File Number: 41212

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL OF QUEBEC)

BETWEEN:

MICHAEL ROYER
and
ALA'A ABOU-KHADRA

APPLICANTS
(Applicants)

AND:

CAPITAL ONE BANK (CANADA BRANCH)
and
CAPITAL ONE FINANCIAL CORPORATION
and
CAPITAL ONE BANK (USA) NATIONAL ASSOCIATION
and
AMAZON.COM.CA INC.
and
AMAZON.COM INC.
and
AMAZON WEB SERVICES CANADA, INC.
and
AMAZON WEB SERVICES, INC.
and
AMAZON TECHNOLOGIES, INC.

RESPONDENTS
(Respondents)

APPLICATION FOR LEAVE TO APPEAL
Article 40(1) of the *Supreme Court Act*, RSC 1985, c S-26 and Rule 25 of the *Rules of the Supreme Court of Canada*, SOR/2002-156)

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APPLICANTS' MEMORANDUM OF ARGUMENT

PART I – OVERVIEW AND STATEMENT OF FACTS

A. Overview

1. This Application raises matters of significant public and national importance concerning: (1) damages in the context of a data breach and the exposure of consumers' personal, private, and financial information; (2) the reliability of a defendants' purportedly factual submissions at an early stage of a class action proceeding (authorization/ certification), which are employed to oppose (and defeat) the class action; and (3) whether an appellate court can use its powers to cure a belatedly filed appeal to instead partially dismiss an appellant's appeal, even in the absence of any arguments from the respondents on this issue.

2. The present class action arises from a cybersecurity incident resulting in a massive data breach affecting the personal, private, and financial information of both individual and corporate clients of Capital One,[1] a credit card issuer and financial institution. Capital One collects this information on anyone applying for credit cards, and stores it in a database hosted on Amazon Web Services,[2] a third-party cloud-based server located in the U.S.

3. On March 22-23, 2019, a former employee of Amazon Web Services, Paige Thompson, unlawfully accessed Capital One's database containing the personal, private, and financial information of Capital One's individual and corporate clients who had submitted applications for credit cards. The breach compromised the information of over 6 million Canadians and 100 million Americans. Capital One did not publicly announced the data breach until July 23, 2019.

4. On July 30, 2019, Applicant Royer initiated class proceedings in the form of an Application to Authorize the Bringing of a Class Action against the Capital One Respondents in the Superior Court of Quebec (this was later amended to include Applicant Abou-Khadra as a co-representative plaintiff and to add the Amazon Web Services Respondents as co-defendants). In 2019, similar class actions were filed in British Columbia and Ontario. While certification was denied in

[1] "Capital One" refers to all Capital One entity Defendants, which includes: Capital One Bank (Canada Branch), Capital One Financial Corporation, and Capital One Bank (USA) National Association.
[2] "Amazon Web Services" refers to all Amazon entity Defendants, which includes: Amazon.com.ca, Inc., Amazon.com, Inc., Amazon Web Services Canada, Inc., Amazon Web Services, Inc., and Amazon Technologies, Inc.

Ontario,[3] the Supreme Court of British Columbia certified the class action as a multi-jurisdictional class proceeding under the *Class Proceedings Act*, R.S.B.C. 1996, c. 50. Notably, Québec residents were excluded from the class.[4]

5. As concerns the class action filed in Québec, on August 1, 2023, the Honourable Mr. Justice Bernard Tremblay, J.S.C. rendered judgment authorizing/ certifying the class action, in part, and appointing Applicant Royer as the representative plaintiff. However, the claim with respect to Applicant Abou-Khadra was dismissed (the "First Instance Judgment").[5] On September 13, 2023, Applicant Royer filed a Notice of Appeal appealing: (a) the rejection of Applicant Abou-Khadra as the representative plaintiff (only Applicant Royer was named as representative); and (b) the dismissal of certain common issues of fact and law, as well as the conclusions sought relating to compensatory and/or moral damages.

6. On September 20 and 21, 2023, Respondents Capital One and Amazon Web Services filed separate *Applications for Incidental Leave to Appeal*. During the hearing wherein the Respondents were seeking leave in front of the Honourable Mr. Justice Stephen W. Hamilton, J.A., a question arose as to whether the Applicants' Notice of Appeal had been filed within 30 days following the *Avis de jugement/* Notice of Judgment, given that there had been two notices of judgment issued due to a rectification of the Judgment in First Instance. As instructed, on December 11, 2023, the Applicants filed an *Application De Bene Esse for Leave to Appeal Beyond the Delay*.

7. On February 7, 2024, the Court of Appeal of Quebec, by a panel of three judges, granted the Applicants' *Application De Bene Esse for Leave to Appeal Beyond the Delay*, but dismissed it as concerns the Applicant Abou-Khadra, and granted the Defendants' *Applications for Incidental Leave to Appeal a Judgment Authorizing a Class Action* (the "Judgment on Appeal").

8. It is submitted that this Honourable Supreme Court should grant leave to appeal to decide the important issues of law underlying the Applicants' class action, as well as, the decision on the *Application De Bene Esse for Leave to Appeal Beyond the Delay* for at least five interlinked, reasons:

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[3] *Del Giudice v. Thompson*, 2020 ONSC 5379, appeal dismissed in *Del Giudice v. Thompson*, 2024 ONCA 70.
[4] *Campbell v. Capital One Financial Corporation*, 2022 BCSC 928, at para. 178 (judgment on appeal under reserve).
[5] *Royer c. Capital One Bank (Canada Branch)*, 2023 QCCS 2993.

(a) To Restore Consistency in Québec Class Action Law. This Honourable Supreme Court's intervention is necessary to remediate the doctrinal inconsistency that will otherwise be introduced in Québec class action law. In its Judgment on Appeal, the Court of Appeal misapplied its own precedent set in *Levy c. Nissan Canada inc.*, 2021 QCCA 682, at para. 43. Consequently, the Court of Appeal erroneously concluded that an individual's or entity's right of action against a defendant in the context of a data breach, which compromises personal, private, and financial information – and thus the class definition – is restricted to persons notified directly by the defendant by letter or email. This inconsistency cannot be allowed to stand.

