

SUPERIOR COURT

CANADA
PROVINCE OF QUEBEC
DISTRICT OF MONTREAL

N°: 500-06-000849-170

DATE: November 7, 2017

IN THE PRESENCE OF THE HONOURABLE PAUL MAYER, J.S.C.

STÉPHANE DURAND
APPLICANT

v.

SUBWAY FRANCHISE SYSTEMS OF CANADA, LTD.
AND
DOCTOR'S ASSOCIATES INC.
DEFENDANTS

JUDGEMENT

1. INTRODUCTION

[1] In March 2017, CBC Marketplace investigative television and Internet reports captured the public imagination. They revealed that DNA analysis had discovered that two popular Subway chicken sandwiches contain only about half chicken. The other half is mainly soy filler and additives.

[2] The Applicant, Mr. Stéphane Durand ("**Mr. Durand**"), a loyal customer, was alarmed by the findings. He seeks to be authorized to institute a class action on the basis of an alleged false representation by the Defendants.

[3] The Defendants, Subway Franchise Systems of Canada, Ltd. and Doctor's Associates Inc. (jointly "**Subway**") are crying foul. They disagree with the investigative results. They allege that the DNA tests conducted (the "**WDLF Report**") lack scientific

rigour. They state that the CBC television and Internet investigative reports are false and misleading and they have been defamed.

[4] The parties have each filed a motion to put forward relevant evidence in respect to the authorization of a class action.

[5] Mr. Durand asks the Court to order Subway to produce information in respect to the following:

- a) the total number of chicken sandwiches purchased from Subway restaurants in the Province of Quebec between 2014 and 2017; and
- b) the geographic distribution of these purchases across the Province of Quebec's judicial districts.

[6] As for Subway, it seeks an Application for leave to file three pieces of evidence as part of their contestation of the Authorization of a class action. These are respectively:

- a) an affidavit;
- b) an expert report; and
- c) an examination of Mr. Durand.

[7] We will now examine each of the parties' Applications.

2. THE APPLICANT'S APPLICATION

2.1 The legal issues

[8] The Application raises two questions of law, namely:

- a) whether he can introduce evidence at the authorization stage of a class action; and
- b) whether the type of order sought by him in this instance is appropriate at the authorization stage.

2.2 Positions of the Parties

[9] Mr. Durand justifies his request on the grounds that this information is unavailable to him and that it is relevant to the Court's determination of the composition of the class under Article 575(3) of the *Code of Civil Procedure* ("C.C.P.").¹

¹ *575. The court authorizes the class action and appoints the class member it designates as representative plaintiff if it is of the opinion that [...]*

[10] No authorities are cited by him in support of his Application, but he assures the Court that it is "*well founded in fact and law*".

[11] Subway submits that Mr. Durand cannot rely on Article 574 C.C.P to compel the production of documents. He has no such enforceable right at the authorization stage.

2.3 Analysis

[12] As mentioned, Mr. Durand's Application raises two related legal issues that we will now examine.

2.3.1 May an applicant seek leave to introduce supplemental evidence at the authorization stage?

[13] Article 574 C.C.P. governs the introduction of evidence at the authorization stage.²

[14] On its face, the article neither obliges nor precludes the Court from admitting evidence adduced by Mr. Durand.

[15] During the pleadings, the Defendants acknowledged that they do not contest Mr. Durand's right to seek leave to submit evidence at this stage. The Court agrees.

[16] The admission of evidence submitted by an applicant at the authorization stage was extensively treated in the Superior Court case decided by Madam Justice Manon Savard in *Comité des citoyens inondés de Rosemont v. Montréal (Ville de)*.³ In that instance, the Court undertook both a textual and purposive assessment of Article 574 C.C.P. (Article 1002 of the old C.C.P.). It concluded that an applicant may request to submit additional evidence in support of his attempt to satisfy the criteria for authorization of the class. Justice Savard noted:

"rien dans le processus particulier qui préside à l'octroi ou au refus de l'autorisation d'exercer un recours collectif ne limite, en soi, la possibilité pour la partie requérante de présenter une requête pour obtenir la permission de présenter une preuve".⁴

(3) *the composition of the class makes it difficult or impracticable to apply the rules for mandates to take part in judicial proceedings on behalf of others or for consolidation of proceedings; [...]*

² **574.** *The application for authorization must state the facts on which it is based and the nature of the class action, and describe the class on whose behalf the person intends to act. It must be served on the person against whom the person intends to institute the class action, with at least 30 days' notice of the presentation date.*

An application for authorization may only be contested orally, and the Court may allow relevant evidence to be submitted.

