[BLG TRANSLATION]

SUPERIOR COURT

CANADA
PROVINCE OF QUÉBEC
DISTRICT OF MONTRÉAL

Nº: 500-06-000774-154

DATE: March 26, 2021

THE HONOURABLE FLORENCE LUCAS, J.C.S. PRESIDING

DANNY LAMOUREUX
Plaintiff

c.

INVESTMENT INDUSTRY REGULATORY ORGANIZATION OF CANADA (IIROC)
Defendant

JUDGEMENT

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[1] The class action instituted by Danny Lamoureux (**Lamoureux**[1]) against the Investment Industry Regulatory Organization of Canada (**IIROC**) results from an unencrypted laptop computer containing personal information of thousands of Canadian investors being forgotten on a train by an IIROC inspector. The unidentified device was never returned or found.

[2] That event was at the origin of two decisions rendered in the case of *Sofio c. OCRCVM*. In first instance, the judge dismissed the application for authorization to institute the class action, concluding that the petitioner had not made a *prima facie* case that he met the criterion of a serious appearance of right required by Article 1003 b), since

[1] The use of family names in this judgement is intended to shorten the wording and does not indicate any familiarity or pretence.

there was no compensable damage, or any tangible moral injury that could be compensated in money.[2]

[3] The Court of appeal affirmed that decision[3], specifying, however, that [translation] "*that is not to say […] that where there is a loss or theft of personal information, there would only be a compensable injury if the loss or the theft in question led* de facto *to the theft or attempted theft of the petitioner's identity or the commission of a fraud or attempted fraud in his regard. That is not the case.*"

[4] In this case, the class action instituted subsequently aims, in the first place, to obtain compensatory damages for the injury suffered due to the loss of the computer and personal information. The stress, anxiety, disturbance and anger felt by the Class Members, as well as the inconveniences, loss of time and expenses[4] occasioned by the corrective measures implemented by the IIROC following the incident are invoked.

[5] Secondly, some Class Members, including Representative Plaintiff Lamoureux, are claiming compensation for the injury connected with the theft or attempted theft of their identities or with the commission of a fraud or attempted fraud ("**unlawful uses**") of which they have been victims. They believe that these issues are connected with the presumed theft of the laptop computer and the data it contained.

[6] Finally, the Class Members are seeking punitive damages, alleging the grave carelessness of the IIROC, charging it with having acted too late in publicizing the incident and notifying the investors, the brokers and the competent authorities.

[7] In light of the facts and of the evidence taken as a whole, the Court dismisses the class action instituted by Lamoureux. For the reasons more fully set forth in this judgement, the Court believes, on one hand, that the fears and annoyances suffered by the Class Members because of the loss of the personal information cannot constitute damages susceptible of compensation. They are more akin to the normal inconveniences that everyone living in society encounters and should be bound to accept. On the other hand, the evidence does not support the conclusion that the computer or the information are in the hands of wrongdoers. Nor does there exist any proven link between the loss of the computer and the unlawful uses alleged by the Class Members. In consequence, the IIROC cannot be held liable for the damages suffered by certain victims of unlawful acts. Finally, the Court holds that the IIROC reacted diligently, according to the standards expected in similar circumstances, and consequently concludes that its unintentional fault and subsequent conduct do not justify condemning it to punitive damages.

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[2] *Sofio c. Organisme canadien de réglementation du commerce des valeurs mobilières (OCRCVM)*, 2014 QCCS 4061.
[3] *Sofio c. Organisme canadien de réglementation du commerce des valeurs mobilières (OCRCVM)*, 2015 QCCA 1820.
[4] The claim for costs was added in the amendment notified on December 9, 2020, and the IIROC has objected to the making of that claim.

1. THE CONTEXT

[8] The IIROC is a national self-regulating organization that supervises all investment brokers and all operations carried out on the equity capital markets and the debt capital markets in Canada. In performing its mandate, the IIROC carries out reviews of the conformity of the client accounts of investment brokers. In that work, the brokers are required to provide certain information concerning their Canadian investor clients.

[9] On Friday, February 22, 2013, an IIROC inspector left his portable computer on the baggage rack of the train that was taking him home (**the "Incident"**). Despite his immediate action, the unidentified computer was not found.

[10] During the following week, the IIROC realized that the computer complied with first level password protection, but that it did not comply with the second level (encryption), although the Organization's internal policies prescribed both levels of protection.

[11] An internal priority investigation was launched immediately[5], enabling the IIROC to determine, as early as March 4, 2013, that the laptop computer probably contained information concerning thousands of natural and legal persons, who were clients of brokerage firms belonging to the IIROC, including 36,734 persons residing in Québec.[6]

[12] On March 6, 2013, the IIROC contacted professionals from the firm Deloitte Canada ("**Deloitte**"), to act as independent information security experts, in order to determine what specific information was in the computer (*Computer Forensic and Investigative Analysis*) and to assist the IIROC in managing the risks and obligations connected with the loss of the personal information (*Privacy Risk Management*).[7]

[13] In the meantime, the IIROC filed a complaint with the Montréal Police Department.[8]

[14] On March 22, 2013, the first preliminary report from Deloitte revealed to the IIROC, in particular, that the lost computer contained Highly Sensitive[9] Information relating to 470 individuals, the clients of six (6) member brokerage firms, as well as Increased Sensitivity[10] Information concerning 50,322 individuals, being mainly clients of Laurentian Bank Securities ("**LBS**") or Industrial Alliance Securities ("**IAS**").[11]

[15] On March 27, 2013, the IIROC sent letters to the *Commission d'accès à l'information du Québec* and to the Privacy Commissioner of Canada, notifying them of

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[5] Testimony of Lina Barbusci, December 2, 2020; Exhibits P-38 and P-39.
[6] Exhibit P-40.
[7] Testimony of Alan Stuart, December 2, 2020; Exhibit D-7, p. 2.
[8] Exhibit P-37.
[9] Highly Sensitive Information: At least two of the following items of data: address, account number(s), driver's license, passport, health insurance card or other identification document, cancelled cheque, social insurance number, date of birth and/or other details concerning the bank account (assets, net worth or income) (P-58).
[10] Increased Sensitivity Information: Name, address, date of birth, as well as the name of the investment broker and the account number(s) opened with that broker (P-58).
[11] Exhibit P-58.

the incident involving the loss of personal information and kept them informed of developments thereafter.[12]

[16] The second preliminary report from Deloitte, dated April 4, 2013, provided further details about the information contained in the first report, in light of the ongoing investigation.[13]

[17] On April 8 and 9, 2013, the IIROC met in person with representatives of the eight (8) brokerage firms affected by the incident to explain the situation to them, to let them know about the measures that had been implemented and to reassure them of the IIROC's cooperation throughout the process.

