

CANADA

PROVINCE OF QUÉBEC
DISTRICT OF MONTRÉAL

(Class Action)
SUPERIOR COURT

NO: 500-06-001219-233

ALEXANDER [REDACTED]
[REDACTED]
[REDACTED]

Representative Plaintiff

v.

DELL CANADA INC., legal person having its
head office at 501-155 Gordon Baker Road,
Toronto, Ontario, M2H 3N5

Defendant

ORIGINATING APPLICATION
(Articles 141 and 583 C.C.P.)

THE REPRESENTATIVE PLAINTIFF RESPECTFULLY STATES THE FOLLOWING:

I. INTRODUCTION

1. This class action seeks compensatory and punitive damages from Dell Canada Inc. (“Dell”) for violating sections 16, 224c) and 231 of Quebec’s *Consumer Protection Act* (“CPA”) by cancelling purchases of Nintendo Switch consoles made by Class Members on the Dell website on January 25, 2023;
2. By judgment rendered on March 26, 2024, the Superior Court of Quebec granted the status of Representative Plaintiff to Mr. Alexander Martin-Bale and authorized him to bring a class action on behalf of the following class:

All consumers with a billing address in Quebec who placed an order for a Nintendo Switch console for \$79.99 on Dell’s website on January 25, 2023, and whose purchase was unilaterally cancelled by Dell thereafter.	Tous les consommateurs avec une adresse de facturation au Québec qui ont passé une commande pour une console Nintendo Switch pour 79,99\$ sur le site Web de Dell, le 25 janvier 2023, et dont l’achat a été unilatéralement annulé par Dell par la suite.
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3. The Court authorized Mr. Martin-Bale to institute a class action in damages and identified the principal questions of fact or law to be dealt with collectively in this class action as follows:

<p>a) By cancelling consumers' orders, did Dell violate the <i>Consumer Protection Act</i>?</p>	<p>a) En annulant les commandes des consommateurs, Dell a-t-elle enfreint la <i>Loi sur la protection du consommateur</i>?</p>
<p>b) If so, are Class members entitled to compensation and in what amount?</p>	<p>b) Dans l'affirmative, les membres du groupe ont-ils droit à une indemnisation et à quel montant?</p>
<p>c) Are the Class members entitled to punitive damages and, if so, in what amount?</p>	<p>c) Les membres du groupe ont-ils droit à des dommages-intérêts punitifs et, dans l'affirmative, à quel montant?</p>

II. THE PARTIES

4. The Plaintiff is a consumer within the meaning of the CPA;
5. The Defendant, Dell, is a corporation that owns and operates the Canadian version of the Dell website (www.dell.com/en-ca). An extract of the enterprise's information statement from the Quebec enterprise register for Dell is filed as **Exhibit P-1**;
6. Dell does business in the province of Quebec and runs the Dell website where consumers can purchase their products online;
7. Dell is a merchant within the meaning of the CPA and its activities are governed by this legislation, among others;

III. THE PERSONAL EXPERIENCE OF THE REPRESENTATIVE PLAINTIFF

8. On January 25, 2023, the Plaintiff visited Dell's website because he was shopping for a Nintendo Switch that he wished to purchase for his personal use;
9. On January 25, 2023, while browsing Dell's website, the Plaintiff saw that the "*Nintendo Switch with Pastel Green and blue Joy-Con - New Horizons Edition - Game console - blue, pastel green*" (the "**Nintendo Switch**") was advertised on Dell's website for **\$79.99** plus taxes and he decided to purchase this item at this advertised price, as it appears from a copy of his first purchase confirmation email (2009470753889) from

Dell disclosed as **Exhibit P-2**;