(b) To Advance Access to Justice and Ensure Fair Victim Compensation. This Honourable Supreme Court's intervention is required to affirm, emphasize, and strengthen the principles of access to justice and victim compensation, which are the "twin goals" of Québec's class action regime.[6] Confining the personal right of action arising from a data breach resulting in the compromise of personal information to individuals or entities whom the Respondents informed or otherwise notified by letter or email, bestows unilateral discretionary power on prospective defendants and a concomitant denial of access to justice. In the context of the present case, affirming such limitations on the class definition would arbitrarily deny access to justice for anyone whose information was compromised in the March 2019 data breach, but who, for whatever reason, were not notified by the defendants. Allowing the defendants control over the narrative cannot stand.

(c) To Promote Behaviour Modification and Deterrence of Future Wrongdoing. This Honourable Supreme Court's intervention is required to affirm, emphasize, and strengthen the promotion of behaviour modification and the deterrence of future wrongdoing.[7] In the context of the present case, affirming that the class definition may be limited by the defendants actions creates perverse incentives to conceal wrongdoing by essentially allowing defendants to proactively and pre-emptively limit their liability in damages or exposure by cherry-picking whether and how many persons to notify in the event of a data breach that compromise the personal, private, and financial information of millions of individuals and entities.

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[6] *Desjardins Financial Services Firm Inc. v. Asselin*, 2020 SCC 30, at para. 116; *L'Oratoire Saint-Joseph du Mont-Royal v. J.J.*, 2019 SCC 35, at para. 8.
[7] *L'Oratoire Saint-Joseph du Mont-Royal v. J.J.*, 2019 SCC 35, at para. 6. *Bank of Montreal v. Marcotte*, 2014 SCC 55, at para. 43.

(d) To Promote Temporal Proximity and the Standard of Proof Applicable to a Plaintiff at the Authorization Stage. This Honourable Supreme Court's intervention is required to clarify the role, significance, and judicial treatment of temporal proximity between the fault allegedly committed by the Respondents and the injury allegedly incurred by the Applicants as part of their burden and standard of proof to show that "[t]he facts alleged appear to justify the conclusions sought" within the meaning of art. 575(2) of the *Code of Civil Procedure*, CQLR c C-25.01 ("C.C.P.") and therefore disclose an arguable case. In *Belley c. TD Auto Finance Services Inc./Services de financement auto TD inc.*, 2015 QCCS 168, at paras. 56-61, the Superior Court of Quebec held that the temporal proximity between a data breach (the fault) and an alleged fraud and identity theft suffered by the Applicant (the injury) were sufficient to establish an arguable case for the purposes of art. 575(2) C.C.P. The Court emphasized that the inquiry into the requisite *causal* link – of which *temporal* proximity represents a single component – is a question to be decided on the merits, after authorization, with the benefit of testimony and other evidence. In the face of an equivalent legal syllogism and circumstances advanced by Applicant Abu-Khadra in the present case, the Court of Appeal concluded that his allegations were merely hypothetical, based on personal belief, and insufficient to disclose an arguable case against the Respondents.[8]

(e) Pre-emptively and *Sua Sponte* Dismissing a Class Action after the Presentation of a Different Motion. It is true the Court of Appeal does have the right when evaluating whether a late appeal should be accepted to look at if the appeal lacks merit; however, does it have the power to partially dismiss the Applicants' appeal when no other party is making this argument? In the present case, Applicant Abu Khadra's appeal should not have been prematurely dismissed.

9. It is the Applicants' position that:

i) The ability of an individual or entity to pursue legal action against one or more defendants in a class action involving a data breach, which compromises personal, private, and financial, does not hinge on whether they have been directly notified by the defendant(s);

ii) The temporal proximity or closeness in time between a data breach leading to the compromise of personal information (fault) and subsequent fraudulent activities or

[8] *Royer c. Capital One Bank (Canada Branch)*, 2024 QCCA 154, at para. 16.

transactions (injury) is sufficient. Determining the necessary causal link between the fault and injury alleged in a class action must be based on evidence presented at the merits stage. Where a judge undertakes this inquiry at the authorization stage, they overstep their essentially procedural role[9] and unlawfully heightens the standard for the applicant to establish that "the alleged facts appear to justify the conclusions sought" under art. 575(2) C.C.P., therefore committing a reversible error of law.

B. Background Facts

10. On March 22-23, 2019, a former employee of Amazon Web Services, Paige Thompson, hacked the Capital One cloud-based database containing the personal, private, and financial information of Capital One's individual and corporate clients who had previously applied for credit cards. The data breach compromised the personal information of 6 million Canadians and 100 million Americans.[10]

11. The data included information submitted on credit card applications between 2005 and early 2019, including, but not limited to: name, date of birth, address, email address, phone number, mother's maiden name, banking information, housing situation, status of mortgage, annual income, and employer name. Also compromised were some customers' credit limits, balances, payment history and credit scores, and segments of transaction histories over 23 days in 2016-2018. One million social insurance numbers were also stolen.[11]

12. The Capital One Respondents were informed of the data breach by an independent security researcher on July 17, 2019 and only publicly announced the data breach on July 29, 2019. The Capital One Respondents subsequently notified certain affected individuals and entities of the data breach, highlighting measures to monitor and protect their personal data and offering them free identity theft protection and monitoring services for a period of two years.[12]

13. On July 30, 2019, Applicant Royer filed the Application to Authorize the Bringing of the present class action, alleging that the failure of the Capital One Respondents to adequately safeguard their customers' personal, private, and financial information directly caused legally

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[9] *L'Oratoire Saint-Joseph du Mont-Royal v. J.J.*, 2019 SCC 35, at paras. 6-7; *Vivendi Canada v Dell'Aniello*, 2014 SCC 1, at para. 37.
[10] *Royer* c. *Capital One Bank (Canada Branch)*, 2023 QCCS 2993, at paras. 1 & 5.
[11] *Campbell* v. *Capital One Financial Corporation*, 2022 BCSC 928, at para. 178.
[12] *Royer* c. *Capital One Bank (Canada Branch)*, 2023 QCCS 2993, at paras. 197-199, 201.

cognizable harm to Class Members. This harm includes, among other things, the devaluation of their private information, trouble and inconvenience in having to carefully review their transactions and remain vigilant against fraud, the need for additional credit monitoring and identity theft protection services beyond those offered by the Capital One Respondents, and potential future fraud. The Application also seeks punitive damages.

