

SUPERIOR COURT
(Class action division)

CANADA
PROVINCE OF QUÉBEC
DISTRICT DE MONTRÉAL

N°: 500-06-000561-114

DATE: November 19th 2012

PRESIDING : THE HONOURABLE MICHELINE PERRAULT, J.S.C.

DE WAYNE MILLER
Petitioner

VS

KABA ILCO INC.
-and-
KABA ILCO CORP.
-and-
KABA AG
Respondents

**JUDGMENT ON RESPONDENT'S MOTION FOR LEAVE TO CONDUCT A
PRELIMINARY EXAMINATION OF PETITIONER AND LEAVE TO FILE
DOCUMENTARY EVIDENCE**

[1] Respondents are seeking leave to conduct a preliminary examination of Petitioner and file documentary evidence pursuant to article 1002 of the *Code of civil procedure* (the "**Motion**").

[2] The Court must decide Respondents' Motion before the hearing on the *Motion to authorize the bringing of a class action & to ascribe the status of representative* to Petitioner, De Wayne Miller (the "**Motion for Authorization**").

[3] Petitioner seeks authorization to bring a class action against Kaba Ilco Inc., Kaba Ilco Corp. and Kaba AG on behalf of the following class, of which he is a member :

" All residents in Canada who have purchased and/or own a pushbutton lock sold under the brand names Unican and Simplex with regard to their 1000 Series, 3000 Series, 5000 Series, 6200 Series, 7000 Series, 7100 Series, and any such other locks manufactured by the Respondents that are capable

of being opened with a magnet (the "Locks"), or any other group to be determined by the Court;

Alternately (or as a subclass)

All residents in Quebec who have purchased and/or own a pushbutton lock sold under the brand names Unican and Simplex with regard to their 1000 Series, 3000 Series, 5000 Series, 6200 Series, 7000 Series, 7100 Series, and any such other locks manufactured by the Respondents that are capable of being opened with a magnet (the "Locks"), or any other group to be determined by the Court;"

[4] Petitioner alleges that Respondents concealed information pertaining to the alleged vulnerability of the Locks and failed to assist their customers with this problem.

[5] Respondents seek permission to adduce evidence by way of a preliminary examination of Petitioner and the filing of documents with respect to the issues listed at paragraph 8 of their Motion, on the following grounds :

"[9] The Respondents should be allowed to examine Petitioner out-of-court prior to the hearing on authorization in order to obtain full disclosure of the facts relevant to the contestation of the Motion for Authorization;

[10] An examination of Petitioner with respect to the abovementioned issues is necessary to allow the Respondents to exercise their right to contest the allegations of the Motion for Authorization which relate to the criteria set out by section 1003 *C.C.P.*"

[6] At the hearing, Respondents did not present any arguments with respect to most of the issues listed at paragraph 8 of the Motion, but indicated to the Court that they wish to examine Petitioner on the following :

a) the "lien de droit" between Petitioner and Respondents, and

b) Petitioner's contacts with other class members and his ability to represent the proposed class.

[7] Respondents relate these issues to the authorization criteria set out in article 1003 *C.C.P.*

ANALYSIS

[8] Article 1002 *C.C.P.*, which is the basis for the present Motion, provides that the issue is one of judicial discretion :

1002. A member cannot institute a class action except with the prior authorization of the court, obtained on a motion.

The motion states the facts giving rise thereto, indicates the nature of the recourses for which authorization is applied for, and describes the group on behalf of which the member intends to act. It is accompanied with a notice of at least 10 days of the date of presentation and is served on the person against whom the applicant intends to exercise the class action; the motion may only be contested orally and the judge may allow relevant evidence to be submitted.

[9] At the authorization stage, evidence is the exception, not the rule, as the facts alleged in the Motion for Authorization are taken as true. The Court may allow relevant evidence in order to decide whether the conditions for authorization set out in article 1003 C.C.P. are met.