10. The Plaintiff confirms that the Nintendo Switch that he purchased and that was advertised on Dell's Website contained all the essential elements of the intended contract, including the product description and price;
11. The Plaintiff further confirms that at the time of his purchases, Dell's Website indicated that the Nintendo Switch was available in stock and that Dell restricted purchases to ten (10) units per customer, as it appears from **Exhibit P-3**;
12. Plaintiff understood that Dell was offering a very good promotion as this Nintendo Switch retails on Nintendo's website \$399.99 plus taxes, which is the reason why Dell placed a restriction on the number of purchases a customer can make. In the Plaintiff's case, he decided to purchase a single unit for his personal use;
13. On January 25, 2023, Dell sent first email confirmation to the Plaintiff titled "Your Dell Order Has Been **Received** | Dell Purchase ID: 2009470753889 (Exhibit P-2);
14. A few minutes later on January 25, 2023, Dell sent a second email confirmation to the Plaintiff titled "Your Dell Order Has Been **Confirmed** | Dell Purchase ID: 2009470753889", leaving no doubt that a binding contract had been formed, as it appears from **Exhibit P-4**, which includes the following declaration:

"Thank you for **your purchase! Here's a confirmation** of your recent order. You can check the status anytime by visiting the Order Details page. Thank you for choosing Dell!"

(our emphasis in bold)

15. Moreover, by clicking on the "View Order Details" (blue button in Exhibit P-4), the Applicant was directed to a webpage on Dell's site showing the status of his order and which provided the "Estimated ship date: Feb 28, 2023" and the "Estimated arrival: March 3, 2023", as it appears from **Exhibit P-5**;
16. On January 25, 2023, Dell debited the Plaintiff's credit card, as it appears from **Exhibit P-6**;
17. However, on January 26, 2023, Dell unilaterally cancelled the Plaintiff's order, as it appears from the screenshot disclosed as **Exhibit P-7**;
18. Having learnt that his order was unilaterally cancelled (Exhibit P-7), the Plaintiff contacted Dell via its online chat tool on January 26, 2023. The Dell online customer service agent confirmed to the Plaintiff that the cancellation was due to a pricing error, as it appears from a copy of the chat transcript disclosed as **Exhibit P-8**;
19. Dell refused to sell the item that the Plaintiff purchased at the price Dell advertised on

its website and failed to honour its contracts with the Plaintiff and all Class members;

20. Under consumer protection legislation, a binding agreement was formed at \$79.99 plus taxes, which Dell cannot unilaterally cancel on the basis of pricing error, even if Dell's Terms of Sale provides for otherwise (**Exhibit P-9**, clause 3) – notably because section 54.1 C.P.A. is of public order and stipulates the following:

<p>54.1 Un contrat conclu à distance est un contrat conclu alors que le commerçant et le consommateur ne sont pas en présence l'un de l'autre et qui est précédé d'une offre du commerçant de conclure un tel contrat.</p> <p>Le commerçant est réputé faire une offre de conclure le contrat dès lors que sa proposition comporte tous les éléments essentiels du contrat envisagé, qu'il y ait ou non indication de sa volonté d'être lié en cas d'acceptation et même en présence d'une indication contraire.</p>	<p>54.1 A distance contract is a contract entered into without the merchant and the consumer being in one another's presence and preceded by an offer by the merchant to enter into such a contract.</p> <p>A merchant is deemed to have made an offer to enter into a distance contract if the merchant's proposal comprises all the essential elements of the intended contract, regardless of whether there is an indication of the merchant's willingness to be bound in the event the proposal is accepted and even if there is an indication to the contrary.</p>
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21. The Plaintiff declares that at the time he purchased the console, Dell's website displayed the items as available and contained an option showing that there was sufficient quantity available for purchase. Dell also indicated a description of the item, a picture of the item, the price and that it was available for purchase at the advertised price;
22. Dell's cancellation of the class members' orders is also in violation of sections 16, 54.1 and 224c) CPA, rendering sections 253 and 272 applicable;
23. The Plaintiff is therefore entitled to claim on his behalf and on behalf of all class members damages equivalent the "Lost Value", calculated as the difference between the price it would cost to purchase the Nintendo Switch today and the price advertised by Dell at the time of his purchase on January 25, 2023:

Item	Price paid by Plaintiff to Dell on January 25, 2023	Price advertised online on January 26, 2023	Lost Value
Nintendo Switch with Pastel Green and blue Joy-Con - New Horizons Edition - Game console - blue, pastel green	\$79.99	\$536.97 Amazon.ca (Exhibit P-10)	\$456.98

	\$79.99	\$399.99 Nintendo website (Exhibit P-11)	\$320.00
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24. If the Plaintiff wanted to purchase this model Nintendo Switch around the time his order was cancelled by Dell, it appears that the only way to do so (in Canada) would be online from Amazon’s website for \$554.88 (**Exhibit P-10**). Plaintiff notes that the Nintendo Switch is listed on the Nintendo Canada website for \$399.99, but that it is out of stock and not available for sale (**Exhibit P-11**);
25. As such, the Lost Value claimed by the Plaintiff is **\$456.98**;
26. Quebec case law has already applied the Lost Value formula (“*valeur perdue*”) in similar circumstances, as it appears from the judgment in *Charest-Corriveau c. Sears Canada inc.*, 2015 QCCQ 6417, disclosed as **Exhibit P-12**;
27. Dell refused to sell the items that the Plaintiff purchased at the price advertised by Dell on its website and failed to honour its contracts with the Plaintiff and all Class members;
28. Given the duration for which the Nintendo Switch was available for sale on Dell’s website (24 hours), the fact that Dell sent reception and confirmation emails to class members – and that Dell has already been to the Supreme Court of Canada for this issue (related to a Quebec class action), Dell’s “pricing error” in this case can only be qualified as inexcusable, especially by a multinational such as Dell who should have systems in place to ensure that the prices it advertises on its website to the public are correct;
29. Quebec case law states that merchants must have “safeguards to protect the integrity of its on-line system from the type of human error that was allegedly made here” (*Lavoie c. Wal-Mart Canada Corp.*, 2022 QCCS 1060, par. 63);
30. Even if Dell later insists that there was no pricing error and that reason for cancellation was the item was out of stock, it follows that Dell would have then violated section 231 CPA by having an insufficient quantity of the goods it advertised;
31. The Plaintiff declares that at the time he purchased the Nintendo Switch, Dell’s website displayed the item as available and contained an option showing that there was sufficient quantity available for purchase – even capping the quantity per purchase to 10 units per customer. Dell also indicated a description of the Nintendo Switch, a picture of the item, the price and that it was available for purchase at the advertised price (**Exhibit P-3**);
32. By refusing to honour its advertised price Dell violated several sections of the CPA, including sections 16, 54.1, 224 c) and 231. The Plaintiff is therefore entitled to claim

damages in the form of the “Lost Value” described at paragraph 23 above;

33. In the circumstances, the Plaintiff is also entitled to claim punitive damages pursuant to section 272 CPA which he hereby claims in the aggregate amount of \$500 per class member, which is appropriate in the circumstances given that Dell is clearly a repeat offender;
34. Indeed, Dell’s conduct warrants such a condemnation because it refused to honour the advertised price despite the Plaintiff’s request and because it is well aware of the law in Quebec;
35. Some consumers were able to purchase the Nintendo Switch by going to other stores (i.e. competitors of Dell) and asking them to match the price advertised on Dell’s websites on January 25, 2023. The Plaintiff could have done the same, but had no reason to believe that Dell would not honour its contract with him;
36. The Plaintiff’s damages are a direct and proximate result of Dell’s misconduct and, in these circumstances, the Plaintiff’s claims for both compensatory and punitive damages are justified;
37. Indeed, Dell’s conduct warrants such a condemnation because it refused to honour the advertised price despite the Plaintiff’s request and then simply removed the item in question from its website as if it never existed;
38. Moreover, Dell is a repeat offender with respect to pricing violations (*Dell Computer Corp. v. Union des consommateurs*, 2007 SCC 34, para. 4-5 and 121);
39. Dell’s conduct can only be qualified as negligent and intentional, and warrants the requested condemnation in punitive damages;
40. Dell’s patrimonial situation is significant enough that the foregoing quantum of punitive damages is appropriate in the circumstances;