[emphasis added]

³ 2010 QCCS 1879.

⁴ *Id.*, par. 21.

[17] In sum, an applicant may seek leave from the Court to introduce evidence at the authorization stage, but nonetheless carries the burden of convincing the judge of the relevance of his application.

2.3.2 Is the Applicant's Application appropriate at the authorization stage?

[18] In the case at hand, Mr. Durand requests that the Court order the Defendants to produce evidence regarding the number of chicken sandwiches purchased in Quebec and the geographic distribution of these purchases. He alleges that this information is available to the Defendants and would be helpful to the Court's evaluation of the composition of the prospective class as per Article 575(3) C.C.P.

[19] The form or nature of evidence that can be admitted under Article 574 C.C.P. is not fixed by the article itself. Courts have broad discretion in determining what constitutes evidence that is relevant to the evaluation of the criteria for authorization under Article 575 C.C.P.⁵ A review of the jurisprudence suggests that Courts have been willing to accept affidavits, reports, expertise, medical files, journal articles, newspaper article, letters patent, property surveys, and aerial photos of property as relevant evidence at the authorization stage of class action proceedings.

[20] Although the categories of what constitutes relevant evidence are not closed, it appears that Mr. Durand's request in this instance is qualitatively different from the forms of evidence that have been previously admitted by Quebec courts. Whereas parties have been granted leave to voluntarily introduce evidence in their possession in support of their claims, the Applicant in this case seeks to force the opposing party to produce evidence that he alleges is in their possession. Mr. Durand has provided the Court with no authorities for the imposition of such an order and provided no valid legal justification in support of his Application.

[21] The case of *Comité des citoyens inondés de Rosemont* provides helpful guidance on this matter due to its similarities with the present instance. In that case, the Applicant requested that the Court order the production of documents that were held by the defendants. The content of the documents, according to the Applicant, would aid the Court in delineating the precise composition of the class. Justice Manon Savard, observed that:

"permettre à une partie d'obtenir la preuve de la partie adverse est un concept bien distinct, qui ne relève pas du mécanisme de l'autorisation".⁶

[22] She concluded that the application amounted to surreptitious discovery rather than the submission of evidence by the Applicant, and was consequently not appropriate at the authorization stage. It was denied.

⁵ *Allstate du Canada, compagnie d'assurances v. Agostino*, 2012 QCCA 678, par. 35.

⁶ *Supra* note 3, par. 33.

[23] In another case, *Durand c. Attorney General of Québec*,⁷ the Superior Court similarly rejected an application for the forced production of documents at the authorization stage. While that case is distinguishable from the present one in that the application was not made pursuant to Articles 574 or 575 C.C.P., Mr. Justice Gary D.D. Morrison's observation regarding the forced production of materials is nevertheless relevant:

*"Opening the door to forced document exchanges of the nature sought by Petitioner, notwithstanding good intentions, risks encumbering the authorization process unnecessarily, perhaps even uselessly, and transforming it into something different from the filtering process it is recognized to be."*⁸

[24] The reasoning and conclusions of the Superior Court in both the *Rosemont* and *Durand* cases are applicable to the present request by Mr. Durand. It is useful to recall that the authorisation stage of the class action proceeding is intended as a filtering mechanism to weed out frivolous and unfounded claims.⁹ Allowing an application that orders a form of concealed discovery at this stage would alter the character of this procedural mechanism, and would have the effect of undermining the legislator's intention.

[25] Mr. Durand's application in this instance is analogous to the request made by the Applicant in the *Rosemont* case. His request that the Court order the defendants to produce information is an attempt to extract documentary information from Subway, and consequently oversteps the boundaries of the authorization stage. As described above, the jurisprudence indicates that such an order is not appropriately exercised at this stage in the proceedings.

[26] Even if the nature of Mr. Durand's request was supported in law, he has failed to convince the Court of the relevance of the information sought for the purpose of the inquiry regarding Article 575(3) C.C.P. The exact number of sandwiches sold is not needed by the Court at the authorization stage.