[18] The next day, the brokerage firms received drafts of letters and documents that the Organization intended to send to the affected investors. The IIROC provided two (2) types of letters, adjusted depending on the category of information that was in the device concerning the investor in question, either Increased Sensitivity Information or Highly Sensitive Information.[14] The letters were made available in both official languages.[15]

[19] At the same time, in cooperation with Deloitte, the IIROC signed agreements with Equifax Canada Co. ("**Equifax**")[16], and then with TransUnion of Canada Inc. ("**TransUnion**")[17], credit information agencies, in order to institute certain protective measures made available to the investors and the brokerage firms. They agreed to flag the credit file of every investor. That alert notified the credit providers that the personal identification of each person might have been compromised and that they must take additional precautions to verify the real identity of individuals applying for credit (a piece of ID or additional authentication questions).[18]

[20] In addition to the measures taken by the IIROC to receive calls from brokers and investors in-house, the Organization retained the bilingual services of the TigerTel[19] call centre, whose respondents were trained in the use of scenarios prepared by Deloitte's professional staff.[20]

[21] On April 11, 2013, the IIROC issued a first press release, announcing the accidental loss of the laptop computer and the internal and external investigations in progress. That information was updated subsequently.[21]

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[12] Exhibits P-40 to P-45.
[13] Exhibit P-59.
[14] Definitions at notes 9 and 10.
[15] Exhibit P-63.
[16] Exhibits D-8 and D-9, April 3 and 16, 2013.
[17] April 19, 2013, Exhibit D-10.
[18] Exhibit P-5.
[19] Exhibit P-25.
[20] Testimony of Garnett Grayson, December 1, 2020; Exhibits P-26 and P-56.
[21] Exhibits P-46 to P-53.

[22] At the end of April, the IIROC sent a letter to the investors informing them of the incident affecting their personal information, which letter Lamoureux in particular received on April 24, 2013.[22]

[23] He was sent the version of the letter adapted to the loss of information classified as being of Increased Sensitivity, as were the other Class Members called to testify at trial.[23] The content of that letter deserves to be reproduced in full:[24]

> [Translation]
>
> We are writing to you to notify you of an incident affecting your personal information. At the end of February, a portable device containing personal information concerning you was lost by an employee of our Organization and, despite constant efforts and reporting the incident to the authorities, it has not been recovered. Following a priority judicial investigation of the computer system, we were able to confirm, on March 22, 2013, that the information that was in the device may have included your name, address, date of birth, as well as the name of your investment broker and your account number(s) opened with that broker.
>
> The Investment Industry Regulatory Organization of Canada (IIROC) is the national self-regulating body that supervises all operations conducted on the equity capital markets and debt capital markets in Canada. Our mandate obliges us to carry out reviews of investment brokers' client accounts. In this capacity, we obtained access to your information. The investment broker with whom you are dealing is required to provide that information to us.
>
> Although our policies prescribe two levels of protection, that device complied with the first level of password protection, but not with the second level (encryption). Moreover, we have received no indication that any third party has accessed the information contained in the portable device or has made use of any such information. We are taking this matter very seriously and deeply regret that it occurred.
>
> We have taken a number of measures to mitigate any potential risk to which you might be exposed:
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> - We have set up a dedicated call center, available to you from Monday to Friday between 9:00 a.m. and 5:00 p.m., which will provide answers to your questions and concerns and, if necessary,

[22] Originating Application for a Class Action, December 20, 2017 (**OA**), para 19.
[23] Testimony of Class Members: Ms. Amiot, Mr. Charbonneau, Ms. Filion, Mr. Gosselin, Mr. Lafontaine, Ms. Lamontagne, Ms. St-Amour and Mr. Lamoureux: At the request of the parties, by consent, the Court is keeping their first names confidential (except that of the Representative Plaintiff), as well as the personal information of such members and the relevant exhibits produced under seal.
[24] Exhibit P-3.

explain to you the relevant documents that we have provided to you. The toll-free number is 1-866-333-0888;

- We have taken measures to provide you, free of charge, with an alert service from Equifax Canada for 6 years. Your credit record is now supported by such a service, which enables your to reduce the potential risk of fraud. Please note that you may waive that service by contacting Equifax at 1-800-465-7166; and

- We have attached hereto a complete reminder providing you with information on additional measures that you can take to protect your personal information.

We have notified the brokerage house whose client you are and have sent it all the information that we are sending you. We wish to assure you that your investment broker is in no way involved in the above-described incident.

Owing to the delicate nature of the information, we have also notified the privacy commissions. We are cooperating with those commissions to make sure that all reasonable measures are taken to minimize the potential risks associated with the loss of your information.

Although this is an isolated case for the IIROC, we have also launched an exhaustive review of our policies, procedures and security and business protocols, in order to do everything possible to avoid this happening again.

We would encourage you to review the enclosed documents attentively. They contain important information about the services available to you and the additional measures that you can take to further protect your information. We realize that this news is upsetting; please allow us to reiterate, on behalf of the IIROC, our most sincere regret for any upset or concern that this might cause you.

[Reproduced as is. Emphasis by the Court.]

[24] The wording of the other letter, relating to Highly Sensitive Information, is almost identical. It merely replaces, in the first paragraph, the nature of the information that the device may have contained with: [translation] "*your name and the name of your investment broker, and at least two of the following items of data: your address, your account number(s) opened with your investment broker, a copy of your driver's license, passport, health insurance card or another identification document, a copy of a cancelled cheque, your social insurance number, your date of birth, as well as details concerning the bank accounts or financial data such as assets in the account, net worth or income*."[25]

[25] Exhibit P-64.

[25] On April 26, 2013, Deloitte filed its final report, detailing the steps taken in the investigation, the sources of information consulted, the history of the laptop computer and the information probably contained in the lost device, classified into three (3) categories, Highly Sensitive Information concerning 3,293 individuals, Increased Sensitivity Information involving 48,386 individuals and Sensitive Information[26] relating to 128 individuals.[27]

[26] In a second letter, dated April 30, 2013[28], the IIROC informed the investors affected that although no identity theft or any fraud resulting from the loss of the computer had been reported to it, some other measures were being taken to ensure their protection. Thus, the following additional services were made available to the investors free of charge:

- in addition to a 6-year alert service mentioned in the first letter, a 1-year credit monitoring through Equifax;

- the recording of a fraud warning in the investor's credit file with TransUnion for 6 years.

[27] In the meantime, by way of a first motion introduced on April 30, 2013, Plaintiff Representative Paul Sofio sought the Superior Court's authorization to institute a class action on behalf of persons whose personal information had been lost. Sofio claimed for each of the Class Members an amount of $10,000 in compensatory damages resulting from the [translation] "stress, inconvenience and actions made necessary[29]" owing to the following faults for which the IIROC was blamed. He made no claim for punitive damages.

[28] On August 20, 2014, that first motion for authorization was dismissed.[30] Justice André Provost found that the conditions stipulated at article 1003 C.C.P. were met, except for the condition relating to a serious appearance of right, specified by paragraph (b). Although the Representative Plaintiff had established the fault of the IIROC *prima facie*, the judge held that he had failed to show the existence of any compensable injury.

[29] On November 6, 2015, the Court of Appeal confirmed the decision in first instance.[31] It held that the Appellant had not shown that the assessment of the criterion laid down at paragraph 1003(b) C.C.P. was patently erroneous. The Court held that the motion for authorization had quite simply not revealed any injury, not even a simply moral one.

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[26] Name, address, name of investment broker and account number(s) (P-23).
[27] Exhibit P-23: The results listed result from an addition of the data concerning the two inspectors, paras 3, 4, 5, 8, 9 and 10.
[28] Exhibit P-6.
[29] Sofio (CS), *supra*, note 2, para 19.
[30] Idem.
[31] Sofio (CA), *supra*, note 3.