IV. THE DEFENDANT’S LIABILITY

41. As a result of Dell’s breaches of the CPA and unjustified refusal to honour its contracts with the Plaintiff and all Class Members, the Plaintiff is justified in asking that Dell be condemned to pay the Plaintiff and the Class members: (i) compensation equal to the aggregate Lost Value; and (ii) punitive damages of \$500 each;
42. Dell must be held accountable for its breaches of the legal obligations which were imposed upon it by law including sections 16, 54.1, 215, 219, 224 c) and 231 CPA, thus rendering sections 253 and 272 applicable;

V. THE PERSONAL CLAIMS OF EACH OF THE CLASS MEMBERS

43. The claims of the Plaintiff and the approximate 1000 Class Members (the precise

number to be confirmed by Dell) are founded upon similar facts;

44. Indeed, the Dell “chat” representative wrote to the Plaintiff that “**The order got cancelled automatically by the system**” due to a “**pricing error**” (see Exhibit P-16);
45. As such, the situation is similar for all Class Members who had their purchases unilaterally cancelled by Dell;
46. The Lost Value formula applies the same to all Class Members, as would the compensation based on the aggregate of the Lost Value;
47. The Plaintiff is accordingly entitled to claim and does hereby claim from Dell the following as damages on behalf of each Class Member:
 - a) The Lost Value for each of the Class Members; and
 - b) \$500 per Class Member on account of punitive damages.

FOR THESE REASONS, MAY IT PLEASE THE COURT:

1. ACCUEILLIR l'action collective du demandeur et des membres du groupe contre la défenderesse;	1. GRANT the Plaintiff's and Class Members' action against the Defendant;
2. CONDAMNER la défenderesse à payer aux membres du groupe un montant à déterminer à titre de dommages-intérêts compensatoires;	2. CONDEMN the Defendant to pay to the the Class Members an amount to be determined in compensatory damages;
3. CONDAMNER la défenderesse à payer à chaque membre du groupe la somme de 500 \$ à titre de dommages-intérêts punitifs,	3. CONDEMN the Defendant to pay to the Class Members \$500 each in punitive damages;
4. ORDONNER que les montants de dommages fassent l'objet d'un recouvrement collectif;	4. ORDER that the amounts of damages be subject to collective recovery;
5. CONDAMNER la défenderesse à payer les intérêts et l'indemnité additionnelle à compter de la signification de la Demande d'autorisation;	5. ORDER the Defendant to pay interest and the additional indemnity on the above sums according to law from the date of service of the Authorization Application;
6. ORDONNER à la défenderesse de déposer au greffe de cette Cour la totalité des sommes faisant partie du recouvrement collectif, avec intérêts et frais;	6. ORDER the Defendant to deposit in the office of this Court the totality of the sums which form part of the collective recovery, with interest and costs;

<p>7. ORDONNER que les réclamations des membres individuels du groupe fassent l'objet d'une liquidation collective si la preuve le permet et, à défaut, d'une liquidation individuelle;</p>	<p>7. ORDER that the claims of individual Class Members be the object of collective liquidation if the proof permits and alternately, by individual liquidation;</p>
<p>8. LE TOUT avec frais de justice, incluant les frais d'avis, les frais de gestion des réclamations et les frais d'experts, le cas échéant, y compris les frais d'experts nécessaires à l'établissement du montant des ordonnances de recouvrement collectif.</p>	<p>8. THE WHOLE with costs including the cost of notices, the cost of management of claims and the costs of experts, if any, including the costs of experts required to establish the amount of the collective recovery orders;</p>

Montreal, June 7, 2024

(s) LPC Avocats

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SUMMONS
(ARTICLES 145 AND FOLLOWING C.C.P.)

Filing of a judicial application

Take notice that the Representative Plaintiff has filed this Originating Application in the office of the Superior Court in the judicial district of **Montreal**.