14. On January 29, 2020, Applicant Abou-Khadra was added as a co-plaintiff in an amended Application.[13]

15. On August 1, 2023, the Honourable Mr. Justice Bernard Tremblay, J.S.C. rendered judgment authorizing the class action in part with respect to Applicant Royer, but refusing authorization as concerns Applicant Abou-Khadra.

16. Justice Tremblay granted authorization for Applicant Royer's claim seeking damages for additional credit monitoring services not already offered by the Respondents and identified it as one of the common issues to be resolved on the merits. However, Justice Tremblay refused to authorize Applicant Royer's claim for non-pecuniary compensatory damages for stress, anxiety and fear occasioned by the data breach based on his view that these constitute the ordinary stresses of life that people may encounter in such circumstances, and that uncertain, future or hypothetical injuries are not legally cognizable or compensable.[14]

17. As concerns Applicant Abou-Khadra, Justice Tremblay held that his pleadings did not disclose a cause of action against the Respondents[15] and that he as a result, fell outside the class definition due to his failure to provide evidence of having received a notification from the Respondents of the data breach. Despite acknowledging that Applicant Abou-Khadra had been the victim of credit card fraud on or about July 30, 2019, Justice Tremblay relied on an affidavit that he had authorized the Respondents to file pursuant to art. 574 C.C.P. to conclude that the fraud was unrelated to the cyber incident.[16]

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[13] The amended Application also added Amazon.com.inc, Amazon.com.ca inc., Amazon Web Services Canada inc., Amazon Web Services inc. and Amazon Technologies inc. as Defendants.
[14] *Royer* c. *Capital One Bank (Canada Branch)*, 2023 QCCS 2993, at paras. 181-186, 208, 248-249.
[15] *Royer* c. *Capital One Bank (Canada Branch)*, 2023 QCCS 2993, at para. 244; *Royer c. Capital One Bank (Canada Branch)*, 2024 QCCA 154, at para. 1.
[16] *Royer* c. *Capital One Bank (Canada Branch)*, 2023 QCCS 2993, at paras. 83-90, 235, 243.

18. The *Avis de judgment/* Notice of Judgment of the First Instance Judgment was sent to the parties on August 10, 2023, pursuant to art. 335 C.C.P. On the parties' request, Justice Tremblay subsequently rectified two of the conclusions contained in the August 1, 2023 judgment, clarifying the scope of the period during which Class Members may opt out of the certified class action,[17] and of the period during which the Respondents are required to publish notices of the class action certification.[18] The rectified First Instance Judgment is dated August 10, 2023 and the new *Avis de jugement* is dated August 16, 2023.[19]

19. Calculating the time limit to file the Notice of Appeal of the First Instance Judgment pursuant to art. 338 C.C.P. as of August 10, 2023, and in light of encountering delays in serving the Respondent Amazon Web Services with same, the Applicants filed said Notice of Appeal on September 13, 2023.[20]

20. On September 20 and 21, 2023, the Capital One and Amazon Web Services Respondents filed applications for leave to cross-appeal. Respondent Amazon Web Services also contended that the Applicants' Notice of Appeal was untimely filed, and that said Notice should have been filed on September 11, 2023 in light of their grounds of appeal being focused on issues other than those rectified by Justice Tremblay in the August 10, 2023 version of the judgment.[21]

21. On November 7, 2023, the Honourable Justice Stephen W. Hamilton, J.A., sitting alone in the Court of Appeal of Quebec, postponed the hearing on the Respondents' motions for leave to file incidental appeals to January 29, 2024, due to the Applicants commitment to file a motion *de bene esse* for leave to appeal beyond the delay before a panel of three judges.[22] On December 11, 2023, the Applicants filed an Application *De Bene Esse* For Leave to Appeal Beyond the Delay pursuant to art. 363 para. 2 C.C.P. (the "Application *De Bene Esse*").

22. On February 7, 2024, in a judgment authored by the Honourable Justice Marie-France Bich, J.C.A., (the "Judgment on Appeal") a three-judge panel of the Court of Appeal of Quebec also comprised of the Honourable Justice Patrick Healy, J.C.A., and the Honourable Justice Benoit

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[17] *Royer* QCCS, note 3, at para. 251; *Royer* QCCA, note 10, at para. 2.
[18] *Royer* QCCS, note 3, at para. 254; *Royer* QCCA, note 10, at para. 2.
[19] *Royer* QCCA, note 10, at para. 2.
[20] *Royer* QCCA, note 10, at para. 3.
[21] *Royer* QCCA, note 10, at para. 4.
[22] *Royer c. Amazon.com.ca.inc.*, 2023 QCCA 1426.

Moore, J.C.A., was issued. The judgment granted Applicant Royer's Application *De Bene Esse*, but rejecting same as concerns Applicant Abou-Khadra as well as granting and the Respondents' Application for Leave to Cross-Appeal.[23]

23. Applying art. 363 para. 2 C.C.P., the Court of Appeal concluded that Applicant Royer met all three conditions for granting an application *de bene esse*: (1) less than six months had elapsed since the publication of the judgment sought to be appealed; (2) it was impossible for the Applicant to have acted earlier; and (3) the envisaged appeal has a reasonable chance of success.[24]

24. However, the Court of Appeal held that Applicant Abou-Khadra met the first two criteria, but concluded that his pleadings, even if taken as true, did not disclose a cause of action against the Respondents such that his appeal had no reasonable chance of success.[25]

PART II – STATEMENT OF THE QUESTIONS IN ISSUE

25. The central question at issue in this appeal is whether the Court of Appeal erred in dismissing, in part, the Applicants' *Application De Bene Esse* of the judgment of the Superior Court of Quebec on the basis that Applicant Abu-Khadra's personal claim had no reasonable chance of success.

