the Applicant's position is that it is not in the interests of Québec class members to grant Facebook's Application to Stay. They believe that the Québec action will likely proceed with more celerity than those in Ontario. No case management judge has been assigned to the Howat Action. While Justice Belobaba is the case management judge for the Donegani No 1 and No 2 and the Simpson Action, apparently, none of the plaintiffs in these four Ontario actions has yet to deliver a certification motion. This adds to the likelihood that the Québec action will proceed more rapidly to the certification stage. They argue that the procedural differences between Ontario and Québec at the certification stage will also lead to a faster resolution in Québec at the authorization stage.

[13] In addition, in respect of those actions where they are involved, namely the Howat Action and the Donegani No 2 Action, Applicant's counsel has undertaken to amend those proceedings in order to remove the Québec residents from the proposed national class.

## **3. THE LAW**

[14] The Québec Court of Appeal has recently considered the issue of international *lis pendens* in class actions in the matter of *FCA Canada Inc. c. Garage Poirier & Poirier inc.*<sup>2</sup>

[15] The parties did not have the benefit of this decision when making their submissions to the Court, but given their arguments and the Court's discretion on the question of a stay, it did not deem it necessary to reconvene them.

[16] *Garage Poirier*<sup>3</sup> is a matter where parallel proceedings were filed in Ontario, British Columbia and Québec, the former two with a national class and the Québec action being limited to residents of Québec. The Ontario and Québec actions had been

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<sup>1</sup> The Court adds that there are a number of other actions in Québec pending against Facebook, at least some of which have been stayed, pending decisions in other jurisdictions.

<sup>2</sup> 2019 QCCA 2213.

<sup>3</sup> *Ibid.*

filed on the same day, although it was not possible for the motion judge, Justice Marie-Anne Paquette to determine which had been filed first. The British Columbia action had been filed several days later. Justice Paquette refused to stay the proceedings, as she was of the view that the conditions of article 3137 C.C.Q. were not satisfied. This article reads:

**3137.** On the application of a party, a Québec authority may stay its ruling on an action brought before it if another action, between the same parties, based on the same facts and having the same subject is pending before a foreign authority, provided that the latter action can result in a decision which may be recognized in Québec, or if such a decision has already been rendered by a foreign authority.

**3137.** L'autorité québécoise, à la demande d'une partie, peut, quand une action est introduite devant elle, surseoir à statuer si une autre action entre les mêmes parties, fondée sur les mêmes faits et ayant le même objet, est déjà pendante devant une autorité étrangère, pourvu qu'elle puisse donner lieu à une décision pouvant être reconnue au Québec, ou si une telle décision a déjà été rendue par une autorité étrangère.

[17] The conditions of this article were considered by the Court of Appeal as follows:

[36] L'analyse d'une demande de sursis à statuer sur une demande d'autorisation, au motif que des recours semblables ont été entrepris dans d'autres juridictions, exige que le juge détermine d'abord si les conditions permettant de surseoir à statuer en raison d'une litispendance internationale sont remplies (3137 C.c.Q.). En effet, si l'une des conditions énoncées n'est pas satisfaite, la demande ne peut être accueillie.<sup>4</sup>

(Reference omitted)

[18] So, if the conditions for international *lis pendens* under article 3137 C.C.Q. are present, the Québec Court may grant the requested stay, but has discretion to decide otherwise. The motions judge must principally consider the protection of the interests of Québec residents.

[19] This was also recognized by Justice Bisson in *Li c. Equifax inc.*<sup>5</sup>

[20] The Court of Appeal considered the judgment of Justice Hamilton (then in this Court) in *Chasles c. Bell Canada inc.*,<sup>6</sup> relied on by Facebook, where he granted a stay notwithstanding that the Ontario action had been filed subsequent to the Québec one. It stated:

[49] Certes, le contexte particulier de l'action collective peut venir teinter l'analyse sous l'article 3137 C.c.Q. et inciter à faire preuve d'une certaine

<sup>4</sup> *FCA Canada Inc. c. Garage Poirier & Poirier inc.*, *supra* note 2, par. 36.

<sup>5</sup> 2018 QCCS 1892.

<sup>6</sup> 2017 QCCS 5200.

souplesse, notamment au niveau de l'identité des parties. Toutefois, le juge doit, avant d'exercer la discrétion conférée par cet article, s'assurer que l'ensemble des conditions fixées par le législateur, incluant celles concernant l'antériorité du recours québécois, sont satisfaites.

[50] Permettre le sursis à statuer en vertu de l'article 3137 C.c.Q., malgré l'antériorité du recours québécois, reviendrait à suspendre en vain le Recours Québec dans l'attente d'une décision étrangère qui ne serait pas exécutoire au Québec en raison de l'article 3155(4) C.c.Q.<sup>7</sup>

[References omitted]

[21] One can take from these words that the motions judge may not stay the Québec proceeding on the basis of article 3137 C.C.Q. where the Québec application has been filed prior to the foreign proceeding raised to support the stay application.