[10] In the case of *Pharmascience inc. c. Option Consommateurs*,¹ the Court of appeal described the role of the Court seized with a motion for permission to present relevant evidence :

“ [30] Dès lors, puisque, dans le cadre du mécanisme de filtrage et de vérification, le juge doit, si les allégations de fait paraissent donner ouverture aux droits réclamés, accueillir la requête et autoriser le recours, il n'y aura pas, dans tous les cas, la nécessité d'une preuve. Aussi, la prétention suivant laquelle le requérant doit se soumettre à une sorte de préenquête sur le fond n'est pas conforme aux prescriptions du *Code de procédure civile* telles qu'interprétées par la jurisprudence. Par conséquent, le retrait de l'obligation d'un affidavit et la limitation des interrogatoires à ceux autorisés par le juge assouplissent et accélèrent le processus sans pour autant modifier fondamentalement le régime québécois de recours collectif, et encore moins stériliser le rôle du juge. En effet, non seulement doit-il toujours se satisfaire d'une apparence sérieuse de droit et de la réalisation des autres conditions de l'article 1003 *C.p.c.*, mais la loi lui reconnaît en plus la discrétion d'autoriser une preuve pertinente et appropriée dans le cadre du processus d'autorisation du recours collectif. Enfin, la modification apportée à l'article 1002 *C.p.c.* s'inscrit parfaitement dans le nouvel environnement créé par la réforme du *Code de procédure civile* qui a accru le niveau d'intervention du tribunal dans la gestion du dossier pour le conduire à la phase essentielle de l'enquête et de l'audition au mérite. “

[11] In 2006, Justice Clément Gascon of the Superior Court (as he then was) set out the applicable principles which must guide the Court in the analysis of a motion for the presentation of relevant evidence:²

“ [20] Cela dit, au chapitre du mérite maintenant, le Tribunal retient de la jurisprudence pertinente les sept (7) propositions suivantes comme devant servir de guide dans l'analyse des requêtes formulées par les *Banques*:

¹ [2005] QCCA 437, par. 30.

² *Option Consommateurs c. Banque Amex du Canada*, 2006 QCCS 6290, par. 20.

1) puisque, dans le cadre du mécanisme de filtrage et de vérification qui caractérise la requête en autorisation, le juge doit, si les allégations de faits paraissent donner ouverture au droit réclamé, accueillir la requête et autoriser le recours, il n'y aura pas, dans tous le cas, la nécessité d'une preuve;

2) en vertu du nouvel article 1002 C.p.c., le retrait de l'obligation d'un affidavit et la limitation des interrogatoires à ceux qui sont autorisés assouplissent et accélèrent le processus sans pour cela stériliser le rôle du juge, car la loi lui reconnaît la discrétion d'autoriser une preuve pertinente et appropriée dans le cadre du processus d'autorisation;

3) c'est en utilisant sa discrétion, qu'il doit bien sûr exercer judiciairement, que le juge doit apprécier s'il est approprié ou utile d'accorder, dans les circonstances, le droit de présenter une preuve ou de tenir un interrogatoire. Idéalement et en principe, cette preuve et ces interrogatoires se font à l'audience sur la requête en autorisation et non hors cour;

4) pour apprécier s'il est approprié ou utile d'accorder la demande faite, le juge doit s'assurer que la preuve recherchée ou l'interrogatoire demandé permettent de vérifier si les critères de l'article 1003 C.p.c. sont remplis;

5) dans l'évaluation du caractère approprié de cette preuve, le juge doit agir en accord avec les règles de la conduite raisonnable et de la proportionnalité posées aux articles 4.1 et 4.2 C.p.c., de même qu'en accord avec la règle de la pertinence eu égard aux critères de l'article 1003 C.p.c.;

6) 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 du recours, il doit tenir les allégations de la requête pour avérées sans en vérifier la véracité, ce qui relève du fond. À cette étape de l'autorisation, le fardeau en est un de démonstration et non de preuve;

7) Le fardeau de démontrer le caractère approprié ou utile de la preuve recherchée repose sur les intimés. Aussi, il leur appartient de préciser exactement la teneur et l'objet recherchés par la preuve qu'ils revendiquent et les interrogatoires qu'ils désirent, en reliant leurs demandes aux objectifs de caractère approprié, de pertinence et de prudence déjà décrits.