26. The answer to this question depends on the two following questions which are of public and national importance, namely:

1. Did the Court of Appeal and Superior Court of Quebec err in concluding that the Applicant Abu-Khadra lacked a personal cause of action because the fraud that was committed on his Capital One credit card cannot be attributable to the data breach?

2. Did the Court of Appeal and Superior Court of Quebec err in concluding that Applicant Abu-Khadra did not have a personal cause of action because he had not been informed or otherwise notified by the Capital One Respondents that his personal, private, and financial information had been compromised as part of the cyber incident?

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[23] *Royer* QCCA, note 10, at paras. 23-25.
[24] *Royer* QCCA, note 10, at paras. 11-15.
[25] *Royer* QCCA, note 10, at paras. 11-19.

3. Did the Court of Appeal of Quebec err in dismissing Applicant Abu-Khadra's appeal *sua sponte* while deciding whether to cure a belatedly filed appeal in the absence of any arguments from the Respondents on this issue?

27. These questions raise issues that transcend the immediate appeal and fall within the five categories of questions of law or mixed fact and law listed in s. 40(1) of the *Supreme Court Act*.

(1) Should the inquiry into the requisite causal connection between the fault and injury alleged in an application for authorization be resolved at the authorization/ certification stage or on the basis of evidence presented at the merits stage after the class action has been authorized?

(2) Is an individual or entity's cause of action against one or more defendants in the context of a class action involving a data breach resulting in personal information being compromised contingent upon receiving notification of the breach by the Respondent(s)?

PART III – ARGUMENT

28. With regard to both arguments below, the consistent error which runs through the analysis of both issues (lack of notice of the breach and the timing of the fraudulent transactions) was the authorization judge's reliance, at the authorization stage, of Respondent Capital One's evidence. With respect, the authorization judge gave Respondent Capital One's evidence too much weight at the authorization stage, as stated in *Benamor* c. *Air Canada*, 2020 QCCA 1597:

> « [44] Une note de prudence s'impose : les faits qui doivent être tenus pour avérés sont ceux allégués par le requérant, pas ceux déposés en preuve par l'intimée. Ici, le juge, s'autorisant du pouvoir octroyé à l'article 574 *C.p.c.*, a permis le dépôt de déclarations sous serment au soutien de la contestation de la demande d'autorisation. Cela ne signifie pas que le requérant est nécessairement d'accord avec les affirmations énoncées dans ces déclarations. »

29. This was reiterated and expanded upon in *Durand* c. *Subway Franchise Systems of Canada*, 2020 QCCA 1647:

> « [52] Si la preuve déposée est susceptible d'être éventuellement contredite par le requérant, le juge de l'autorisation doit faire preuve de prudence et ne pas tenir pour acquis qu'elle est vraie[10]. Il doit se rappeler qu'il ne doit tenir pour avérés que les faits allégués par le requérant et non pas ceux allégués par l'intimé, même lorsque la preuve produite par ce dernier démontre *prima facie* l'existence de ces faits[11].

> [53] À ce stade, le fardeau du requérant en étant un de logique (également qualifié de fardeau de démonstration) et non de preuve[12], il n'a d'ailleurs pas à offrir une preuve prépondérante de ce qu'il avance, mais bien, tout au plus, une « certaine preuve »[13] et n'a pas l'obligation de contester la preuve que l'intimé dépose, ni d'y répondre. D'ailleurs, il n'est souvent pas en mesure de le faire puisqu'il n'a pas toujours toute la preuve en main, une bonne partie de celle-ci pouvant être en possession de l'intimé[14].
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> [54] Bref, la preuve déposée par un intimé au soutien de sa contestation ne change pas le rôle du juge de l'autorisation qui peut, certes, trancher une pure question de droit et interpréter la loi pour déterminer si l'action collective projetée est frivole, mais qui ne peut, pour ce faire, apprécier la preuve comme s'il y avait eu un débat contradictoire ou encore présumer vraie celle déposée par l'intimé alors qu'elle est contestée ou simplement contestable. »

30. This is a reviewable error as in *Nashen* c. *Station Mont-Tremblant*, 2022 QCCA 415:

> « [26] Une erreur de droit sera commise par le juge de première instance s'il « impose au demandeur un seuil de preuve trop élevé ou [s'il] se penche sur le fond du différend »[9]. Ce sera également le cas s'il considère les éléments de preuve déposés par la partie défenderesse comme s'il y avait eu un débat contradictoire[10].
> …
> [40] En somme, la juge a imposé à l'appelant un seuil de preuve trop élevé au stade de l'autorisation, a analysé une preuve incomplète et contradictoire de façon plus que sommaire, en tenant au surplus certains des faits allégués par les intimées comme avérés, pour en tirer des conclusions de fait et de droit prématurées. Ce faisant, elle a « emprunté à maintes reprises à des considérations réservées à l'appréciation du juge du fond »[19], justifiant ainsi la Cour d'intervenir afin d'infirmer le jugement entrepris et d'autoriser l'appelant à exercer l'action collective en litige. »

ISSUE 1: Did the Quebec Court of Appeal err in dismissing the Applicant's *Application De Bene Esse* for Leave to Appeal the judgment of the Quebec Superior Court beyond the applicable time limit on the basis that Applicant Abu Khadra's appeal had no reasonable chance of success?