[30] Ten days later, on November 16, 2015, Representative Plaintiff Lamoureux brought a *Motion for Authorization to Institute a Class Action and to be Ascribed the Status of Representative pPlaintiff*. That proceeding repeated a number of the allegations in the application filed by his predecessor *Sofio*.[32] in addition, however, Lamoureux detailed the anxiety, stress, upsets and inconveniences personally experienced by reason of the loss of his personal information in 2013[33], as well as the damages related to unlawful uses of his identity that had occurred in 2015, which he connected with the presumed theft of his personal information in the computer that had never been found.[34]

[31] On October 26, 2017, Justice Karen Kear Jodoin authorized that new class action.

[32] On September 25, 2019, the undersigned allowed in part IIROC's application for leave to conduct a pre-trial examination in writing, of four of the seven Class Members called as witnesses at trial, namely those who alleged that they had been victims of a fraud or attempted fraud.

[33] The trial, initially set down for June 2020, was delayed owing to the COVID-19 pandemic and was held in December 2020, in a completely virtual manner, thanks to the excellent cooperation of counsel, the parties and the witnesses.

* * *

[34] The action instituted by Lamoureux aims first to obtain a condemnation of $1,000 payable to each of the Class Members, as compensatory damages related to the loss of their personal information. Lamoureux, for his part, is seeking particular damages of $20,000 resulting from the loss of his information in 2013, but also for the unlawful uses of his identity in 2015. Hence, the Court is called upon to determine the particular damages suffered by the other Class Members who allegedly were victims of unlawful uses of their personal information. Lastly, a condemnation of $500 is sought for each class member as punitive and exemplary damages.

[35] In the final days of the trial, Lamoureux notified amended conclusions, whereby he increased his particular damages to $50,000, referring in particular to [translation] "his participation as a Representative Plaintiff". He quantified the compensation [translation] "for each of the (…) identity thefts or attempted identity thefts …. or frauds or attempted frauds of which they had been victims up to April 15, 2019" at $50,000. Finally, he introduced the condemnation [translation] "to pay the Class Members (…) all expenses incurred by them as a result of Defendant's fault"[35], which claim the IIROC is vigorously contesting, and which the Court is now called upon to decide in this judgment.

2. ISSUES IN DISPUTE

[32] Exhibit D-5.
[33] Motion for authorization to institute a class action duly ascribed the status of Representative Plaintiff, November 16, 2015, paras 25 to 33, 67 and 68.
[34] *Idem*, paras 34 to 68.
[35] Amended Conclusions, December 9, 2020.

[36] The authorization judgement identified the class as follows:

> [Translation] All natural and legal persons, employing 50 employees or less since February 1, 2013, and whose personal information was lost in Québec by the IIROC or one of its employees in 2013.

[37] The authorized issues in dispute are the following:

(a) Did IIROC commit a fault when one of its employees lost the portable device containing the personal information of the Members?

(b) Did IIROC commit a fault in not securing maximum protection of the information contained in the said portable device?

(c) Did IIROC take too long to notify the members of the loss of their personal information?

(d) Did IIROC fail to implement appropriate measures to limit the damages of the members after the loss of their personal information?

(e) Are the Members entitled to claim compensatory damages from IIROC?

(f) What should the amount of such compensatory damages be?

(g) Are the Members entitled to claim punitive and exemplary damages of $500 from IIROC?

(h) Is the claim for punitive costs well founded?

[38] The following analysis responds to these different questions by reference to the major themes of civil responsibility, namely:

- The faults of IIROC (3.1);
- The damages and causal link (3.2);
- Punitive damages (3.3).

[39] Finally, IIROC's objection to the Application to Amend Conclusions in Damages, notified by the Plaintiff during the trial will be addressed in the introduction to the related section (3.2).

3. ANALYSIS

[40] The class action before us is based on the right to privacy and the obligation of persons, corporations, and public bodies to take proper safety measures to ensure the

protection of the personal information it collects from individuals[36], failing which they will be held liable.[37]

[41] In the context of an action in extra contractual[38] civil responsibility, [translation] "brought in the form of a class action, the elements of fault, prejudice and causal connection must be established in respect of the members of the group by normal evidentiary rules."[39]

[42] Let us consider each of those elements.

3.1 The faults of the IIROC

[43] The IIROC admits that it committed a fault i) with respect to the loss of the laptop computer and ii) by not ensuring maximum protection of the personal information of its members in failing to encrypt the missing, as its policies required.

[44] The dispute focuses rather on proving a compensable injury suffered by the Class Members (3.2).

[45] In addition, the Class Members blame the IIROC for having delayed in taking action and in notifying them, which the Organization contests. Exemplary damages are claimed, on the ground that the IIROC showed gross negligence. Analyzing that fault is therefore relevant and will be undertaken in the section on punitive damages (3.3).

3.2 Damages and the Causal Link

[46] It clearly emerges from the Court of Appeal's decision in *Sofio*, as well as subsequent decisions, that in a class action based on the loss of personal information, it is not necessary for the class members to have been victims of any unlawful uses of their information, in order to support their claims. Preponderant evidence of damages related to the [mere] wrongful loss may be sufficient.[40]

[47] Consequently, our analysis will first deal with the alleged moral injury connected with the loss of the personal information and the inconveniences occasioned by the monitoring and protective measures instituted by the IIROC with the credit information agencies (3.2.1).

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[36] Article 5, Quebec *Charter of Human Rights and Freedoms,* c-12; art. 35 et seq. C.C.Q.; *Act Respecting the Protection of Personal Information in the Private Sector*, R.S.Q., c. P-39.1; *Act Respecting Access to Documents of Public Bodies and the Protection of Personal Information*, R.S.Q., c. A-2.1.

[37] Baudoin, Jean-Louis, Deslauriers, Patrice et Moore, Benoît, La responsabilité civile, 8e édition, vol. 1, Cowansville, Éditions Yvon Blais, 2014, paras.1-275, p. 269; *Zuckerman c. Target Corporation* 2017 QCCS 110, para. 59; *Lévy c. Nissan Canada inc.*, 2019 QCCS 3957, paras. 93 et seq.

[38] Art. 1457 C.C.Q.

[39] *Québec (Public Curator) v. Syndicat national des employés l'hôpital St. Ferdinand*, [1996] 3 S.C.R. 211, para. 33.

[40] *Sofio* (CA), *supra*. note 3, para. 25; *Zuckerman*, supra, note 37, para. 69; *Lévy*, supra., note 37., paras. 103 et. Seq.

[48] In a second stage, it will be appropriate to review the evidence of the unlawful uses of personal information of which certain Class Members claim to have been victims, as well as the causal link with the admitted faults and, where applicable, the related damages (3.2.2).

[49] But the Court must first decide the fate of the amendment to the conlusions sought, made at trial, by adding a conclusion [translation] "*to pay the Class Members (…) all expenses incurred by them as a result of Defendant's fault*".

[50] Articles 206, 207 and 585 C.C.P. deal with the amendment of proceedings and apply to class actions.

[51] Permission to modify a pleading is the rule and refusal is the exception.[41] The possible amendment of proceeding [translation] "*must be analyzed in a flexible, wide and liberal manner, open-mindedness being the rule in this regard when relevance is probable*".[42] The Judge therefore has no discretionary power to deny an amendment that appears serious.[43]

[52] However, the right to amend is not without restrictions; they are set forth in the first paragraph of article 206 C.C.P. and are to be interpreted restrictively.[44] Thus, the amendment of a pleading must not result in an entirely new application having no connection with the original one; nor may it be contrary to the interests of justice or delay the conduct of the proceedings.

