SUPERIOR COURT

CANADA
PROVINCE OF QUEBEC
DISTRICT OF MONTREAL

No: 500-06-000616-124

DATE: SEPTEMBER 4, 2013

BY THE HONOURABLE DAVID R. COLLIER, J.S.C.

ESSINE EID MOUAIKEL

Petitioner

v.

FACEBOOK, INC.

and

MARK ZUCKERBERG

and

PETER A. THIEL

and

MARC L. ANDREESSEN

and

ERKSINE B. BOWLES

and

JAMES W. BREYER

and

DONALD E. GRAHAM

and

REED HASTINGS

and

ALLEN & COMPANY LLC

and

BARCLAYS CAPITAL INC.

and

GOLDMAN, SACHS & CO.

and

J.P. MORGAN SECURITIES LLC

and

MERRILL LYNCH, PIERCE, FENNER & SMITH INCORPORATED

and

MORGAN STANLEY & CO. LLC

and

RBC CAPITAL MARKETS, LLC

Respondents

JUDGMENT

INTRODUCTION

[1] On May 18, 2012, the US social networking company Facebook held its initial public offering, one of the largest in corporate history. As a result of its IPO the company sold 421 million shares and raised over $16 billion in capital.[1] The public offering was not entirely successful however. Among other things, Facebook's underwriters were alleged to have offered too many shares to investors, at too high a price, and to have shared insider information with selected investors. Facebook's stock lost a significant portion of its value in the weeks following the IPO.

[2] The petitioner purchased 120 of Facebook shares in May 2012, shortly after the IPO, paying $38 a share. Three weeks later, she sold her stock for $29 a share, incurring a loss. Alleging misrepresentations by Facebook and its underwriters which

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[1] According to paragraph 27 of the petitioner's Motion to institute class action proceedings.

induced her to pay too much for Facebook's shares, the petitioner seeks to institute a class action on behalf of everyone in Québec who purchased Facebook stock as a result of its initial public offering.

[3] The respondents include Facebook, its founder Mark Zuckerberg, a number of Facebook directors, and seven US banks and brokerage firms who participated in the underwriting. The respondents have moved to dismiss the petitioner's motion to institute a class action on the ground that the Québec Superior Court lacks jurisdiction *ratione loci*.[2] Alternatively, they argue that the Superior Court should decline jurisdiction in favour of the New York District Court which is already seized of a number of class actions relating to Facebook's IPO, and which the respondents believe is the natural forum to hear the petitioner's case.

[4] The respondents' declinatory exception raises the question of whether there exists a real and substantial connection between Québec and the matters alleged in the petitioner's motion to institute a class action. The existence of a real and substantial connection is determined in light of the criteria found at article 3148 of the Québec Civil Code.[3] If such a connection is found to exist, the Court must then decide whether it should exceptionally decline its jurisdiction according to the doctrine of *forum non conveniens* and refer the matter to the New York court on the basis that the latter is in a better position to decide the case in a just and efficient manner (article 3135 CCQ).[4]

THE RESPONDENTS' DECLINATORY EXCEPTION

[5] The respondents' declinatory exception places the onus on the petitioner to demonstrate the connecting factors attributive of jurisdiction. Any doubt in the matter is interpreted against the petitioner.[5]

[6] Although the petitioner purports to represent a class of investors, the question of jurisdiction must be considered in light of the petitioner's individual recourse, prior to the authorization of the class action.[6]

[7] A review of the petitioner's motion shows that the respondents are all domiciled in the United States, many of them in California and New York. The motion alleges that

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2 Articles 163 and 164 of the *Code of Civil Procedure*.

3 *Spar Aerospace Ltd. v. American Mobile Satellite Corp.*, [2002] 4 SCR 205, para. 56.

4 *Club Resorts Ltd. v. Van Breda,* [2012] 1 SCR 572, para. 109, 2012 SCC 17.