Defendant's answer

You must answer the application in writing, personally or through a lawyer, at the courthouse of Montreal situated at **1, Rue Notre-Dame E, Montréal, Quebec, H2Y 1B6**, within 15 days of service of the Application or, if you have no domicile, residence or establishment in Québec, within 30 days. The answer must be notified to the Representative Plaintiff's lawyer or, if the Representative Plaintiff is not represented, to the Representative Plaintiff.

Failure to answer

If you fail to answer within the time limit of 15 or 30 days, as applicable, a default judgement may be rendered against you without further notice and you may, according to the circumstances, be required to pay the legal costs.

Content of answer

In your answer, you must state your intention to:

- negotiate a settlement;
- propose mediation to resolve the dispute;
- defend the application and, in the cases required by the Code, cooperate with the Representative Plaintiff in preparing the case protocol that is to govern the conduct of the proceeding. The protocol must be filed with the court office in the district specified above within 45 days after service of the summons or, in family matters or if you have no domicile, residence or establishment in Québec, within 3 months after service;
- propose a settlement conference.

The answer to the summons must include your contact information and, if you are represented by a lawyer, the lawyer's name and contact information.

Change of judicial district

You may ask the court to refer the originating application to the district of your domicile or residence, or of your elected domicile or the district designated by an agreement with the Representative Plaintiff.

If the application pertains to an employment contract, consumer contract or insurance contract, or to the exercise of a hypothecary right on an immovable serving as your main residence, and if you are the employee, consumer, insured person, beneficiary of the insurance contract or hypothecary debtor, you may ask for a referral to the district of your domicile or residence or the district where the immovable is situated or the loss occurred. The request must be filed with the special clerk of the district of territorial jurisdiction after it has been notified to the other parties and to the office of the court already seized of the originating application.

Transfer of application to Small Claims Division

If you qualify to act as a plaintiff under the rules governing the recovery of small claims, you may also contact the clerk of the court to request that the application be processed according to those rules. If you make this request, the plaintiff's legal costs will not exceed those prescribed for the recovery of small claims.

Calling to a case management conference

Within 20 days after the case protocol mentioned above is filed, the court may call you to a case management conference to ensure the orderly progress of the proceeding. Failing this, the protocol is presumed to be accepted.

Exhibits supporting the application

In support of the Originating Application, the Representative Plaintiff intends to use the following exhibits:

- Exhibit P-1:** Copy of the enterprise's information statement from the Quebec enterprise register for Dell Canada Inc.;
- Exhibit P-2:** Copy of first purchase confirmation email from Dell titled "Your Dell Order Has Been Received" from January 25, 2023;
- Exhibit P-3:** Screenshots taken of Dell's website on January 25, 2023 indicating a limit of 10 units per order;
- Exhibit P-4:** Copy of second purchase confirmation email from Dell titled "Your Dell Order Has Been Confirmed" from January 25, 2023;
- Exhibit P-5:** Screen capture of the Dell's website showing the order progress of Applicant's order;
- Exhibit P-6:** Copy of Applicant's credit card statement (redacted) showing the charge from Dell;
- Exhibit P-7:** Screen capture of Dell's website showing the Applicant's order was

cancelled;

- Exhibit P-8:** Copy of the chat transcript between the Applicant and Dell;
- Exhibit P-9:** Copy of Dell's Terms of Sale;
- Exhibit P-10:** Screen capture of the Amazon.ca website showing the Nintendo Switch available for \$536.97 (in stock);
- Exhibit P-11:** Screen capture of the Nintendo Canada website showing the Nintendo Switch listed MRSP of \$399 (out of stock);
- Exhibit P-12:** Copy of the judgment of *Charest-Corriveau c. Sears Canada inc.*, 2015 QCCQ 6417.

The exhibits in support of the application are available on request.

Notice of presentation of an application

If the application is an application in the course of a proceeding or an application under Book III, V, excepting an application in family matters mentioned in article 409, or VI of the Code, the establishment of a case protocol is not required; however, the application must be accompanied by a notice stating the date and time it is to be presented.

Montreal, June 7, 2024

(s) LPC Avocats

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