[53] In its analysis, the Court must have regard to the principles of the proportionality, sound case management and the proper administration of justice.[45]

[54] In this case, the final amendment proposed to the conclusions of the Originating Application seeks to introduce a condemnation [translation] "*to pay the Class Members (…) all expenses incurred by them as a result of Defendant's fault*" -- an amendment submitted when the Plaintiff's evidence was closed.

[55] The IIROC correctly argued that that amendment contravened the judicial contract between the parties to the suit, since it added a claim that had not been announced or even envisaged by the parties. In fact, neither in the proceedings nor in the issues initially addressed to the Class Members in 2018[46] had there been any question of costs incurred by the Class Members. There was nothing to give rise to any such claim.

[56] At trial, two Class Members testified as to charges of $20 a month, connected with additional protection obtained from Equifax.[47] We would recall that right from the outset,

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[41] *Volcano Technologie inc. c. Factory Mutual Insurance Company*, 2007 QCCA 802.
[42] *Vermette c. General Motors du Canada ltée*, 2010 QCCS 1103, para. 19; *Maltais c. Hydro-Québec*, 2011 QCCS 3587, para. 17.
[43] *Technologie Labtronix inc. c. Technologie Micro-contrôle inc*., 1996 CanLii 6094 (QC CA).
[44] *6608604 Canada inc. c. Gatineau (Ville de)*, 2009 QCCS 3282.
[45] Article 18 et seq., C.C.P.
[46] Exhibit P-29(2), Tab 2: email of May 2, 2018 from Maître Demers.
[47] Testimony of Filiion and of Lamontagne, December 4, 2020.

the IIROC, in its first letter, had already offered to reimburse investors who paid for protective services, under certain conditions[48]. Moreover, no evidence was adduced as to the context, nature, utility or value of those services. Nothing foreshadowed the amendment notified thereafter.

[57] Unaware of the intention of the Class Members to claim such expenses, the IIROC did not seek to question the legitimacy of the services and expenses claimed their necessity or their connection with the alleged wrongdoing. Nor did the Organization foresee or adduce any contradictory evidence in that regard. Consequently, the amendment deprives IIROC of any adequate ground of defence against that new claim.

[58] Under the circumstances, this amendment, sought at an obviously inappropriate and late point in time, appears contrary to the interests of justice, one essential element of which is preserving the balance between the rights of the parties.[49]

[59] In consequence, the amended conclusion seeking expenses incurred by the Class Members is not authorized.

3.2.1 Damages connected with the loss of personal information and the monitoring and protection measures

[60] The Court repeats the considerations clearly expressed by the Court of Appeal in the *Sofio* case concerning the state of the applicable law, to the effect that [translation] "*There is no need to state that a fault does not ipso facto cause an injury, not even a moral one. The same applies to the wrongful loss of personal information although it may interfere with the victim's right to privacy.*" The Court recalled that [translation] "*damages are not awarded based on the gravity of the fault, but rather on the injury resulting from it. A serious fault may not entail any injury or give rise to only a minimal one. The opposite is also true. Everything depends upon the facts*."[50]

[61] As regards evidence, in its decision in *Bou Malhab v. Diffusion Métromédia CMR inc*., the Supreme Court reminds us that there is no question of requiring each class member to testify, in order to establish injury actually sustained: "*Proof of injury will usually be based on presumptions of fact, that is, on an attempt to find 'an element of damage common to everyone […] to be able to infer that there were serious, precise and concordant presumptions that all the [members of the group sustained personal injury]'".* Hence, "*the plaintiff must prove an injury shared by all members of the group so the Court can infer that personal injury was sustained by each member*". Finally, the Court reiterated that "*While the injuries sustained by the members of the group in question varied in intensity, this Court confirmed that it could be inferred that each member had sustained injury based on the similarities between them*".[51]

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[48] Exhibit P-3.
[49] *Huard c. Saguenay (Ville de)*, 2010 QCCA 583.
[50] *Sofio* (CA), *supra*., note 3, paras. 21 and 22.
[51] *Bou Malhab c. Diffusion Metromedia CMR inc.*, 2011 SCC 9, [2011] 1 S.C.R. 214, para. 54.

[62] In this case, the compensatory damages claimed are based upon[52]:

1) the worry, anger, stress and anxiety felt with regard to the incident;

2) the obligation to monitor their financial accounts, and particularly their credit cards and bank accounts[53];

3) the inconveniences and loss of time incurred in interacting with the credit information agencies and monitoring the protection of their personal information;

4) the embarrassment felt and the delays caused by verifying their identity in their credit applications, caused by the alerts placed on their credit files.[54]

[63] Moral injuries, even in an individual action, remain extremely difficult to characterize and quantify. In class actions, owing to their subjective, qualitative, and highly individual nature, that portion of the members' claims are more difficult to indemnify collectively.

[64] However, in certain circumstances where it appears possible to infer a common injury from the evidence,[55] [translation] "*Courts have recognized the possible existence of this type of damages, particularly in illegal work stoppages or undue delays in public transportation services[56], or where a travel agency has failed to perform certain of its obligations*[57]".

[65] Wherefore, it is the principles laid down by the Supreme Court in the case of *Mustpaha v. Culligan of Canada Ltd.* that apply[58]:

> [Translation]
>
> [9] This said, psychological disturbance that rises to the level of personal injury must be distinguished from psychological upset. Personal injury at law connotes serious trauma or illness" see *Hinz v. Berry*, [1970] 2 Q.B. 40 (C.A.), at p. 42; *Page v. Smith*, at p. 189; Linden and Feldthusen, at pp. 425-427. <u>The law does not recognize upset, disgust, anxiety, agitation or other mental states that fall short of injury</u>. I would not purport to define compensable injury exhaustively, except to say that it <u>must be serious and</u>

[52] Originating Application, paras 19-33.
[53] Exhibit P-4.
[54] See para. 19 of this judgement.
[55] SCFP, idem, paras. 106 and 107.
[56] *Binette c. Syndicat des chauffeures et chauffeurs de la Corp. métropolitaine de Sherbrooke*, 2004 CanLII 20437 (QC CS), paras. 46 et seq.
[57] *Sofio* (CS), *supra*, note 2, para. 38.
[58] *Mustapha v. Culligan of Canada Ltd*, 2008 SCC 27, [2008] 2 S.C.R. 114, a Common Law decision, but one frequently cited by our jurisprudence, particularly with respect to the loss of personal information; *Li c. Equifax inc.*, 2019 QCCS 4340, paras. 23 et seq; *Zuckerman*, supra., note 37, paras. 65 et seq; M*azzonna c. DaimlerChrysler Financial Services Canada Inc./Services financiers DaimlerChrysler inc*., 2012 QCCS 958, paras 56 et seq.

> prolonged and rise above the ordinary annoyances, anxieties, and fears that people living society routinely, if sometimes reluctantly, accept. The need to accept such upsets rather than seek redress in tort is what I take the Court of Appeal to be expressing in its quote from *Vanek v. Great Atlantic & Pacific Co of Canada* (1999), 48 O.R. (3d) 228 (C.A.): "Life goes on" (para 60). Quite simply, minor and transient upsets do not constitute personal *injury* and, hence, do not amount to damage.
>
> [Emphasis added by the Court.]

[66] In this case, 7 of the 8 Class Members questioned testified as to the anger, worry, stress and fear they felt with regard to the incident that occurred in February 2013. The 8th witness, being busy, paid no attention to the letter, presuming it to be an error.[59]

[67] These testimonies and the evidence permit us to infer that these were probably common feelings felt by all of the Class Members, even if with varying intensity.