[27] The Court has already been provided with information regarding the composition of the class in the Applicant's Amended Application for authorization to institute a class action at paragraphs 4.1 to 4.6. Notably, the Applicant notes the estimated number of purchases in Quebec at paragraph 4.2 and the broad geographic distribution at paragraph 4.5. The details sought in this order may provide some specificity to those claims, but they disclose no new information about the composition of the class.

[28] As such, the information sought by the Applicant would not meaningfully assist the Court in determining whether the criterion of Article 575(3) C.C.P. is satisfied.

⁷ 2017 QCCS 2455.

⁸ *Id.*, par. 29.

⁹ *Infineon Technologies AG v. Option consommateurs*, 2013 SCC 59, pars. 59, 61.

2.4 Conclusion

[29] For the reasons given above, the Applicant's Application that the Court order the Defendants to provide the requested information is denied.

3. THE DEFENDANTS' APPLICATION

[30] As previously stated, Subway seeks to file three pieces of evidence as part of its contestation of the Authorization of a class action.

[31] Mr. Durand contests this Application.

3.1 The law

[32] Unlike other civil actions, the legislator has imposed a preliminary authorization stage in class action proceedings that is detailed in Article 574 C.C.P. As stated, the purpose of this stage of the proceedings is to serve as a filtering and verification mechanism designed to dismiss frivolous and inappropriate claims.¹⁰

[33] More specifically, the Court at the authorization stage is tasked with assessing whether the Applicant has satisfied the four criteria set out in Article 575 C.C.P.:

"575 The court authorizes the class action and appoints the class member it designates as representative plaintiff if it is of the opinion that

(1) the claims of the members of that class raise identical, similar or related issues of law or fact;

(2) the facts alleged appear to justify the conclusions sought;

(3) the composition of the class makes it difficult or impracticable to apply the rules for mandates to take part in judicial proceedings on behalf of others or for consolidation of proceedings; and

(4) the class member appointed as representative plaintiff is in a position to properly represent the class members."

[34] Failure to meet any of the criteria results in the rejection of the Application.

[35] Given the summary nature of the authorization proceeding, the jurisprudence sets out that the evidentiary threshold for the applicant at this stage is not one of balance of probability, but merely that *"the applicant has an arguable case in light of the facts and the applicable law"*.¹¹

¹⁰ *Id.*, pars. 59, 61.

¹¹ *Id.*, par. 65.

[36] In evaluating whether the criteria in Article 575 C.C.P. are satisfied, the jurisprudence reveals the existence of a presumption that the allegations contained in the application for authorization of a class are deemed to be correct.¹² The genesis of this presumption is attributed to the 2003 reform of Article 1002 C.C.P., whereby the requirement that applications be supported by an affidavit was dropped.¹³

[37] Where the Court is satisfied that all four criteria are met by the applicant, it is bound to authorize the class. Unlike regimes in other Canadian provinces, where the judge is vested plenary discretion in whether to authorise a class action even where all criteria are met, Quebec's legislators have provided the Court with discretion only in evaluating each individual criterion.¹⁴

[38] Notwithstanding the presumption of veracity described above, the legislator has provided the defendant the opportunity to contest an application for authorization, both orally and by seeking leave to submit relevant evidence.¹⁵

[39] The jurisprudence confirms that the Court may, at its discretion, admit evidence where it serves to clarify the judge's inquiry into whether the four criteria of Article 575 C.C.P. are satisfied.¹⁶ In this regard, Mr. Justice François P. Duprat observed that:

*"afin de justifier une preuve additionnelle pertinente, les défendeurs doivent convaincre le Tribunal que cette preuve est utile et permettra de déterminer si les critères de l'article 575 C.p.c. sont rencontrés. Par exemple, on doit l'accepter si elle sert à contredire les allégations de la demande d'autorisation qui souffrent de faussetés, d'inexactitudes, ou d'invraisemblances."*¹⁷

[40] The burden for demonstrating that evidence is relevant at this stage falls on the defendant, according to the Superior Court case of *Option Consommateurs v. Banque Amex du Canada*.¹⁸ Mr. Justice Clément Gascon, noted that:

*"[...] il leur appartient de préciser exactement la teneur et l'objet recherchés par la preuve qu'ils revendiquent et le interrogatoires qu'ils désirent."*¹⁹

[41] In evaluating evidence for admission, courts have shown themselves attentive to the principle of proportionality, as articulated in Article 18 C.C.P.²⁰ and its precursor in Articles 4.1 and 4.2 of the former C.C.P.²¹

¹² *Pharmascience inc. v. Option Consommateurs*, 2005 QCCA 437 par. 29; see also *Sibiga v Fido Solutions inc.*, 2016 QCCA 1299, par. 52.