31. The Applicants respectfully submit that the Court of Appeal of Quebec erred in dismissing Applicant Abu Khadra's Application *De Bene Esse* on the basis that his pleadings did not disclose an arguable case against the Capital One Respondents such that his appeal had no reasonable chance of success.[26]

32. In particular, the Court erred in arriving at its conclusion on the basis that the allegations against the Capital One Respondents contained in Applicant Abu Khadra's pleadings were merely hypothetical or based on personal belief even if taken as averred; and that Applicant Abu Khadra

[26] *Royer* QCCA, note 10, at paras. 12-19.

did not receive a letter or email from the Capital One Respondents informing him that his personal information had been compromised during the data breach.[27]

33. As noted, the data breach occurred on March 22-23, 2019.[28] The Capital One Respondents were informed of the breach on July 17, 2019[29] and made it public on July 29, 2019.[30] On July 30, 2019, Applicant Abou-Khadra experienced two fraudulent transactions on his Capital One credit card.

34. Significantly, in its decision authorizing a class action in *Belley c. TD Auto Finance Services Inc./Services de financement auto TD inc.*, 2015 QCCS 168 ("*Belley*") the Superior Court of Quebec held at paras. 56-61 that the "time link" between a data breach and an "alleged identity theft and fraud allow the Court to conclude to an arguable case for the Petitioner."[31] The Superior Court accepted that "[i]t may or may not be that the identity theft and fraud alleged by Mr. Belley are a result" of the data breach at issue in that case, but emphasized that the inquiry into the requisite causal link between them was "a question to be determined on the merits" on the basis of evidence and testimony – not at the authorization stage.[32]

35. The above conclusions apply *mutatis mutandis* to the allegations advanced by the Applicant Abou-Khadra against the Respondents in the case at bar.

36. The fundamental issue revolves around whether the Applicant's allegations meet the criteria for establishing a cause of action against the Respondents, which hinges on whether the "facts alleged appear to justify the conclusions sought" against the Respondents within the meaning of art. 575(2) C.C.P. A generous and purposive reading of this Honourable Supreme Court's jurisprudence interpreting and applying art. 575(2) C.C.P. in accordance with the goals of access to justice, victim compensation,[33] the deterrence of defendants' future wrongdoing and behaviour modification[34] leads ineluctably to the conclusion that the answer is affirmative.

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[27] *Royer* QCCA, note 10, at paras. 16-19.
[28] Exhibit R-37a and Exhibit R-77.
[29] Exhibit R-37a and Exhibit R-77.
[30] Exhibit R-1a.
[31] *Belley c. TD Auto Finance Services Inc./Services de financement auto TD inc.*, 2015 QCCS 168, at para. 61.
[32] *Belley c. TD Auto Finance Services Inc./Services de financement auto TD inc.*, 2015 QCCS 168, at para. 60.
[33] *Desjardins* SCC, note 4, at para. 116.
[34] *Oratoire Saint-Joseph*, note 5, at paras. 6, 8, 61.

37. The following synthesis of this Honourable Supreme Court's caselaw on the sufficiency requirement appears in *L'Oratoire Saint-Joseph du Mont-Royal v. J.J.*, 2019 SCC 35 at para. 58 (majority reasons of Brown J.):

> The applicant's burden at the authorization stage is simply to establish an "arguable case" in light of the facts and the applicable law: *Infineon*, at paras. 65 and 67; see also *Vivendi*, at para. 37; *Marcotte v. Longueuil*, at para. 23. This is a "low threshold": *Infineon*, at para. 66. The applicant need establish only a mere "possibility" of succeeding on the merits, as *not even* a "realistic" or "reasonable" possibility is required: *Infineon*, at paras. 80, 100, 101, 130, 136 and 144; *Charles*, at para. 70; *Theratechnologies inc. v. 121851 Canada inc.*, 2015 SCC 18, [2015] 2 S.C.R. 106, at paras. 19, 35, 36 and 38; *Asselin v. Desjardins Cabinet de services financiers inc.*, 2017 QCCA 1673, at paras. 29-31 (CanLII). The legal threshold requirement under art. 575(2) *C.C.P.* is a simple burden of "demonstration" that the proposed "legal syllogism" is tenable: *Pharmascience inc.*, at para. 25; *Martin v. Société Telus Communications*, 2010 QCCA 2376, at para. 32 (CanLII); *Infineon*, at para. 61. As I pointed out above, it is in principle not appropriate at the authorization stage for the court to make any determination as to the merits in law of the conclusions in light of the facts being alleged. It is enough that the application not be "frivolous" or "clearly wrong" in law, or in other words, the applicant must establish "a good colour of right": *Guimond v. Quebec (Attorney General)*, [1996] 3 S.C.R. 347, at paras. 9-11; *Berdah v. Nolisair International Inc.*, [1991] R.D.J. 417 (C.A.), at pp. 420-21, per Brossard J.A.; *Infineon*, at para. 63. As for the evidentiary threshold requirement under art. 575(2) *C.C.P.*, it is more helpful to define it on the basis of what it is *not*. First, the applicant is *not* required to establish an arguable case in accordance with the civil standard of proof on a balance of probabilities, as the evidentiary threshold for establishing an arguable case falls "comfortably below" that standard: *Infineon*, at para. 127; see also paras. 65, 89 and 94. Second, he or she is *not*, unlike an applicant elsewhere in Canada, required to show that the claim has a "sufficient basis in fact": *Infineon*, at para. 128.