5 *Pisapia Construction Inc. c. Gravel*, [1976] RP 347 (C.A.), AZ-76121133; *Ultramar Canada Inc. c. Livernoche,* [1991] RDJ 631 (C.A.), AZ-91011777.

6 *Option Consommateurs c. Bell Mobilité*, J.E. 2008-2293, para. 54 (C.A.), 2008 QCCA 2201, AZ-50521940; *Option Consommateurs c. Infineon Technologies, a.g.*, EYB 2008-135116, para. 19 (C.A.) 2011 QCCA 2116, AZ-50805798.

Facebook filed its offering documents with the US Securities and Exchange Commission and that its stock was traded on the NASDAQ exchange in New York.

[8] The petitioner alleges that the respondent directors and underwriters made untrue statements and omitted to state material facts, such that Facebook's offering documents "were not prepared in accordance with applicable securities laws".[7] In addition, she alleges that Morgan Stanley revised its earning projections for the company prior to the IPO, but only advised certain "preferred clients" of this fact.[8] As a result of these actions, the petitioner claims that she and the other members of the proposed group "were induced to over-pay substantially for Facebook's securities", thereby suffering damages "equivalent to the loss in market value that occurred when Facebook's misepresentations were discovered".[9]

[9] It is not contested that all of the respondents' alleged activities occurred in the United States, not in Québec. Moreover, the petitioner does not allege that Facebook is a reporting issuer in Québec or that it distributed securities in this province within the meaning of article 236.1 of the Québec *Securities Act*.[10]

[10] The petitioner concedes that the only connecting factor with Québec is that she and other members of the proposed group suffered damage in this province as a result of having purchased Facebook shares at an inflated price. She therefore grounds the jurisdiction of this Court on article 3148(3) CCQ:

> 3148. In personal actions of a patrimonial nature, a Québec authority has jurisdiction where
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> [...]
>
> (3) a fault was committed in Québec, damage was suffered in Québec, an injurious act occurred in Québec or one of the obligations arising from a contract was to be performed in Québec;
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> [...]
>
> [our underlining]

[11] The meaning of the term "damage [...] suffered in Québec" in article 3148(3) CCQ has been considered by the Court of Appeal in a line of cases beginning with

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7 Petitioner's motion, para. 29.
8 *Ibid*, para. 48.
9 *Ibid*, para. 66.
10 L.R.Q., ch. V-1.1.

Quebecor Printing Memphis Inc. c. Regenair Inc.[11] in 2001. The respondents rely on these cases to argue that the petitioner's allegation that she suffered a financial loss in Québec, in the absence of proof that any other activity or event occurred in Québec in relation to that loss, is insufficient to ground the jurisdiction of this Court.

[12] In *Quebecor Printing*, the Court of Appeal defined the limits of the court's jurisdiction by holding that the simple recording of a financial loss in Québec is not sufficient to attribute jurisdiction to the Québec courts. In that case, the defendant Regenair owed money to Quebecor for a contract performed in the United States. The debt was owed in the US but recorded in Quebecor's books in Québec. The Court of Appeal concluded that the mere recording of the debt in this province was not sufficient to conclude that Quebecor had suffered damage in Québec within the meaning of article 3148(3) CCQ.

[13] The *Quebecor Printing* decision was followed a year later in *Foster c. Kaykan Ltd.*[12] where the Court of Appeal upheld the dismissal of the action on the grounds that the plaintiff had failed to allege the commission of any fault by the defendant in Québec, even though the plaintiff claimed to have suffered damage here.

[14] A similar result followed in *Banque de Montréal c. Hydro Aluminum Wells Inc.*,[13] where the Court of Appeal again refused to ground the jurisdiction of the Québec court on the plaintiff's mere allegation that it had suffered financial damage in Québec, holding that the defendant's obligation to pay for merchandise had arisen in the United States where the plaintiff's injury necessarily occurred. The Court of Appeal recently came to the same conclusion in *Green Planet Technologies Ltd. c. OTR Blackstone Tire Corporation* [14] on similar facts.