¹³ *Option consommateurs v. Brick Warehouse*, 2011 QCCS 569, pars. 28, 29.

¹⁴ *Bouchard v. Agropur*, 2006 QCCA 1342, par. 41.

¹⁵ *Supra* note 2.

¹⁶ *Supra* note 5.

¹⁷ *Walter v. Quebec Major Junior Hockey League Inc.*, 2017 QCCS 3161, par.17.

¹⁸ *Option Consommateurs v. Banque Amex du Canada*, 2006 QCCS 6290.

¹⁹ *Id.*, par. 20.7.

²⁰ **18.** *The parties to a proceeding must observe the principle of proportionality and ensure that their actions, their pleadings, including their choice of an oral or a written defence, and the means of proof*

[42] Undoubtedly, the most challenging aspect of the Court's task in deciding whether to admit evidence relates to the determination of what constitutes "*relevant evidence*" as per the language of Article 574 C.C.P. Perhaps, one of the most instructive statements on the nature of "*relevant evidence*" at this stage was articulated by Mr. Justice Louis Crête:

*"La "preuve appropriée" est donc celle qui permettra au tribunal non pas d'évaluer le bien-fondé de l'action au fond, mais plutôt de vérifier sommairement si les conditions de l'article 1003 C.p.c. sont remplies."*²²

[43] As this excerpt suggests, limiting the scope of admissible evidence to ensure that the authorization stage not devolve into an assessment of merits has been a core concern of the jurisprudence.²³

[44] Hence, determining whether evidence should be admitted under Article 574 C.C.P. is appropriately achieved using a flexible, prudent, and contextual approach. Only evidence that aids in the assessment of whether the applicant satisfies the four criteria of Article 575 C.C.P., rather than evidence going to the merit of the case itself, is admitted. Further guidance on undertaking the analysis is provided by Madam Justice Marie-France Bich in the *Allstate* case. She recommends caution and care. In assessing whether to admit evidence that refuted the applicant's allegations, she noted the need to:

*"choisir une voie mitoyenne, qui, entre la rigidité et la permissivité, est celle de la prudence, une prudence qui s'accorde avec le caractère sommaire de la procédure d'autorisation du recours collectif."*²⁴

3.2 Analysis

[45] Subway has applied to file three pieces of evidence:

- a) an affidavit accompanied by supporting documents;
- b) an expert report by Dr. Sreetharan Kanthaswamy, PhD (the "**Expert Report**"); and
- c) an examination of the Applicant.

they use are proportionate, in terms of the cost and time involved, to the nature and complexity of the matter and the purpose of the application.

Judges must likewise observe the principle of proportionality in managing the proceedings they are assigned, regardless of the stage at which they intervene. They must ensure that the measures and acts they order or authorize are in keeping with the same principle, while having regard to the proper administration of justice.

²¹ *Id.*, par. 20.5; see also *Benizri v. Canada Post Corporation*, 2016 QCCS 454, par. 5; *Dubé v. Nissan Canada Finance*, 2008 QCCS 470, par. 22.

²² *Supra* note 13, par. 32.

²³ *Pro-Sys Consultants Ltd. v. Microsoft Corporation*, 2013 SCC 57, par. 102; *supra* note 9, par. 58.

²⁴ *Supra* note 5, par. 35.

[46] The appropriateness of each is to be assessed in turn.