38. This Honourable Supreme Court emphasized that the sufficiency requirement in art. 575(2) C.C.P. should be interpreted and applied in a manner consistent with the role of an applications judge at the authorization stage. This role entails screening out only those applications that are deemed "'frivolous', 'clearly unfounded' or 'untenable'"[35]. In undertaking this assessment, the allegations pleaded by Applicant Abu-Khadra must be taken as true except when they are *prima*

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[35] *Oratoire Saint-Joseph*, note 5, at para. 56, citing *Sibiga c. Fido Solutions inc.*, 2016 QCCA 1299, at paras. 34, 52, 78, *Charles c. Boiron Canada inc.*, 2016 QCCA 1716 at para. 70, *Fortier c. Meubles Léon ltée*, 2014 QCCA 195, at para. 70, Pierre-Claude Lafond, *Le recours collectif, le rôle du juge et sa conception de la justice: impact et évolution*. Cowansville, Qué.: Yvon Blais, 2006 (2006) at pp. 112, 116, and *Infineon Technologies AG v. Option consommateurs*, 2013 SCC 59, at paras. 61, 125, 150. See also *Desjardins* SCC, note 4, at paras. 25, 27, 55-57.

facie implausible, unlikely, or imprecise.[36] The vagueness of allegations is not in and of itself sufficient to conclude that the applicant has failed to establish an arguable case. Instead, allegations must be considered "in light of all the documentary evidence…"[37]

39. In the case at bar, the Court of Appeal of Quebec's conclusion that the allegations formulated in the Application for Authorization were hypothetical or merely based on personal belief and insufficient to establish a cause of action against the Capital One Respondents even if taken as true is inconsistent with the above-mentioned principles.

40. First, the Court of Appeal's affirmation of the Quebec Superior Court's conclusion that the Applicant's allegations did not disclose a viable cause of action[38] eschews the generous, broad, purposive approach that this Honourable Court has emphasized should be applied consistently with the objectives of class proceedings.[39]

41. To determine whether an application discloses an arguable case, the entire application must be read in context "in order to understand the 'true meaning' of the allegations" advanced.[40] The allegations "may be imperfect" and "need not specify in minute detail the evidence that [the] applicant intends to adduce on the merits…" Further, any inferences of fact or law that may stem from the allegations must be considered in determining whether an arguable case is advanced.[41] It is unnecessary and ill-advised to undertake a line-by-line treasure hunt for error or imperfection in the application for authorization to justify the conclusion that it does not disclose an arguable case. The Court of Appeal has itself warned that "a rigid or literal approach is risky."[42]

42. In the present case, however, a rigid, literal, and ungenerous approach was applied by the Court of Appeal in concluding that the Quebec Superior Court did not err in holding that the Applicant's allegations were merely hypothetical and based on personal belief and failed to disclose an arguable case against the Capital One Respondents even if taken as averred. Any

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[36] *Oratoire Saint-Joseph*, note 5, at para. 59, citing, *inter alia*, *Sibiga*, note 37, at para. 52; *Infineon*, note 37, at para. 67; *Charles*, note 37, at para. 43; and *Fortier*, note 37, at para. 69.
[37] *Oratoire Saint-Joseph*, note 5, at para 60, citing *Comité d'environnement de La Baie Inc. v. Société d'électrolyse et de chimie Alcan Ltée*, [1990] R.J.Q. 655, at 660-661.
[38] *Royer* QCCA, note 10, at para. 16.
[39] *Desjardins* SCC, note 4, at para. 16.
[40] *Desjardins* SCC, note 4, at paras. 16-17, 21.
[41] *Desjardins* SCC, note 4, at para. 21, citing *Transport TFI 6 v. Espar inc.*, 2017 QCCS 6311, at para. 23.
[42] *Desjardins* SCC, note 4, at para. 19, citing *Asselin c. Desjardins Cabinet de services financiers*, 2017 QCCA 1763, para. 95 ("*Desjardins* QCCA").

doubts arising from the allegations should, in any event, have been resolved in favour of authorization.[43]

43. Second, the Court of Appeal's conclusion that the Applicant's allegations of his personal information being compromised and becoming a victim of fraudulent transactions as a result of the data breach is inconsistent with the essentially procedural "screening" function of applications judges at the authorization stage.[44] This Honourable Supreme Court has repeatedly emphasized that questions going to the merits of a proposed action are only to be considered *after* authorization has been granted,[45] and that it is, in principle, inappropriate and a reversible error of law for judges to do otherwise.[46]

44. The Court of Appeal of Quebec arrived at the same conclusion in *M.L. c. Guillot*, 2021 QCCA 1450 holding that the applications judge had overstepped their procedural screening function and imposed on the applicants a higher evidentiary burden than that required by art. 575(2) C.C.P. in finding that their allegations failed to establish a causal connection and were therefore insufficient to disclose an arguable case. [47]

45. Additional judgments of the Court of Appeal confirm that the inquiry into causal connection is undertaken at the merits stage of proceedings, not at the authorization stage.[48] It is deemed sufficient for the applicant to demonstrate an arguable case that the claimed injury is the direct result of the alleged misconduct.[49] On this point, the Court of Appeal directly applies the standard of causality as established by this Honourable Supreme Court's to be applied at the authorization stage.[50]

46. Further, the Applicant's allegations are far from frivolous, grounded as they are in a wholly logical legal syllogism. They essentially mirror allegations that rely on temporal proximity that the Quebec Superior Court identified as sufficient to authorize the class action in *Belley*.[51] The

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[43] *Oratoire Saint-Joseph*, note 5, at paras. 42, 79, citing *Sibiga*, note 37, at para. 51; *Charles*, note 37, at para. 43.
[44] *Oratoire Saint-Joseph*, note 5, at paras. 6-7; *Vivendi Canada v. Dell'Aniello*, 2014 SCC 1, at para. 37.
[45] *Oratoire Saint-Joseph*, note 5, at para. 7, citing *Infineon*, note 37, at para. 68 and *Vivendi*, note 45, at para. 37
[46] *Oratoire Saint-Joseph*, note 5, at paras. 22, 55, 58; *Infineon*, note 37, para. 60; and *Vivendi*, note 45, at para. 4, 37.
[47] *M.L. c. Guillot*, 2021 QCCA 1450, at paras. 33-34.
[48] *Desjardins* QCCA, at para. 111; *J.J. c. Oratoire Saint-Joseph du Mont-Royal*, 2017 QCCA 1460, at para. 143.
[49] *Desjardins* QCCA, at para. 112, citing *Infineon*, note 37 at para. 144, and requiring only "une simple possibilité"
[50] *Infineon*, note 37 at para. 144.
[51] *Belley*, note 8, at paras. 60-61.