[68] This evidence, however, provides very few details, concrete facts or significant manifestations of their psychological states. Probably disturbed by the loss of their personal data, the Members spoke in rather general terms about anger, worry and stress, without relating any particular difficulties connected with their states of mind. In addition, they provided no documentary, medical or other evidence to convince the Court of the severity of those sufferings.[60]

[69] Lamoureux, for his part, even found himself reassured by the contents of the letter from the IIROC and the security measures implemented, so that he took no action following the second letter.[61] Other Class Members found explanations and were pacified by the communications from the IIROC and their investment brokers.[62]

[70] Consequently, the incident does not appear to have resulted in any serious and persistent psychological consequences for any of the Class Members affected.

[71] Conversely, for example, Lamoureux provided further details relating to the panic and insomnia he experienced, resulting from the unlawful uses of his identity in 2015, which are claimed under this heading.[63]

[72] In short, in the Court's opinion, the generally negative feelings felt following the loss of the computer and the personal information it contained did not cross the threshold

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[59] Testimony of Lafontaine, December 4, 2020.
[60] *Bérubé c. Procureure générale du Québec*, 2018 QCCS 614, paras. 124 to 128.
[61] Testimonies of Gosselin, December 4, 2020, and of Lamoureux, December 7, 2020
[62] Testimonies of Claudyne Bienvenu, December 2, 2020, of Amiot and Lamontagne, December 3, 2020, of St-Amour, December 4, 2020 and of Lamoureux, December 7, 2020.
[63] Section [96]3.2.2 of this judgement. Same observation applies particularly to Class Members Gosselin and Fillion.

of the "*annoyances, anxieties and fears that people living in society routinely, if sometimes reluctantly, accept*[64]".

[73] The Class Members further deplore the fact that the loss of their personal information required increased supervision of their financial accounts, which "do not consider as being a compensable injury, but rather as part of the normal activities of a reasonable person protecting his or her assets".[65]

[74] However, in his decision in *Zuckerman c. Target Corporation*, Mr. Justice Hamilton provided an opening for other damages connected with organizing a credit monitoring and a security alert service:

> [73] The Court concludes that the monitoring of bank accounts and credit cards constitute normal activities and not inconveniences for which the account or cardholder can recover damages. However, other matters such as setting up credit monitoring and security alerts, obtaining credit reports, and cancelling cards or closing accounts and replacing them are not "ordinary annoyances, anxieties and fears that people living in society routinely, if sometimes reluctantly, accept" but may amount to something more. These potentially are matters for which Class Members would be entitled to compensation.

[75] We must remember that in that case, the Representative Plaintiff had himself taken steps to cancel his credit card, as well as to pay for Equifax's credit monitoring program, paying $19.95 to do so, which sufficed at the authorization stage to justify recognizing an apparent injury giving rise to damages.[66]

[76] In another decision, *Lévy v. Nissan Canada Inc.*, the Representative Plaintiff had extended the one-year protection offered by Nissan with the TransUnion agency to six years and had paid $6.90 to activate Equifax's alert program. Justice Gagnon *prima facie* identified a compensable injury, similar to that recognized in the *Zuckerman* case, and authorized the class action.[67]

[77] In this case, the IIROC offered the investors all necessary monitoring and protective measures of Equifax and TransUnion, free of charge. However, one question remains: May the Class Members obtain compensation for their loss of time and inconveniences resulting from the rollout of those measures?

[78] In *Fortin c. Mazda Canada inc*., the Class Members argued that they had sustained inconveniences due to having to make trips to and from their dealers for the installation of measures to correct the locking system of their Mazdas. In first instance, the Judge

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[64] *Mustapha*, *supra.*, note 59, para. 9; Li, supra., note 59, para 31.
[65] *Sofio* (CS), *supra.*, note 2, para. 41; *Sofio* (CA) supra., note 3, para. 19; *Zuckerman*, supra., note 37, para. 73.
[66] *Zuckerman*, *supra.*, note 37, paras. 70 to 76.
[67] *Lévy*, supra, note 37, paras 103 et seq.

dismissed that aspect of their claim, on the ground that these were out of the ordinary disturbances of life, which the Court of Appeal confirmed[68], stating the following:

> [Translation]
>
> [170] Then although Appellants have suffered annoyances from the campaign launched by Mazda to correct the defect affecting its Mazda 3 model, obviously those did not exceed the normal inconveniences to which all vehicle owners are confronted now and then in the normal course of any year.[69]

[79] The Court of Appeal referred to the analysis provided by the author Me Christine Carron, cited by the trial judge in first instance[70], concerning the normal inconveniences that anyone living in society should be bound to accept:

> [Translation]
>
> […]Let us suppose that a car manufacturer notices the existence of a manufacturing defect compromising the utility, but not the safety, of the vehicles sold. Wishing to perform its obligations voluntarily, it recalls the cars in order to repair the defect, the whole free of charge. Can the car owners then claim an indemnity for the inconvenience of having had to go to the dealership to have their cars repaired? Should they be able to institute a class action for compensation for that inconvenience?
>
> Lawsuits of that kind do not attain the objective of dissuasion. On the contrary, in the long term, they will have the effect of dissuading the voluntary performance of obligations by manufacturers, who will become hesitant to voluntarily perform their obligations if, in so doing, they expose themselves to such suits for inconveniences. Consequently, discouraging debtors from performing their obligations voluntarily will eventually multiply the number of lawsuits, both individual and collective. Such actions obviously do not serve the objectives contemplated by the class action procedure.
>
> More fundamentally, one may wonder whether car owners in our example should be recognized as having the right to be compensated for the annoyances they have experienced. We would suggest that Quebec law should distinguish annoyances, upsets, stresses, fears and other passing psychological states from real injuries likely to engage the civil liability of the party causing them. We will argue that Courts should not authorize the institution of class actions for the sole purposes of obtaining compensation

[68] *Fortin*, supra, note 55, para. 168 et seq.
[69] Carron, Christine A, « *La quiétude et la règle de minimis: le recours collectif pour inconvénients mineurs* », in Barreau du Québec, Service de la formation continue, *Développements récents en recours collectifs (2012)*, volume 345, Cowansville, Editions Yvon Blais, 2012 [online], p. 45 et seq.
[70] *Fortin c. Mazda Canada inc.*, 2014 QCCS 2617, para. 149.

> for inconveniences that do not exceed the normal inconveniences that anyone in living in society should be bound to accept.[71]
>
> [Emphasis added by the Court.]

[80] The Court then concluded:

> [Translation]
>
> [171] The law of civil liability does not purport to compensate a party for all his or her frustrations and susceptibilities connected with the slightest shortcoming on the part of those with whom he or she interacts, if only because of the large measure of subjectivity that applications of that nature entail. Accordingly, it is not appropriate to overburden courts with individual claims based on consequences of only slight importance (Art. 1604, para 2, C.C.Q.) - rules often encapsulated in the form of the Latin maxim de *minimis non curat lex.*
>
> [Emphasis added by the Court.]

[81] In the very different circumstances of this case, even in the same spirit of making reparation, the IIROC has sought to mitigate any potential risk of fraud or identify theft by offering each of the investors monitoring and protective services.

[82] More specifically, the alert services from Equifax and TransUnion automatically apply to the credit file of each investor, which services they may waive by contacting the agencies. However, they must subscribe to the second credit monitoring service with Equifax, proposed in the second letter.