[22] However, the Court's inherent jurisdiction under article 49 C.C.P. may allow it to nonetheless stay a prior Québec application, given the particular nature of a class action proceeding:

[76] Cette flexibilité est tout autant de mise en matière d'actions collectives parallèles à travers le Canada.

[77] Il pourrait arriver que la multiplicité des instances jette un discrédit sur l'administration de la justice. La duplication des procédures doit être évitée. La saine gestion des recours doit être prise en considération, notamment, à titre d'exemple, lorsqu'on sait qu'un règlement prochain devant le tribunal étranger pourrait avoir un impact sur le recours québécois. La coopération internationale entre les tribunaux dans un tel contexte est de mise.

[78] Si l'intérêt des membres putatifs et l'administration de la justice militent pour la suspension de l'instance, le juge désigné doit pouvoir utiliser sa compétence inhérente pour ordonner une telle suspension (temporaire par sa nature) lorsque l'existence d'une procédure étrangère est susceptible d'avoir un impact sur le déroulement de l'instance québécoise. Ceci, même si les conditions de l'article 3137 C.c.Q. ne sont pas satisfaites. L'article 577 C.p.c. n'y crée pas obstacle, tout au contraire.<sup>8</sup>

[23] The Court of Appeal in some measure goes further than Justice Bisson in *Equifax*<sup>9</sup> in its conclusion on the inherent jurisdiction of the Court under article 49 C.C.P. However, the discretion accorded by article 49 is not: "[...] une invitation à suspendre les demandes au Québec au profit des demandes étrangères, tout au contraire. La

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<sup>7</sup> *FCA Canada inc. c. Garage Poirier & Poirier inc.*, supra note 2.

<sup>8</sup> *Ibid.*

<sup>9</sup> *Li c. Equifax*, supra note 5.

Cour supérieure est saisie d'une demande d'autorisation d'exercer une action collective et devra la trancher".<sup>10</sup>

[24] Applied to the present facts, the take away from this decision of the Court of Appeal is that the criteria of article 3137 C.C.Q. will not be applicable in respect of the Howat Action, as there is no doubt that it is posterior to the Québec application. The Howat Action may remain relevant to the exercise of the Court's inherent jurisdiction as to whether it is nonetheless appropriate to grant the requested stay.

[25] As to the Donegani No 1 action, whether or not the criteria of article 3137 C.C.Q. are applicable will depend on whether or not it is grounded on the same facts.

[26] Regardless of these facts, as the Court has stated, it may refuse to grant the stay considering article 577 C.C.P. In *Equifax*, Justice Bisson discusses reasons that might lead to a refusal to grant the stay :

2) **La deuxième étape** repose sur l'analyse de l'article 577 Cpc et porte sur l'analyse de la protection des droits et intérêts des résidents du Québec. Cette étape n'est analysée que si la suspension est par ailleurs permise en vertu de la première étape, celle portant sur les conditions substantives du droit international privé québécois. Cette deuxième étape inclut les éléments suivants :

- o Le Tribunal doit prendre en considération dans sa décision la protection des droits et des intérêts des résidents du Québec.

[...]

- o La protection des droits et des intérêts des résidents du Québec s'apprécie en fonction de plusieurs critères, notamment les suivants :
  - L'avancement des procédures devant l'autre juridiction;
  - La participation active des avocats du groupe au Québec dans les procédures en cours devant l'autre juridiction;
  - Le fait qu'il n'existe aucune règle nationale pour régir les cas de litispendance internationale;
  - La différence des lois applicables dans les différentes juridictions;
  - Le fait que le représentant du groupe proposé au Québec soit dans une meilleure position pour représenter les membres du Québec que le représentant dans le recours pendant devant une autre juridiction;
  - La participation et l'intérêt démontré par les membres quant aux procédures au Québec;

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<sup>10</sup> *FCA Canada inc. c. Garage Poirier & Poirier inc.*, supra note 2, par. 80.

- L'intérêt démontré à l'égard des résidents du Québec et leur participation dans les procédures en cours devant l'autre juridiction.<sup>11</sup>

#### 4. ANALYSIS

[27] The first question is whether article 3137 C.C.Q. is applicable to the Donegani No 1 Action. While there is no doubt that the factual basis for it and for the Applicant's authorization application appear to be very similar and involve an alleged breach by Facebook of its obligation to protect the personal data of its users, the Court considers that it does not need to fully analyse the two proceedings to determine whether or not there is international *lis pendens*. This is because, even if the criteria of article 3137 C.C.Q. are satisfied, considering article 577 C.P.C. and the criteria put forward by Justice Bisson in *Equifax*, the Court concludes that at this juncture the interests of the Québec class members are better protected by allowing the Québec application to proceed.

