SUPERIOR COURT

(Class Action)

CANADA
PROVINCE OF QUEBEC
DISTRICT DE MONTREAL

Not. : 500-06-001210-224

DATE: August 16th, 2023

BY THE HONOURABLE PIERRE NOLLET, J.S.C.

ALI ELGADI.
Plaintiff
in.
WHATSAPP LLC.
META PLATFORMS INC.
Defendants

JUDGMENT ON APPLICATION FOR LEAVE TO ADDUCE RELEVANT EVIDENCE AND EXAMINATION OF THE AFFFIANT

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[1] The Court is seized of two applications. Defendants (the “Applicant”) submit an application for permission to add relevant evidence, one of which is an affidavit from a software engineer on the What'sApp security team, Mr. Attaullah Baig (the “Affiant”). Counsel for Plaintiff made an informal oral motion to cross-examine the Affiant.

1. APPLICATION FOR LEAVE TO ADD RELEVANT EVIDENCE

1.1 Context

[2] The Applicant seeks to represent a national group composed of the following individuals (" **Class Members** "):

> "All WhatsApp users in Canada whose phone numbers were compromised in November 2022 and whose personal information was then put up for sale on the dark web.
>
> (hereinafter the "**Group**")
>
> or any other category to be determined by the Court.
>
> [the "**Application to authorize the bringing of a class action"**)

[3] The Plaintiff alleges that a data breach occurred in What'sApp's systems, allegedly compromising personal and highly sensitive information.

[4] Plaintiff's main basis for the bringing of the proposed class action is a Cybernews Article[1]. This Cybernews Article was then taken up by a second website named MobileSyrup[2]. The articles report that "*an actor posted an ad on a well-known hacking community forum, claiming they were selling a 2022 database of 487 million WhatsApp user mobile numbers*"(«**Reported Data Set**»).

[5] They also indicated hat the "seller did not specify how they obtained the database".

[6] The Plaintiff alleges that the Defendants made "false statements within the meaning of the CPA" with respect to WhatsApp's "security and privacy features" (para. 17 of the application to introduce a class action).

[7] In another allegation, the Plaintiff states that "the Defendants' contractual obligations to the Plaintiff include the protection and non-disclosure of his personal and confidential information" (paragraph 18 of the application).

[8] The defendants wish to file evidence regarding:

8.1. WhatsApp Terms of Service .

8.2. Affidavit of Mr. Attaullah Baig (the "**Affidavit**").

1.2 Legal principles

[9] In *Ward* v. *Attorney General of Canada*[3], JusticeBisson summarized the teachings of the Court of Appeal and the Supreme Court regarding appropriate evidence:

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1 Exhibit P-5.
2 Exhibit P-4.
3 2021 QCCS 109.

[17] Les demandes de preuve appropriée à l'étape de l'autorisation sont prévues à l'article 574 Cpc. La jurisprudence de la Cour d'appel et de la Cour suprême du Canada nous enseigne quels sont les critères applicables :

le juge dispose d'un pouvoir discrétionnaire afin d'autoriser une preuve pertinente et appropriée ainsi que la tenue d'un interrogatoire du représentant, dans le cadre du processus d'autorisation;

une preuve n'est appropriée que si elle est pertinente et utile à la vérification des critères de l'article 575 Cpc. Le consentement de la partie demanderesse à une preuve suggérée par la défense ne suffit pas à en autoriser le dépôt;

la preuve documentaire et l'interrogatoire proposés doivent respecter les principes de la conduite raisonnable et de la proportionnalité posés aux articles 18 et 19 Cpc;

la vérification de la véracité des allégations de la demande relève du fond. Une partie défenderesse ne peut mettre en preuve des éléments qui relèvent de la nature d'un moyen de défense au mérite;

le tribunal doit analyser la demande soumise à la lumière des enseignements récents de la Cour suprême du Canada et de la Cour d'appel sur l'autorisation des actions collectives et qui favorisent une interprétation et une application libérales des critères d'autorisation;

à ce stade, la finalité de la demande se limite au seuil fixé par la Cour suprême du Canada, soit la démonstration d'une cause défendable. Le tribunal doit se garder d'autoriser une preuve qui inclut davantage que ce qui est strictement nécessaire pour atteindre ce seuil;

le tribunal doit se demander si la preuve requise l'aidera à déterminer si les critères d'autorisation sont respectés ou si elle permettra plutôt de déterminer si le recours est fondé; dans cette dernière hypothèse, la preuve n'est pas recevable à ce stade;

la prudence est de mise dans l'analyse d'une demande de permission de produire une preuve appropriée; il s'agit de choisir une voie mitoyenne entre la rigidité et la permissivité;

il doit être démontré que la preuve demandée est appropriée et pertinente dans les circonstances spécifiques et les faits propres du dossier, notamment en regard des allégations et du contenu de la demande d'autorisation;

le fardeau de convaincre le tribunal de l'utilité et du caractère approprié de la preuve repose sur la partie qui la demande;

le tribunal ne doit pas laisser les parties produire une preuve volumineuse et ne doit en aucun cas examiner la preuve produite en profondeur comme s'il s'agissait d'évaluer le fond de l'affaire;

le processus d'autorisation d'une action collective n'est pas, du point de vue de la preuve, une sorte de préenquête sur le fond. C'est un mécanisme de filtrage;