[83] All of this results in the investors having to communicate with the agencies. The letters also invite them to contact the IIROC's call centre or their investment brokers to answer any questions and concerns they may have.

[84] In point of fact, the experience of the 8 members questioned can be summarized thus:

- one of them took no steps[72];

[71] Carron, « *La quiétude et la règle de minimis: le recours collectif pour inconvénients mineurs* », supra, note 70.
[72] Testimony of Lafontaine, December 4, 2020.

- the majority complained of difficulties with having to wait a half-hour[73] to reach Equifax, except one member who made no mention of that and another who experienced no problem[74]. For his part, Lamoureux gave up[75];

- a majority contacted IIROC's call centre or their investment brokers, without any problem.[76]

[85] Should the annoyance and loss of time to take all those steps be compensated? This Court does not believe so.

[86] With respect, the minutes, even the hour, of waiting, and the inconveniences caused by the Class Members, although they were different for each of them, do not represent significant compensable consequences. In the eyes of the Court, they constitute a lesser evil to secure the investors' credit files, avoiding for them the greater inconveniences of fraud or identify theft generally -- an unavoidable reality in our society, even in 2013.[77]

[87] By exception, one Class Member took half a day off work to follow all the recommendations of the reminder, including those relating to a presumed identity theft, without having been the victim of any. The Court considers that such a person was an exception, taking steps, not all of which were connected with, or necessary to, the loss of her information alone. That being said, with due respect, her personal experience cannot be used to draw any inference as to a common damage resulting from the Incident.[78]

[88] The Court therefore thinks that these actions, which after all are brief and momentary, do not exceed the normal inconveniences that any person interacting in 21st century society encounters and should be bound to accept.

[89] Moreover, it is uncontested that a fraud alert may give rise to a delay in the future processing of a credit application, as regards the verification of identity by credit providers. [Translation] "*It may be a question of asking the party seeking credit to submit his or her application in person rather than by telephone or on the web or to provide a piece of photo*

[73] Testimonies of Claudyne Bienvenue, December 2, 2020, of St.-Amour, December 4, 2020, of Gosselin, December 7, 2020.
[74] Testimony of Amiot, December 3, 2020, of Lamontagne, December 4, 2020.
[75] Testimony of Lamoureux, December 7, 2020; originating application, paras. 31 and 32.
[76] Testimonies of Amiot, December 3, 2020, of Lamoureux, December 7, 2020, of Charbonneau, of Lamontagne and of Fillion, December 4, 2020; originating application, para. 32
[77] Testimony of Christophe A. MacDonald, December 9, 2020, Exhibits D-2, D-3, D-24 and P-36; *Mazzona*, supra., note 59; *Belley c. TD Auto Finance Services inc.*, 2015 QCCS 168, paras. 14, 15, 30 and 31; *Larose c. Banque Nationale du Canada*, 2010 aces 5385; *Zuckerman*, supra, note 37; *Lévy*, supra, note 37; *Bourbonnière c. Yahoo! Inc.*, 2019 QCCS 2624; *Li*, supra, note 59; Gingras, Patrick et Vermeys, Nicolas W., *Actes illicites sur Internet: qui et comment poursuivre*, Cowansville, Editions Yvon Blais, 2011, p. 24 et s., p. 28. et seq.
[78] *Bou Malhab*, supra, note 51, par. 54.

ID or to answer additional authentication questions. The lending institution's process is discretionary as regards the authentication protocol and the measures that it takes."[79]

[90] Some of the investors questioned were confronted by such identity checks, and some of them complained about the delays and the embarrassment they felt:

- two Class Members took the initiative to inform their credit providers in advance that they were subject to a fraud alert. This seems to have borne fruit, since one Member testified that she had no problem at the time of renewing her mortgage;[80]

- some Members testified that obtaining a new credit card could take up to one hour;

- in the particular case of Lafontaine, on two occasions, his credit approval for purchasing vehicles required several days[81]. The evidence adduced, however, does not permit the Court to evaluate all the circumstances surrounding his two credit applications or to understand the exact reasons invoked by the financial institutions. Consequently, it is impossible to conclude that those long delays were entirely attributable to a verification process connected with the alerts.

[91] In general, the Court found the scope of the difficulties encountered to be relative and negligible, and they therefore do not appear to support any claim for damages.

[92] Considering the unauthorized access and data thefts plaguing our society[82], is it still reasonable, appropriate and safe in 2013 to expect to obtain instant credit, without any delay for checking identity?

[93] In the Court's opinion, these identity verification delays constituted normal, acceptable delays that may be imposed on any person endowed with ordinary resilience, who is concerned about ensuring the safety of his or her assets and of economic activities generally.

[94] Furthermore, absent any evidence that any third party actually accessed any information contained in the laptop, the Class Members may opt to waive the protective measures in order to avoid these annoyances. None of the Members questioned has thought of unsubscribing, probably because of the benefits that they derive from this protection[83].

[95] Lastly, with regard to the embarrassment felt by certain persons[84] faced with questions and identity verifications, it must be observed that that constitutes a rather circumstantial and objective feeling, akin to mere upset, without more.

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[79] Exhibit P-5; Testimonies of Claudyne Bienvenu, December 2, 2020 and of Keith Persaud, December 3, 2020.
[80] Testimonies of Charbonneau and of Lamontagne, December 4, 2020.
[81] Testimony of Lafontaine, December 4, 2020
[82] See note 79.
[83] Testimony of Charbonneau, December 4, 2020.
[84] Testimonies of Lafontaine, of Lamontagne and of Charbonneau, December 4, 2020.

[96] Finally, the Court believes that in the light of the whole of the evidence, the fears felt and inconveniences suffered by the Class Members since the incident occurred fall into the category of ordinary disturbances of life in society and do not constitute damages qualifying for compensation.

3.2.2 The causal link and the damages claimed by the Class Members victims of illegal acts

[97] Plaintiff suggests that the fact that the computer left on the train was never found permits us to conclude that there was theft: [translation] "*Something obvious: someone who takes an object not belonging to him is a thief*[85]."

[98] Now, a distinction must be made between the disappearance or presumed theft of the lost computer and the theft of the personal information that it contains.

[99] For the plaintiff, [translation] "*the content has much more value than the computer itself*" and experts confirm that it is very easy to access unencrypted content.[86]

[100] Perhaps, but once again it is necessary that the person who finds and is in possession of the computer be wrongfully intentioned. He must know how to hack the secret code, he must realize the sensitivity of the personal information that the laptop contains and he must decide to make unlawful use of that information. One may equally well suggest that such a person, finding the lost computer and unable to identify its owner, might have deleted the contents of the device in order to use it more effectively for his own purposes.

[101] The Plaintiff is far from having provided any serious, precise and concordant evidence in that regard.[87]

[102] For its part, the IIROC retained the expert Christopher A. MacDonald ("**MacDonald**") from the firm PricewaterhouseCoopers ("**PwC**") to study the circumstances and unlawful uses reported by all the investors affected by the Incident, to to determine if they could have results from the theft of the personal information in the computer.[88]

[103] In light of his analysis, the expert MacDonald concluded that nothing clearly indicated that the data had fallen into the hands of an individual or group of individuals for malevolent purposes. His findings and explanations are summarized as follows:

> The lack of connection between the loss of the laptop [and] the alleged fraudulent activity [is] observed in the following way. None of these below

[85] Notes from pleadings on the facts, December 10, 2020, p. 3.
[86] Idem.; Expert Report, July 23 2019, Exhibit D-3 (MacDonald Report 2019), para. 46b, p. 14.
[87] Art. 2849, C.C.Q.
[88] MacDonald Report 2019.

variables on their own are absolutely determinative, but together we believe there is no known link of the individuals to the IIROC laptop information:

a. there would be a much higher volume of credit bureau records of applications for credit;

b. the lack of the expected volume of alleged fraud experienced by the investors;

c. the lack of consistency in the alleged fraud and identity thefts which would indicate a link of the individuals to the IIROC laptop;

d. a lack of any nefarious discussions online regarding the incident.