Court of Appeal's narrow interpretation of the Applicant's allegations instead echo the "sufficient basis in fact" requirement applicable in other provinces, a requirement that this Honourable Supreme Court has emphasized does not apply in Québec.[52]

47. Even as a factual matter, the reality is that, at least at the authorization stage, even if Respondent Capital One's evidence is taken at face value, the authorization judge cannot be able to definitively determine how it came about that Applicant Abou-Khadra's Capital One credit card was defrauded. A professional fraudster knows how to use the type of information that was part of the data leak to change banking passwords, email passwords, and then order a new card to a changed address, maybe a P.O. Box and use it for nefarious purposes (Exhibit R-48). Bad actors can also use phishing techniques to contact the victim and pretend to be a trusted source, like their bank, and because they know so much about their victims, they are trusted and the victims feel comfortable giving them even more confidential information that they didn't already have. Perhaps the fraudster already had the credit card information (for example, from the dark web), but could not link it to a particular person or address, but after this information was leaked, they were able to combine this new information with old information and commit their fraud (Exhibit R-49).[53]

48. This type of reasoning can be found in *Zuckerman* c. *MGM Resorts International*, 2022 QCCS 2914:

> "[43] Although their financial information was not involved in the incident, MGM's customers concerned by the Data Breach are at potential risk for SIM swapping and spear-phishing campaigns[22].The date of birth combined with other personal information may represent sensitive data that required a higher level of protection..
> …
> [46] For these reasons, Zuckerman demonstrates a *prima facie* privacy violation at this stage. It would be premature, on the basis of incomplete evidence, to conclude that the information concerned by the Data Breach is insufficient to place the Class members at risk of fraud.
> …
> [60] Exhibit R-5 states that the personal data concerned by the Data Breach "presents a host of opportunities that cybercriminals will all too eagerly seize. Data like this is frequently used to launch spear phishing campaigns. […] Exposed phone numbers create an additional risk: SIM swapping"."

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[52] *Oratoire Saint-Joseph*, note 5 at para. 58, citing *Infineon*, note 37, at para. 128.
[53] "The aggregation of data collected from multiple breaches can provide cyber threat actors the ability to build comprehensive profiles to conduct cyber threat activity against specific groups or individuals."

49. Finally, and to add credibility to Applicant Abou-Khadra's story, there are at least 12 other Class Members that stated that their Capital One credit card and/or SIN were defrauded following the cyber incident (Exhibit R-30).[54]

50. Overall, the Court of Appeal erred in concluding that the Applicant's pleadings did not disclose a cause of action on the basis that the allegations against the Capital One Respondents were merely hypothetical or based on personal belief even if taken as true.[55] This misinterpretation by the Court of Appeal involves both factual and legal elements can be reversed by this Honourable Supreme Court.[56]

ISSUE 2: Did the Quebec Court of Appeal err in considering the absence of a notification letter from the Capital One Respondents, informing Applicant Abu Khadra that his personal information had been compromised during the data breach, as grounds for concluding that he lacked a personal cause of action against them?

51. Is should be noted that, as a factual matter, Respondent Capital One had submitted two affidavits as relevant evidence,[57] which, make clear that they had meticulously reviewed Applicant Abou-Khadra's personal situation; yet nowhere in these affidavits does Capital One say that Mr. Abou-Khadra's personal and financial information was not part of the cyber incident – the lack of this disclosure is quite telling. Respondent Capital One has never denied that Applicant Abou-Khadra's personal and financial information was leaked, instead they only argue that he did not allege that he received a letter.

52. The Court of Appeal relied on its precedent in *Levy c. Nissan Canada inc.*, 2021 QCCA 682 ("*Levy*") to conclude that a personal cause of action entitling its holder to institute proceedings against a defendant in the context of a data breach leading to the compromise and theft of personal information is limited to individuals who received a letter or email from the defendant informing them that their personal information had been compromised, and who had incurred a legally

[54] For example and *inter alia*, Daniel (Terrebonne), Andréanne (Lévis), Marcel (Sainte-Julie), Randy (Montréal Nord), Lori (Mille-Isles), Jean (L'Ancienne-Lorette), Nathalie (L'Assomption), Stéphane (Québec, Québec), Linda (Pierrefonds), Myriame (Gatineau, Quebec), Brigitte (Saint-Jérôme), Marie Pier (Mascouche).
[55] *Royer* QCCA, note 10, at paras. 16-17.
[56] *Oratoire Saint-Joseph*, note 5 at para. 22.
[57] Sworn Statement of Sevren Williams dated December 7, 2020 (produced as Exhibit CO-1A); Sworn Statement of Jeffrey Behan dated September 29, 2021 (produced as Exhibit C-1).

cognizable injury.[58] Note that *Levy* also involved a class action anchored in the compromise of customers' personal information as a result of a data breach.

53. It is respectfully submitted that the Court of Appeal's reliance on *Levy* is incorrect. Said precedent is clear that the applicant having received such a letter from the defendant is *not* a condition precedent to holding a personal right of action in class actions of this nature:

> "On the other hand, I agree with Appellant that the judge's limitation to those customers who received a letter is incorrect and thus inappropriate.[39] A victim of a data breach may have been among the 1.3 million to whom a letter was sent, but may never have received it for whatever reason, such as due to a change of address or simply because the letter was lost in the mail. On the other hand, I understand that Respondent has not conceded or ascertained that all persons to whom a letter was sent did in fact suffer a data breach. Also, Respondent may have missed some people in the sending, which would make the description illogical because circular. I am, however, cognizant of Respondent's argument that unless the judge's description of the class is retained, Appellant would not be a member. It would thus appear that a combination of the descriptions is required. As such, I consider that the judge committed a reviewable error in the manner in which he exercised his discretion to redefine the class. Accordingly, and respecting the criteria established in the case law as enumerated above, the group should be described as: "All persons in Québec: (i) whose personal or financial information held by Respondent was compromised in a data breach of which Respondent was advised by the perpetrators by email on December 11, 2017, or (ii) who received a letter from Nissan Canada on or about January 2018 informing them of such data breach."[59] (emphasis added)