[15] The reasoning underlying these decisions was perhaps best articulated by the Court of Appeal in *Option Consommateurs c. Infineon Technologies, a.g.*[15] where the Court drew a sharp distinction between cases where a party suffers damage in Québec solely because his patrimony is located in this province and cases where damage is suffered in Québec based on an event that occurs here. In *Infineon Technologies,* the petitioner wished to launch a class action suit on behalf of all the purchasers in Québec of computer and other electronic equipment containing semiconductor memory products allegedly sold at inflated prices as a result of the respondents' price-fixing scheme. The respondents moved to dismiss the petitioner's motion, contending that the Québec

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11 [2001] RJQ 966 (C.A.), AZ-50085863.
12 J.E. 2002-163 (C.A.), AZ-02019017.
13 J.E. 2004-679 (C.A.), AZ-50225218.
14 2013 QCCA 56, AZ-50928004.
15 *Infineon Technologies, supra* note 6, paras. 61-72 (leave to appeal to the Supreme Court granted on the question of whether pure economic loss constitutes "damage" under article 3148 CCQ).

court lacked jurisdiction because the alleged acts had all occurred in the United States. They relied on the *Quebecor Printing*, *Foster* and *Hydro Aluminum Wells* decisions to argue that the petitioner could not ground jurisdiction in Québec merely by pleading that she had incurred a monetary loss here.

[16] The Court of Appeal concluded that the petitioner had suffered damage in Québec, and that the Superior Court had jurisdiction, because she had purchased her personal computer under the terms of a contract concluded in Québec. The fact that the alleged damage was suffered as a result of a contract entered into in Québec was held to distinguish the case from those relied upon by the respondents, where no "material event" had occurred in Québec.[16] Writing for the Court, Justice Kasirer stated:

> In my view, *Quebecor Printing* stands for the principle that when financial damage is only recorded in Quebec (in French I would say "*comptabilisé*"), that alone is insufficient to ground territorial jurisdiction for the purposes of article 3148(3) C.C.Q. To confer jurisdiction on the sole basis of where the plaintiff records his or her patrimonial damage, irrespective of where the injury took place, would undermine the idea that the substantive locus of injury is a freestanding connecting factor, alongside the others spoken to in article 3148(3) C.C.Q. (which include the place where the fault was "committed/*commise*", where the injurious act "occurred/*s'[est] produit*" and where the obligation was to be "performed/*exécutée*"). In other words, where the only sign of damage in Quebec turns on the presence of the plaintiff's patrimony being here, the Superior Court cannot rely on article 3148(3) C.C.Q. as the basis for its jurisdiction *ratione loci*. On the other hand, where there is evidence that the financial loss has been suffered in Quebec (in French I would say "*subi*"), based on a material event that has occurred here, then article 3148(3) C.C.Q. provides that Quebec courts have jurisdiction, subject to *forum non conveniens* considerations pursuant to article 3135 C.C.Q.

[17] In reaching his conclusion Justice Kasirer noted the decision of this Court in *British Airways p.l.c.*,[17] where Justice Payette held that the petitioner had suffered damage in Québec because he had purchased airline tickets from British Airlines (at an allegedly inflated price) in this province. As in *Infineon Technologies*, the fact that the petitioner's alleged damages flowed from a contract concluded in Québec was sufficient to attribute jurisdiction to the Court under article 3148(3) CCQ.

[18] The present petitioner relies heavily on the holding in *British Airways*, arguing that its result should govern because it was decided on similar facts. In the Court's view, however, the facts in *British Airways* and *Infineon Technologies* are clearly distinguishable from those of the present case. Whereas in *British Airways* and *Infineon*

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16 *Ibid*, para. 64.

17 *Option Consommateurs c. British Airways p.l.c.*, 2010 QCCS 140, AZ-50599646, confirmed 2010 QCCA 1134, AZ-50645903.