3.2.1 Affidavit accompanied by supporting documents

[47] Subway seeks leave to submit an affidavit (the "**Affidavit**") to be signed by a senior officer which claims that all chicken products they sell are made from "*100 percent pure chicken breast meat*"²⁵; provides details on the method used by them to prepare the chicken²⁶; and claims that the type of testing employed in the CBC Marketplace reports is "*not used in the food industry to quantify the ingredients in a food product*".²⁷ The Affidavit also refers to a class action filed in the United States on the same factual basis, but which has since been voluntarily withdrawn.²⁸ Finally, the Affidavit notes that the Defendants did not sell food products to consumers in Quebec, did not contract with Quebec consumers, and did not produce chicken products in Quebec.²⁹ A list of ingredients contained in the Defendants' chicken products was attached to the Affidavit in the form of an annex.

[48] As with any evidence advanced for submission under Article 574 C.C.P., the Affidavit must provide additional clarity in the assessment of the four criteria of Article 575 C.C.P. to be deemed "*relevant*". While affidavits have been allowed at the authorisation stage in other cases,³⁰ most of the Affidavit in the present instance fails to meet the necessary threshold and most of it is, therefore, not admitted.

[49] Taking each criterion under Article 575 C.C.P. individually, it is apparent that the Affidavit is relevant neither to the first, third or fourth criteria.

[50] With respect to the second criterion- "*that the facts alleged appear to justify the conclusions sought*", Subway claims that the Affidavit provides additional information regarding the allegations made by the Applicant in paragraphs 2.18 through 2.24 of the Amended Application for authorization to institute a class action. The Affidavit contradicts the results of the WDFL Report at the core of the Applicant's claim and implies that the conclusions sought by Mr. Durand are not supported by facts. According to Subway, the claim thus reveals the absence of a colour of right requisite under Article 575(2) C.C.P.³¹

[51] With respect for the contrary opinion, the Court deems that Subway's Application to submit most of the Affidavit cannot be accepted. The Affidavit's claims regarding the composition of the chicken and the scientific invalidity of the testing methodology of the WDLF Report go to the merit of the Applicant's allegation. In keeping with the guidance

²⁵ Affidavit, par. 4.

²⁶ Affidavit, pars. 5, 6.

²⁷ Affidavit, par. 7.

²⁸ Affidavit, par. 8.

²⁹ Affidavit, par. 9.

³⁰ See *Allstate, Benizri, Dubé, and QMJHL*.

³¹ **575.** The court authorizes the class action and appoints the class member it designates as representative plaintiff if it is of the opinion that [...]
(2) the facts alleged appear to justify the conclusions sought;

provided in the case of *Allstate*³² the evidence included in the Affidavit, though perhaps significant in evaluating the merits of the Applicant's claim, should not be heard at the pre-authorization stage.

[52] That said, where courts have deemed a portion of an affidavit to be significant to the inquiry at the authorization stage, they have severed it from its balance and admitted it into the inquiry.³³

[53] Such an approach appears warranted in this instance with respect to paragraphs 9 and 10 of the Affidavit, which state that the Defendants neither sold food to consumers nor produced chicken in Quebec.³⁴ This information is helpful in providing a factual clarification regarding the nature of the legal relationship between the Applicant and the Defendants under Article 575(2) C.C.P. While the issue is implicitly covered in paragraphs 2.4 to 2.13 of the Applicant's Amended Application for authorization to institute a class action, paragraphs 9 and 10 of the Affidavit provides an explicit statement of the interaction between the parties. It is therefore useful to the Court's inquiry at the authorization stage.

[54] With the exception of paragraphs 9 and 10, the content of the Affidavit goes to the merit of the Applicant's allegations case and is unhelpful in determining whether the Applicant has met the criteria of Article 575 C.C.P. Most of the Affidavit is therefore not deemed relevant evidence within the meaning of Article 574 C.C.P. and will not be admitted by the Court at this stage. Conversely, paragraphs 9 and 10 of the Affidavit are deemed relevant for the reasons above and will be admitted.

3.2.2 Expert Report by Dr. Kanthaswamy

[55] Subway seeks leave to submit an Expert Report which reviews the scientific methodology employed in the WDLF Report that formed the basis for the CBC Marketplace television and Internet reports.

[56] The Expert Report notes several technical problems, and ultimately concludes that:

*"based on the information in the CBC investigative reports and the WDFL report, it would be scientifically impossible to use chicken DNA quantity measurements to draw conclusions on the actual amount of chicken meat in a Subway sandwich."*³⁵

[57] Subway argues that the Expert Report illustrates that the allegations made by the Applicant are unfounded, and that it is *"therefore necessary for this Court in its analysis of the second paragraph of Article 575 CCP"*.³⁶ The Defendants rely on the case of

³² *Supra* note 5.