[104] In reply, Plaintiff mainly criticizes the MacDonald Report for having relied blindly on the information provided by the IIROC and the results of the Deloitte Report, limiting their "stolen" personal information to their: names, addresses, dates of birth, as well as the names of their investment broker and the account number(s) opened with that broker.

[105] Based on his personal experience, Lamoureux hopes to convince the Court that those reports were uncertain and incomplete. In fact, in 2015, he was the victim of a number of unlawful uses of his identity effected using his driver's license or his social insurance number. Since he had provided that information to his LBS broker when opening his account, he presumed that it had been forwarded to the IIROC. He therefore had no doubt that in his mind that the fraudsters had accessed his identification documents via the lost IIROC computer.

[106] That is not what the evidence reveals, however.

[107] On the one hand, going back to the example of the driver's license, there is a concrete finding that the photocopy found in the LBS file related to a driver's license that expired in 2016[89], whereas the licence used to perpetrate the illegal acts expired in 2017.[90] Therefore, no link can be established.

[108] On the other hand, Lina Barbusci ("**Barbusci**"), Manager of Business and Negotiation Conduct Compliance at the IIROC, explained the inspection process for brokerage terms generally, as well as the conduct of the internal investigation carried out immediately after the Incident.[91] Other members of the IIROC management, called as witnesses, corroborated several of the details provided by Barbusci, to the best of their respective knowledge.[92]

[109] Accordingly, in fact, the IIROC sent a first letter to the brokerage firm notifying it of the inspection and requesting a list of many documents to be sent, on a CD-ROM, before

[89] Exhibit P-31.
[90] Exhibit P-32
[91] Testimony of Lina Barbusci, December 2, 2020.
[92] Testimonies of Claudyne Bienvenue, December 2. 2020, of Carmen Crépin, December 3, 2020, and Rosemary Chan, December 7, 2020.

the inspector's visit.[93] Those documents are saved in IIROC's in-house computer system (Montreal/Network Drive/K: Drive[94]). For the purposes of their visit, the IIROC required access to an office, an internet connection, as well as a telephone line for its two inspectors.[95]

[110] Once on site, the inspectors were able to obtain additional information and to scan documents using their laptop computer, which information was immediately transferred to the IIROC's internal computer network, except if, by exception, the internet connection did not so permit. Where applicable, the information was forwarded to the internal computer system when the inspectors returned to the office.[96]

[111] In March 2013, Barbusci carried out the internal investigation in IIROC's computer system, examined all the records of the inspections carried out using the lost computer and found all the information that the lost computer might contain. She compiled her observations and results in memos.[97]

[112] At the same time, out of a concern for transparency, professionalism, thoroughness and accuracy[98], we must remember that the IIROC retained the Deloitte firm to carry out an independent external investigation. Alan Stuart, a partner and practice leader in forensic accounting at Deloitte, explained the stages of that investigation. In particular, he described the interviews conducted with the employees involved, the checking of the records from the IIROC's computer system, the records of all the emails of the inspectors who had made use of the lost computer, the review of the memorandum of the internal investigation and related documents.[99] Independent professionals minutely checked all that information in order to identify the brokerage firms, the investors and the specific information stored on the lost computer, classified into three categories: Sensitive Information, Increased Sensitivity Information and Highly Sensitive Information.

[113] In November 2016, in the present action, Barbusci personally proceeded to make an additional check of the record of Plaintiff Representative Lamoureux, in all the inspection programs from 2009 to 2013.[100] She discussed with the inspectors involved (including the inspector involved to the Incident) and verified all the entries, all the sections, all the modules and documents. She did a key word search in the whole network. She concluded that the information in the IIROC's possession concerning Lamoureux was limited to his name, his date of birth, his address, his client code, his account numbers, the dates of opening of his accounts, the amounts of his assets, the name of his broker and his branch office (Granby). At the conclusion of her research, she appeared convinced that Lamoureux's social insurance number and driver's license were

[93] Exhibit P-60.
[94] Exhibit P-38, page 2.
[95] Exhibit P-60.
[96] Testimony of Lina Barbusci, December 2, 2020.
[97] Exhibits P-38 and P-39.
[98] Testimony of Alan Stuart, December 2 and 3, 2020, of Carmen Crépin, December 3, 2020, and of Rosemary Chan, December 8, 2020.
[99] Testimony of Alan Stuart, December 2 and 3, 2020; Exhibits P-23, page 4.
[100] Affidavit of Lina Barbusci, November 24, 2018, Appendices 1 to 5, Exhibit D-14.

not part of the information received by the IIROC. Her testimony is credible and her work was minute and thoroughgoing.[101]

[114] In reality, Lamoureux and some others remained under the impression that the IIROC was in the possession of all their brokerage records, including in particular their social insurance numbers, license numbers and credit card numbers that had been used to commit the wrongful and unlawful acts. However, the facts, the verifications effected and the evidence demonstrates that such was not the case.

[115] In a second report, the expert MacDonald specifically studied the unlawful uses of the personal information suffered by the Class Members called as witnesses at trial.[102] In light of his analysis, the expert concluded:

> 8. The additional information provided does not change the substantive findings from the original report.
>
> 9. The information provided for the four Class Members; [...] Amiot, [...] Filion, [...] Charbonneau, and [...] Gosselin continues to lack a commonality expected with a targeted attack on a recovered set of data, such as the IIROC laptop. It did not provide any additional precursor or evidence which would be indicative of an attack against the individuals whose information was on the IIROC laptop.
>
> 10. The additional information provided by [...] Amiot, [...] Filion, and [...] Charbonneau demonstrate alleged fraud and identity theft which required personal information that was not located on the IIROC laptop.
>
> 11. There was a temporal association between some of the alleged fraud experienced by [...] Gosselin. But there were pieces of information which were not on the IIROC laptop that were used in the alleged fraud against him; specifically, his pre-existing Desjardins Visa card, and the name of his employer.
>
> 12. We continue to conclude that there are no signature indications that link any of the alleged to conclude that there are no signature indications that link any of the alleged fraud and identity theft anecdotes to the data contained on the IIROC laptop.

[116] Once again, no expert report or other evidence refutes the Expert's method, findings and conclusions.

[117] Finally, Lamoureux suggested that the credit agencies and their alerts did not function at all to prevent the unlawful acts perpetrated in his name. Now obviously, in his

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[101] Testimony of Lina Barbusci, December 2, 2020, Exhibits P-38, P-39 and D-14.

[102] Supplemental report to the Expert Report submitted 23 July 2019, May 14, 2020, Exhibit D-24 (MacDonald Report 2020).

case, it must be concluded that the fraudsters had on hand identity documents to respond to the checking by the credit providers.

[118] In short, the study of all of the evidence convinces the Court that there is no causal link between the loss of the computer and the unlawful uses alleged by the Class Members. Under the circumstances, any claim made in that regard must be dismissed.