L'objectif recherché n'est pas de permettre des interrogatoires ou une preuve tous azimuts et sans encadrement, mais plutôt d'autoriser uniquement une preuve et/ou des interrogatoires limités sur des sujets précis bien circonscrits. “

[12] These principles were recently consecrated by the Court of appeal in *Allstate du Canada, Compagnie d'assurances vs Agostino*³. It is therefore in the light of the principles set out hereinabove that the Court will consider the present Motion.

[13] **a) the “lien de droit” between Petitioner and Respondents**

[14] As for the issue of the “lien de droit” between Petitioner and Respondents, Respondents refer to Petitioner's Exhibit R-3 filed in support of the allegation that eleven class actions have been instituted in the United States based on Respondents' conduct. Exhibit R-3 shows that legal proceedings were instituted against companies other than the three Respondents. Respondents submit the Court should know why Petitioner chose to institute proceedings against them in particular.

[15] Petitioner argues that he is only a small consumer and is not in a position to explain the true relationship between Respondents. The extent of his knowledge concerning Respondents and their relationship with one another is alleged at paragraphs 3 to 7 of the Motion for Authorization:

“ [3] Respondent Kaba Ag (« Kaba Switzerland ») is a Swiss company. Kaba Switzerland is the parent company of the other two (2) Respondents, whether directly or indirectly. Kaba Switzerland developed, manufactured, distributed, and sold the Locks throughout Canada, including the province of Quebec, either directly or indirectly through its affiliates and/or subsidiaries, the other two (2) Respondents;

[4] Kaba Ilco Corp. (“Kaba USA”) is an American company. Kaba USA developed, manufactured, distributed, and sold the Locks throughout Canada, including the province of Quebec, either directly or indirectly through its related entity, the Respondent Kaba Ilco Inc. In fact, many of the Locks in questions were state that they were “Made in USA”;

[5] Kaba Ilco Inc. (“Kaba Canada”) is a federal Canadian company. Kaba Canada's head office and principal place of business is in the province of Quebec, the whole as appears more fully from a copy of the Registre des enterprises report, produced herein as **Exhibit R-1**;

[6] Kaba Switzerland and Kaba USA do business in Canada, including in the province of Quebec, though Kaba Canada. Kaba Canada has directly marketed the Locks in Canada as high-end security devices and has placed the Locks into the Canadian marketplace through its distribution channel of locksmiths and security shops;

[7] Given the close ties between the Respondents and considering the preceding, all Respondents are solidarily liable for the acts and omissions of the other. Unless the context indicates otherwise, all Respondents will be referred to as “Kaba” for the purposes hereof; “

³ 2012 QCCA 678

[16] Keeping in mind that the facts alleged in the Motion for authorization are taken as true at the authorization stage, the Court is of the opinion that an examination on this issue, at least at this stage of the proceedings, is not warranted.

[17] b) Petitioner's contacts with other class members and his ability to represent the proposed class;

[18] Petitioner agrees to provide information with respect to his communication with other potential class members. However, regarding his ability to represent the proposed class, he pleads the subject is too vague and, if it is not strictly circumscribed, may lead to too many objections.

[19] Respondents plead that they wish to question Petitioner on whether he is indeed in a position to represent the proposed class. More specifically, Petitioner contracted with Respondents as a consumer and may not be able to adequately represent members who are businesses, including corporate customers, namely because their recourses are potentially very different, factually and legally, from those of consumers.