³³ *Supra* note 21, par. 20.

³⁴ *Affidavit*, pars. 9, 10.

³⁵ Expert Report, p. 1

³⁶ Defendants' motion, par. 37.

Scalabrini v. Merck Canada in which the Court allowed the inclusion of an affidavit from an expert that the Defendants claim is analogous in nature to an expert report.³⁷

[58] However, the facts in the *Scalabrini* case are distinct from the current matter before the Court. In that case, the medical files included by the Applicant in her application contained considerable technical language, to the extent that Madam Justice Micheline Perrault admitted an expert report to aid the Court in deciphering that content.³⁸ Conversely, the Defendants' Expert Report in this instance fails to aid the Court in understanding the WDFL Report.

[59] Like portions of the Affidavit treated in the previous section, the Expert Report adduced by the Defendants goes to the merit of the Applicant's allegations. The validity of the scientific method employed in the WDFL Report is the foundational element of the Applicant's case. As such, for the purposes of the authorization hearing and in the interest of ensuring access to justice for consumers, the Court deems it subject to the presumption of veracity.

[60] The validity of the WDFL Report should undoubtedly be subjected to a vigorous argumentation by the Parties and evaluation by the presiding court on the merit, but that inquiry is not appropriately undertaken at the authorization stage. The issue cannot be considered at this summary stage without devolving into a "*pré-enquête sur le fond*" against which Madam Justice Bich warned in the case of *Allstate*.³⁹ It also bears reproducing a passage from *Banque Amex's* case, in which Mr. Justice Clément Gascon notes:

*"le juge doit faire preuve de prudence et ne pas autoriser des moyens de preuve pertinents au mérite, puisque, à l'étape de l'autorisation, [le juge] doit tenir les allégations de la requête pour avérées sans en vérifier la véracité, ce qui relève du fond."*⁴⁰

[61] The Supreme Court in the *Infineon* case observed that "*the presentation of expert evidence is not the norm at the authorization stage in Quebec*".⁴¹ Exceptions to this norm certainly occur, but the case before the Court is not such an instance.

[62] Leave to submit the Expert Report is, therefore, denied.

3.2.3 Examination of the Applicant

[63] Finally, Subway seeks leave to examine the Applicant for a period of no more than 90 minutes outside of Court on the following subjects:

³⁷ 2016 QCCS 2353, par. 38.

³⁸ *Id.*, par. 37.

³⁹ *Supra* note 5, par. 34.

⁴⁰ *Supra* note 18, par. 20.6.

⁴¹ *Supra* note 9, par. 128.

- a) his knowledge of Subway products, Subway advertisements and representations to the public, and his understanding of the preparation process for Subway products containing chicken;
- b) the circumstances leading him to purchase Subway oven-roasted chicken sandwiches "because he believed them to be made of chicken", as alleged in paragraph 2.3 of the Application for Authorisation;
- c) the specific facts related to his ability to adequately represent the members of the proposed class; and
- d) the circumstances pursuant to which he agreed to act as Applicant, as well as his efforts and steps to identify other members of the proposed class.

[64] A review of the jurisprudence reveals that the examination of applicants has been permitted by the Superior Court and the Quebec Court of Appeal in prior cases.⁴² As with the admission of all evidence at this stage, the determination of whether such an examination should be allowed at the authorization stage centers on whether it would assist the Court in assessing the criteria in Article 575 C.C.P. The scope of the request by the Defendants must be well calibrated to this goal, recalling that "*l'objectif recherché n'est pas de permettre des interrogatoires ou une preuve tous azimuts et sans encadrement*".⁴³

[65] The jurisprudence has been clear that an examination should not be used to rebut or undermine the allegations advanced by an applicant, but rather in uncovering facts that are relevant in assessing the criteria in Article 575 C.C.P.:

"À l'étape de l'autorisation, on ne permettra pas l'interrogatoire des requérants si le but de cette démarche, avoué ou non, est de contredire les allégations de la requête qui, à ce stade, doivent être tenues pour avérées".⁴⁴

[66] For the reasons that follow, the examination of the Applicant on subjects a) and b) is not allowed, whereas the examination on subjects c) and d) is permitted.