3.3 Punitive Damages

[119] The Class Members allege that there has been an unlawful and intentional interference with their right to privacy under article 5 of the Quebec Charter[103], entitling them to exemplary damages.

[120] It is now well established that punitive damages may be awarded even if the principal action for compensatory damages is not crowned with success.[104] The Supreme Court, in *de Montigny v. Brossard,* explained that punitive damages constitute an independent reparation which "aims at expressing "*special disapproval of a person's conduct*". That condemnation is therefore "*tied to the judicial assessment of that conduct, not to the extent of the compensation required for reparation of actual prejudice, whether monetary or not.*"[105]

[121] This claim is made in the application of paragraph 2 of article 49 of the Quebec Charter:

> **49.** Any unlawful interference with right or freedom recognized by this Charter entitles the victim to obtain the cessation of such interference and compensation for the moral or material prejudice resulting therefrom.
>
> In case of unlawful and intentional interference, the Tribunal may, in addition, condemn the person guilty of it to punitive damages.

[122] Added to that are the rules laid down at article 1621 C.C.Q.:

> **1621.** Where the awarding of punitive damages is provided for by law, the amount of such damages may not exceed what is sufficient to fulfill their preventive purpose.
>
> Punitive damages are assessed in the light of all the appropriate circumstances, in particular the gravity of the debtor's fault, his patrimonial situation, the extent of the reparation for which he is already liable to the creditor and, where such is the case, fact that the payment of the damages is wholly or partly assumed by a third person.

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[103] Quebec Charter of Human Rights and Freedoms, supra., note 36.
[104] *de Montigny c. Brossard (Succession)*, 2010 SCC 51, paras. 38 to 46; *Montréal (Ville) c. Lonardi*, 2018 SCC 29, [2018] 2 S.C.R.. 103, para. 80; *Imperial Tobacco Canada ltée c. Conseil québécois sur le tabac et la santé*, 2019 QCCA 358, para. 1001.
[105] *de Montigny*, id., para. 47.

[123] To satisfy the intentional interference criterion, Plaintiff argues that it suffices that the wrongdoer act with "*full knowledge of the immediate and natural or at least extremely probable consequences that his or her correct conduct will cause*", as decided in the guiding principle laid down in the decision in *Hill v. Church of Scientology of Toronto*[106] and subsequent case law.[107]

[124] Initially, the loss of the unencrypted computer and the violation of the rights that resulted from it were isolated and unintentional incidents.

[125] However, the Class Members contend that the IIROC demonstrated carelessness and indifference toward the interference with their rights, by delaying in reacting and in publicizing the incident, especially to the commissions having jurisdiction, and in informing them in a timely manner. In particular, two months elapsed before the investors received the first letter. According to them, the IIROC could not have been unaware of the extremely probable consequences of the delays caused by its behaviour.

[126] With respect, the Court does not share that opinion.

[127] In fact, as of March 4, 2013, the IIROC was apparently aware the nature of the information stored in the laptop computer and the potential of the personal information concerning the investors, but it definitely could not act precipitately without identifying more specifically the contents of the missing laptop. That is the reason for which the IIROC appealed for help from experts in this field.

[128] Quite rightly, the IIROC, acting on the advice of Deloitte, submits that a certain period of time was needed in order to identify specifically what personal information was involved and the member brokerage firms and individuals affected, in order to implement measures to ensure the protection of the information upfront and to respond to the questions that the announcement of the Incident would trigger. Communicating that information to the public too quickly presented a risk that the unidentified computer might be targeted and be found in some wrongdoer's hands,[108] even before the protective measures had been set in place.

[129] The IIROC invested considerable sums to make available to investors the monitoring and protection services offered by Equifax and TransUnion.[109]

[130] Retained to review the action and the actions taken by the IIROC, the expert MacDonald concluded that its response "*adhered to best practices*", and the measures

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[106] *Hill v. Church of Scientology of Toronto*, [1995] 2 S.C.R. 1130, para. 196.
[107] *Mouvement laïque québécois c. Saguenay (Ville)*, 2015 SCC 16, para. 161; *Ville de Sainte-Marthe-sur-le-Lac c. Expert-conseils RB inc.*, 2017 QCCA 381, paras. 77 to 83; *Canoë inc. c. Corriveau*, 2012 QCCA 109, paras. 6 to 12; *Biondi c. Syndicat des cols bleus regroupés de Montréal (SCFP-301)*, 2010 QCCS 4073, paras. 167 to 171; *Genex Communications inc. c. Association québécoise de l'industrie du disque, du spectacle et de la vidéo*, 2009 QCCA 2201, para. 91.
[108] Testimony of Rosemary Chan, December 8, 2020.
[109] Exhibits D-8, D-9 and D-10.

put in place "*were suitable in the circumstances and were consistent with other investigation responses of this nature […]"*.[110]

[131] No counter-expertise or contradictory evidence permits attacking the expertise, methodology and findings of the expert MacDonald, which were clearly set forth in his report and in his testimony.[111]

[132] In principle, the uncontradicted testimony of an expert may not be arbitrarily set aside and must generally be accepted.[112]

[133] In this case, his opinion is based on his personal competence in *Cyber Incident Response*, based on the guidelines of the *National Institute of Standards and Technology* in cases of cybernetic incidents[113] and results from his analysis of the duly proven facts. His expertise objectively enlightens the Court on the ordinary steps taken in similar circumstances and the legitimacy of the measures undertaken by the IIROC at the time of this Incident.

[134] In consequence, based on the opinion of the expert MacDonald, it must be concluded that the IIROC did not delay in setting in place the appropriate measures to respond to the Incident or to notify the investors, the brokerage firms and others under the circumstances. The claim for punitive damages related to such faults is unfounded and therefore dismissed.

3.4 Legal costs

[135] The final question in dispute raised by the Originating Application relates to legal costs.[114] The Paintiff presented no evidence or any concrete argument[115] and, in the Court's opinion, there is no reason to depart from the loser-pay rule as concerns legal costs.[116]

WHEREFORE, THE COURT:

[136] **DISMISSES** the amendment of the Originating Application of December 9, 2020, as concerns the original conclusion to "*CONDEMN Defendant to pay the Class Members (…) all expenses incurred by them as a result of Defendant's fault*";

[137] **DISMISSES** the class action, as amended on December 9, 2020, instituted against the IIROC;

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[110] MacDonald Expert Report 2019, paras. 11, 14, 41 to 43, 44 to 49 and 80.
[111] Testimony of Christopher A. MacDonald, December 9, 2020.
[112] P.L. c. J.L., 2011 QCCA 1233, para. 64; Royer, Jean-Claude and Piché, Catherine, *La preuve civile*, 5e ed., Montréal, Editions Yvon Blais, 2016, n°559, page 428.
[113] Incident Response Life Cycle, Cichonski et al., 2012, p. 21; MacDonald Report 2019, para. 13 et seq.
[114] Paragraph 37(h) of this judgement.
[115] Pleading notes on the facts, December 10, 2020.
[116] Article 340 C.C.P.

[138] **THE WHOLE**, with legal costs.

FLORENCE LUCAS, J.C.S.

Me Louis Demers
Me Mihaela Roussimova
GILBERT SÉGUIN GUILBAULT
For Danny Lamoureux

Me Anne Merminod
Me Stéphane Pitre
BORDEN LADNER GERVAIS LLP
For the Investment Industry Regulatory Organization of Canada (IIROC)
Hearing Dates: December 1, 2, 3, 4, 7, 8, 9 and 10, 2020