[20] Petitioner alleges his ability to represent the proposed class at paragraphs 40 to 47 of the Motion for Authorization :

“ [40] Petitioner is a member of the class;

[41] Petitioner is ready and available to manage and direct the present action in the interest of the members of the class that they wish to represent and is determined to lead the present dossier until a final resolution of the matter, the whole for the benefit of the class, as well as, to dedicate the time necessary for the present action before the Courts of Quebec and the *Fonds d'aide aux recours collectifs*, as the case may be, and to collaborate with his attorneys;

[42] Petitioner has the capacity and interest to fairly and adequately protect and represent the interest of the members of the class;

[43] Petitioner has given the mandate to his attorneys to obtain all relevant information with respect to the present action and intends to keep informed of all developments;

[44] Petitioner, with the assistance of his attorneys, are ready and available to dedicate the time necessary for this action and to collaborate with other members of the class and to keep them informed;

[45] Petitioner is in good faith and has instituted this action for the sole goal of having his rights, as well as the rights of other class members, recognized and protecting so that they may be compensated for the damages that they have suffered as a consequence of the Respondent's conduct;

[46] Petitioner understands the nature of the action;

[47] Petitioner's interests are not antagonistic to those of other members of the class; "

[21] These allegations are quite general and do not address the ability to act as a representative of non-consumer (or commercial) potential members of the class, which is an issue the Court would like clarified before ruling on the Motion for Authorization.

[22] Although the case law has taken a liberal approach when it comes to choosing a representative, it is not because one files a class action that he is automatically granted the status of representative. In the words of the Court of appeal : "*Bien que la barre ne soit pas très haute, l'appelant doit néanmoins la franchir*".⁴

[23] In the case of *Blackette vs Research in Motion Limited*⁵, Justice Schragger authorized the examination of the Petitioner in order to address several issues, one of them being the ability to represent non-consumer potential members of the class.

[24] Thus, the Court is of the opinion that the examination sought will most likely have an impact on its appreciation of the criteria set out at paragraph d) of article 1003 C.C.P., and will therefore grant Respondents' Motion in part only, so that Petitioner's examination will be limited to the following :

- a) paragraphs 40 to 47 of the Motion for Authorization,
- b) Petitioner's communication with other potential class members, including non-consumers, and
- c) Petitioner's ability to adequately represent the proposed class, including consumers and non – consumers, or commercial parties.

[25] Respondents have estimated that the examination of Petitioner would not require more than one hour and a half, which the Court deems reasonable in the circumstances.

[26] **c) the filing of documentary evidence**

[27] Respondents seek authorization to file documentary evidence adduced during the preliminary examination of Petitioner in order to allow the Court to address allegations made and issues raised by Petitioner in the Motion for Authorization. They also plead that it may be necessary for Respondents to file documents following Petitioner's examination on the subject of the "lien de droit", which are not yet identified.

⁴ *Del Guidice vs Honda Canada Inc.*, 2007 QCCA 922, par. 90.

⁵ 2012 QCCS 2743, par. 10

[28] The Court will not authorize the filing of unidentified documentary evidence. Respondents may present this request to the Court at a later time, once the documents they wish to file have been identified.

[29] **FOR THESE REASONS, THE COURT:**

[30] **GRANTS in part** Respondents' Motion for Leave to Conduct a Preliminary Examination of Petitioner and Leave to File Documentary Evidence ;

[31] **GRANTS** leave to examine Petitioner on the following subject matters only :

- a) paragraphs 40 to 47 of the Motion for Authorization.
- b) Petitioner's communication with other potential class members, including non-consumers, and
- c) Petitioner's ability to adequately represent the proposed class, including consumers and non – consumers, or commercial parties;

[32] **ORDERS** that the examination be held on or before December 21, 2012, for a maximum duration of one hour and a half ;

[33] **COSTS** to follow suit.


MICHELINE PERRAULT, J.S.C.

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Hearing Date : November 9, 2012