54. In other words, an applicant holds a personal right of action against the defendant in respect of any legally cognizable harm resulting from the compromise of their personal information in a data breach, regardless of whether they have received a letter from the defendant informing them of same. Consequently, a judge who chooses to limit the class definition in class actions of this

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[58] *Royer* QCCA, note 10, at para. 18, citing *Levy c. Nissan Canada inc.*, 2021 QCCA 682, but without pinpointing the specific paragraph containing that proposition. This may be explained by the fact that the Court of Appeal rendered its judgment on the same day as the second day of the two-day hearing in the matter, namely, February 7. The absence of a pinpoint citation may further suggest that the Court rendered its judgment *nisi prius* – that is, in haste and without sufficient consideration of binding authority, namely, the precedent in *Levy* (*R. v. Sullivan*, 2022 SCC 19, at para. 73).

[59] *Levy*, note 57, at para. 43. Note that footnote 39 in *Levy* is to the Quebec Court of Appeal's precedent in *Société des loteries du Québec (Loto-Québec) v. Brochu*, 2007 QCCA 1392, para. 8. *Brochu* is cited for the proposition that a reviewable error may arise from the manner a judge exercises their discretion to redefine the class.

nature to individuals and entities who received such notifications from the Defendant commits a reversible error of law.[60]

55. The Court of Appeal's citation to *Levy* for the contrary proposition therefore also constitutes an error of law reversible by this Honourable Supreme Court.

56. The Court of Appeal's decision cannot be said to have been decided *per incuriam*, as it did not cite binding authority that might have affected its disposition of the appeal.[61] Instead, the Court of Appeal's error lies in the incorrect application of its own precedent in *Levy* that overruled the discretion of the application judge to restrict the class definition to individuals who had been notified by the defendant about the compromise of their personal information in a data breach.

57. First, it is possible that the defendants may have unintentionally omitted sending notification letters or emails to all persons and entities whose personal information was actually compromised by the data breach.[62] This is precisely what transpired here: two years after the initial emails and letters were sent to some affected individuals and entities, the Capital One Respondents revealed that they "recently discovered that data pertaining to an additional approximately 51,000 Canadians was included in the files taken by Paige Thompson."[63] None of these 51,000 Canadians received the notification letters that were sent to other impacted Canadians by the Respondents in 2019.

58. Second, and relatedly, confining the holders of a right to take action in proceedings of this nature to individuals and entities to whom the defendants sent letters creates counterproductive incentives for individuals and entities entrusted with personal information that could potentially be compromised or has actually been compromised in a data breach.

59. These entities entrusted with personal information may opt not to notify affected parties precisely to avoid being implicated in class action lawsuit. Alternatively, they may otherwise limit the number of notifications issued to limit potential liability in the event that a class action is successful, or to limit the settlement amount if the class action is resolved through a settlement.

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[60] *Levy*, note 57, at para. 43.
[61] *Sullivan*, note 57, at para. 77.
[62] *Levy*, note 57, at para. 43.
[63] Exhibit R-59 (email) and Exhibit C-1 (affidavit).

60. This results in the unilateral conferral of discretionary authority on prospective defendants, thereby denying access to justice and compensation for prospective plaintiffs in a manner that is fundamentally inconsistent with the principles of class actions. It also prevents the modification of harmful behaviour and the deterrence of wrongdoing as additional "twin goals" of Québec's class action regime.[64] Further, and as highlighted in *Levy*, limiting the class definition in class actions of this kind to individuals and entities to who notification emails or letters were sent would make it "illogical because circular."[65]

61. Third, "a victim of a data breach may have been among the [individuals and entities] to whom a letter was sent, but may never have received it for whatever reason, such as due to a change of address or simply because the letter was lost in the mail."[66] An individual may also have changed or abandoned their registered email address, or the email may have been filtered into their spam folder and never actually been brought to their attention. Myriad factors can explain why an individual does not receive or become aware of any email or letter sent to them.

62. Lastly, adopting as an *a priori* principle that only individuals or entities who received notification that their personal information was compromised in a data breach hold a right of action against the defendants, with the aim of restricting the class definition unduly heightens the standard for authorization. It also inappropriately fetters the application judge's broad discretionary inherent and supervisory powers at the authorization stage. This, in turn, creates an undue obstacle to the authorization of class actions in Québec and further undermines the objectives of access to justice, victim compensation, behaviour modification and deterrence of future wrongdoing.[67]

PART IV – SUBMISSIONS CONCERNING COSTS

63. The Applicants leaves this matter at the discretion of the Court.

PART V – ORDER SOUGHT

64. The Applicants requests that this application for leave to appeal from the judgment of the Court of Appeal of Quebec dated February 7, 2024, be granted and that his Application *De Bene*

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[64] *Oratoire Saint-Joseph*, note 5, at paras. 6, 8; *Marcotte*, note 7, at para. 43.
[65] *Levy*, note 57, at para. 43.
[66] *Levy*, note 57, at para. 43.
[67] *Desjardins* SCC, note 4, at para. 116; *Oratoire Saint-Joseph*, note 5, at paras. 6, 8; *Marcotte*, note 7, at para. 43.

Esse for Leave To Appeal Beyond The Delay the judgment of the Quebec Superior Court be granted.

65. The Applicants further request that the judgment of the Superior Court of Quebec dated August 10, 2023 be reversed, in part, and that Applicant Abu Khadra be designated as a representative plaintiff of the class.

ALL OF WHICH IS RESPECTFULLY SUBMITTED ON THIS 8th DAY OF APRIL 2024.

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PART VI – TABLE OF AUTHORITIES

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LEGISLATION

LEGISLATION	**PARAGRAPHS OF MEMORANDUM**
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