Technologies the plaintiff's alleged damage arose from an activity or event occurring in Québec (i.e. a contract of sale), this is not so in the present case.

[19] In support of her contention that she suffered damage in Québec, the petitioner filed a copy of her May-June 2012 statement of account with her Montreal broker, TD Waterhouse. It shows that she deposited $5,000 in her account on May 22 and that the following day her broker purchased 120 Facebook shares at a cost of $4,868.87. On June 1, the broker sold the shares for $3,536.34, resulting in a loss of $1,332.53.

[20] Although the TD Waterhouse statement records the petitioner's purchase and sale of shares, it does not indicate where the transactions occurred or where she paid for her shares. Nothing in the record indicates that the sales transactions occurred in Québec, and, in the absence of such proof, the law presumes that they occurred in the United States. In this regard, article 1734 CCQ stipulates that a buyer is bound to take delivery of the property sold, and to pay the price, at the time and place of delivery. In our case, the Facebook shares would have been notionally delivered either at the NASDAQ exchange in New York or at Facebook's head office in California, the deemed *situs* of the shares.[18] According to article 1734 CCQ, the petitioner's payment would therefore have been owed at one of these two US locations.

[21] It follows that the petitioner's alleged overpayment and loss would have occurred in the United States where the purchase and sale transactions were concluded. Nothing happened in Québec other than the recording of the petitioner's loss in her brokerage account. Based on the legal principles cited above, it cannot be said that the petitioner suffered damage in Québec within the meaning of article 3148(3) CCQ.

[22] In the absence of proof that the petitioner suffered damage in Québec as a result of a material event that occurred here, there is no basis to conclude that a real and substantial connection exists between the alleged facts of her motion and this Court, which consequently has no jurisdiction to hear the present matter.

THE RESPONDENTS' MOTION BASED ON FORUM NON CONVENIENS

[23] Given the conclusion above, it is unnecessary to deal with the respondents' submissions based on *forum non conveniens*. However, had it been necessary to do so, the Court would have declined its jurisdiction – a tenuous jurisdiction at best, even had the petitioner's arguments prevailed – in favour of the District Court for the Southern District of New York. According to the evidence filed by the respondents, forty-one US lawsuits relating to the Facebook IPO have been centralized and are proceeding before the New York court. The consolidated actions involve the present

[18] *Bern c. Bern*, [1995] RDJ 510 (C.A.), p. 9, AZ-95011682.

respondents and raise the same allegations of wrongdoing as does the present case. Most importantly, the lead plaintiff in the consolidated actions is seeking to represent "all persons and entities who purchased or otherwise acquired the Class A common stock of Facebook in or traceable to Facebook's IPO, and were damaged thereby". The proposed class, if approved, would thus include persons in Québec who purchased Facebook shares and who are included in the petitioner's proposed class action group.

[24] Given the allegations of misrepresentation and insider trading in the United States, and considering that Facebook issued its prospectus under the rules of the US Securities and Exchange Commission and traded its shares on the NASDAQ exchange in New York, there is little question that New York law will apply to the actions against the respondents. The petitioner's contention that its action in Québec would proceed solely according to Civil Code rules of liability is far from convincing. Moreover, the majority of the underwriter defendants are domiciled in New York and it appears certain that much of the relevant discovery will be conducted there. A final judgment would have to be executed in the United States. The New York District Court appears to be the natural forum to hear the actions against the respondents, and Québec shareholders appear to have no advantage in proceeding by way of a duplicative and costly action in this province. There is no reason to believe that their interests would be less well protected in the New York litigation than they would be here.

FOR THESE REASONS, THE COURT:

[25] **GRANTS** the Respondents' motion for declinatory exception;

[26] **DISMISSES** the Petitioner's Re-amended motion for authorization to institute a class action;

[27] **WITH COSTS.**

DAVID R. COLLIER, J.S.C.

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Date of hearing : June 28, 2013