[67] Subjects a) and b) aim to examine the Mr. Durand's subjective knowledge and beliefs prior to his purchase of the Subway products. On its face, this line of inquiry is irrelevant to the determination of whether he is a suitable representative for the class under Article 575(4) C.P.P.⁴⁵ Rather, this appears to be an attempt by Subway to extract information that would otherwise be sought during pre-trial examination on the merit. It cannot, therefore, be said to have relieved its burden of convincing the Court

⁴² See *Allstate; Benizri; QMJLH*; and *Piro v. Novapharm Ltd.*, 2004 CanLII 13549 (QCCS).

⁴³ *Supra* note 18, par. 20.7.

⁴⁴ *Carrier v. Québec (Procureure générale)*, 2009 QCCS 5260, par. 30.

⁴⁵ **575.** *The court authorizes the class action and appoints the class member it designates as representative plaintiff if it is of the opinion that [...]*
(4) the class member appointed as representative plaintiff is in a position to properly represent the class members.

how an examination on subjects a) and b) constitutes "*relevant evidence*" as understood by Article 574 C.P.P.

[68] A further observation is germane with respect to subject b). The Superior Court has on prior occasions declined to authorise examinations of plaintiffs where they concerned reasons for the purchase of a product forming the basis of the class action.⁴⁶ The Court agrees that in this instance, an examination related to the circumstances under which Mr. Durand purchased chicken sandwiches is irrelevant to the evaluation of the criteria in Article 575 C.C.P.

[69] Conversely, subjects c) and d) are relevant in respect to the Applicant's capacity to act as a representative for the class under Article 575(4) C.P.P. The jurisprudence indicates that the assessment of this criterion requires the consideration of three factors: "*the petitioner's interest in the suit, his or her qualification as a representative, and an absence of conflict with other class members*".⁴⁷

[70] Admittedly, Mr. Durand has provided details about his capacity to act as a representative for the class in paragraphs 11.1 to 11.8 of the Amended Application for authorization to institute a class action. The threshold for proof at this stage is a low one.⁴⁸ Nevertheless, it appears useful to the Court and wholly consistent with the principle of proportionality to allow an examination in order obtain a clear and complete picture of his situation and his interest in the suit for the purpose of assessing Article 575(4) C.C.P. The examination on this subject may not, however, dispute or undermine the facts as presented in the Applicant's Amended Application for authorization to institute a class action in paragraphs 11.1 to 11.8, which are subject to a presumption of veracity at this stage.⁴⁹

[71] The Court orders that an examination lasting no more than 60 minutes be conducted.

4. CONCLUSION

[72] Hence, the Court admits only paragraphs 9 and 10 of the Defendants' Affidavit and does not authorize the balance, dismisses leave to submit the Expert Report, and allows for the examination of the Applicant on subjects c) and d) as detailed in the Defendants' Application.

FOR THESE REASONS, THE COURT:

[73] **DISMISSES** the Applicant's Preliminary Application for leave to submit relevant evidence;

⁴⁶ *Lenzi v. Apple Canada Inc.*, 2005 CanLII 48262 (QCCS), par. 22; *Martineau v. Bell Canada*, 2017 QCCS 3256.

⁴⁷ *Supra* note 12, par. 97.

⁴⁸ *Supra* note 9, par. 59.

⁴⁹ *Supra* note 44, par. 30.

[74] **GRANTS** the Defendants' Application for Leave to File Additional Evidence, in part;

[75] **AUTHORIZES** the Defendants to produce only paragraphs 9 and 10 of the Affidavit;

[76] **DOES NOT AUTHORIZE** the Defendants to produce the Expert Report;

[77] **AUTHORIZES** the Defendants to examine the Applicant on the following subjects;

a) the specific facts relating to his ability to adequately represent the members of the proposed class, and

b) the circumstances pursuant to which he agreed to act as Applicant, as well as his efforts and steps to identify other members of the proposed class,

for an approximate length of 60 minutes;

[78] **THE WHOLE WITH JUDICIAL COSTS TO FOLLOW.**



PAUL MAYER, J.S.C.

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Date of hearing: October 17, 2017