[28] Facebook argues that the Québec class members will save time and money if the Ontario action is allowed to proceed first. This is, at best, a subjective assessment of the situation and does not appear to be borne out by the state of the record in either the Howat or the Donegani No 1 Actions.

[29] The Applicants have advised the Court that at the time this Application to Stay was heard, there had been no case management judge named in the Howat Action and there is no timetable agreed upon for the Donegani No 1 Action.

[30] Facebook acknowledged that the Ontario Court was awaiting delivery of the plaintiffs' certification motions in both actions. More particularly, in relation to the Donegani No 1 Action, the absence of the plaintiff's motion has led to the postponement of a hearing that had been scheduled during the month of February 2020.

[31] Given the number of actions on similar facts proceeding in Ontario, it is unclear whether they will proceed together or separately.

[32] In this scenario, it seems far from certain that the Québec class members will have their rights adjudicated upon more rapidly if the matter is stayed here. The words of Justice Bisson in *Equifax* are applicable here given the myriad of proceedings in Ontario and elsewhere:

[...] En matière d'actions collectives plus particulièrement, la complexité et les coûts reliés à des recours multijuridictionnels, entre autres à la lumière des variantes qui existent entre les régimes juridiques des différentes provinces canadiennes et de ses territoires, peuvent également justifier un refus de

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<sup>11</sup> *Li c. Equifax*, supra note 5.

suspendre un recours québécois, et ce, malgré que les conditions de l'article 3137 CcQ soient remplies.<sup>12</sup>

[33] In addition, to draw from the words of the Court of Appeal in *Garage Poirier*,<sup>13</sup> there is no indication that a national settlement is imminent. The contrary seems more likely.

[34] As to the participation of the Applicants' lawyers, while this is assured in the Howat Action, where they have agreed to carve out the Québec class, it is not assured in the Donegani No 1 Action, where they are not involved.

[35] Other factors considered by Justice Bisson are also relevant here. The parties have not presented any evidence of the interest of the members of the Ontario class in the Québec proceeding, nor of the interest on the Québec class members in the actions undertaken elsewhere.

[36] Finally, the difference in the way proceedings are conducted in Québec in comparison to other jurisdictions may well allow for a faster resolution of the rights of the Québec class members. That said, the Court acknowledges that in the Québec application it remains to be seen whether there will be other preliminary matters to be considered. However, if so, they can be adjudicated upon rapidly.

[37] Facebook questions why the same lawyers representing the Applicants in the current proceedings consented to a stay in another Québec class action proceeding involving Mr. Thiel and Facebook, pending the outcome of a similar class action in Ontario. From the Court's perspective, the fact that another matter involving Mr. Thiel was stayed by consent is not particularly relevant. The object of the claim in that matter was a particular security breach which was announced on September 28, 2018. In addition, the Ontario action had been introduced prior to the Québec one and the Joint Application for a Stay alleges that the Ontario Court had appointed a judge to manage the proceeding in Ontario. There were also allegations that the matter was moving forward in Ontario. That the same progress is occurring in the Howat and Donegani No 1 Actions is certainly far from clear based on the representations made by the parties.

[38] The Court has the same view of the other Québec actions *Leventakis*<sup>14</sup> and *Papadatos*<sup>15</sup> in which Facebook is named as a defendant and which were stayed in favour of other national actions. They involve different causes of action and different circumstances. The mere fact that other class actions involving alleged breaches of confidentiality by Facebook have been stayed by consent does not lead to the conclusion that the present matter should have the same fate.

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<sup>12</sup> *Ibid.*

<sup>13</sup> *FCA Canada inc. c. Garage Poirier & Poirier inc.*, supra note 2.

<sup>14</sup> *Leventakis c. Facebook Inc.*, 2019 QCCS 2068.

<sup>15</sup> *Papadatos c. Facebook Inc.*, 2019 QCCS 1616.



[39] In conclusion, Facebook has failed to demonstrate why it is in the interest of the Québec class members that the proposed action be stayed here.

**WHEREFORE, THE COURT:**

[40] **DISMISSES** Defendants' Application to Temporarily Stay the Class Action;

[41] **TAKES ACT** of the undertaking of Québec class counsel to remove Québec residents from the proposed national classes in the Howat Action CV-19-00612179-00CP and the Donegani No 2 Action CV-18-599580-CP, both in the Ontario Superior Court of Justice;

[42] **WITH JUDICIAL COSTS.**

  
THOMAS M. DAVIS, J.S.C.

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Hearing date: November 25, 2019