l'admission de preuve appropriée doit être faite avec modération et être réservée à l'essentiel et l'indispensable. Or, l'essentiel et l'indispensable, du côté du demandeur, devraient normalement être assez sobres vu la présomption rattachée aux allégations de fait qu'énonce sa procédure. Il devrait en aller de même du côté de la défense, dont la preuve, vu la présomption attachée aux faits allégués, devrait être limitée à ce qui permet d'en établir sans conteste l'invraisemblance ou la fausseté. C'est là un « couloir étroit »;

puisque le fardeau du demandeur à l'autorisation en est un de logique et non de preuve, il faut conséquemment éviter de laisser les parties passer de la logique à la preuve (prépondérante) et de faire ainsi un préprocès, ce qui n'est pas l'objet de la démarche d'autorisation;

pour échapper à la perspective d'une action collective, la partie défenderesse souhaitera généralement présenter une preuve destinée à démontrer que l'action envisagée ne tient pas et, pour ce faire, elle pourrait bien forcer la note, sur le thème « abondance de biens ne nuit pas ». Le juge doit résister à cette propension, tout comme il doit se garder d'examiner sous toutes leurs coutures les éléments produits par l'une et l'autre des parties, au risque de transformer la nature d'un débat qui ne doit ni empiéter sur le fond, ni trancher celui-ci prématurément, ni porter sur les moyens de défense;

à l'autorisation, le tribunal doit simplement porter un regard sommaire sur la preuve, qui devrait elle-même être d'une certaine frugalité;

dans tous les cas, la preuve autorisée doit permettre d'évaluer les quatre critères que le juge de l'autorisation doit examiner et non le bien-fondé du dossier. Et si, par malheur, le juge de l'autorisation se retrouve devant des faits contradictoires, il doit faire prévaloir le principe général qui est de tenir pour avérés ceux de la demande d'autorisation, sauf s'ils apparaissent invraisemblables ou manifestement inexacts;

si l'on ne veut pas que les actions collectives accaparent une part indue des ressources judiciaires, ressources limitées, il serait donc utile, dans l'état actuel du droit, que l'on évite de faire au stade de l'autorisation ce qui, en réalité, appartient au fond.

[18] La Cour d'appel et la Cour suprême du Canada ajoutent que les seuls moyens de défense qui peuvent être tranchés par le juge d'autorisation sont ceux qui reposent sur une « pure question de droit au stade de l'autorisation si le sort de l'action collective projetée en dépend ».

[citations omises]

1.3 Discussion

[10] In his affidavit, Mr. Baig explains at paragraphs 3 and 4 that the defendants are both domiciled in California, and that WhatsApp or Meta do not have an establishment in the province of Quebec. [4] WhatsApp argues that these paragraphs help the Court analyze the jurisdictional factors set out in article 3148 of the Civil *Code of Quebec.*

[11] Paragraphs 3 and 4 may play a role in the Court's decision whether or not to grant a national class or to assert its jurisdiction over the matter. It is also possible that this analysis will be done only if the authorization is granted. Nevertheless, it is relevant to authorize the proposed evidence and the conclusion on the stage at which this analysis must be made can be decided at the time of the hearing on the Application to authorize the bringing of a class action.

[12] In paragraphs 5 to 7 of the affidavit, Mr. Baig states that WhatsApp found no evidence that the set of data allegedly advertised for sale was the result of a data breach, breach or infringement of WhatsApp systems.

[13] At the leave hearing, the applicant must establish a mere "possibility" of success on the merits. It does not have to be a "realistic" or "reasonable" possibility[5].

[14] The facts of the Application to authorize the bringing of a class action will be considered true, but not the elements that are based on an opinion, legal argument, unverified inferences or assumptions or that are outright contradicted by reliable documentary evidence.[6]

[15] The defendants intend to argue that the facts alleged are untested inferences or assumptions, broad and vague allegations without supporting evidence. In this context, the Court concludes that paragraphs 5 to 7 are relevant to the leave hearing.

[16] In paragraphs 8 and 9 of the affidavit, Mr. Baig explains that WhatsApp's privacy policy provides that, when creating an account with WhatsApp, every WhatsApp user must agree to (i) provide a phone number and (ii) that a user's phone number is information available to any other WhatsApp user. He further explains that the ability to determine whether a mobile phone number belongs to another WhatsApp user is a core feature of WhatsApp and is necessary to provide the service.

[17] Since the Plaintiff's main contention is that it is the obtaining and the sale of the user mobile phone number that constitutes a data breach (non protection and disclosure of personal and confidential information), the Court finds that paragraphs 8 and 9 are relevant to the Authorization hearing.

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4 Exhibit D-1, paragraphs 3 and 4.

5 *L'Oratoire Saint-Joseph du Mont-Royal v. J.J.*, 2019 SCC 35, para. 58 [emphasis in original]..

6 *Option Consommateurs* c. *Bell Mobilité*, 2008 QCCA 2201, par. 37 et 38.

[18] The relevant evidence is limited to the threshold set by the Supreme Court of Canada, namely the demonstration of an arguable case. The Court may, however, admit reliable evidence that legally contradicts the facts considered to be true.

[19] Plaintiff did not allege nor file in support of his Application to authorize the bringing of a class action, a component of his contractual relationship with WhatsApp, i.e. the entirety of WhatsApp's Terms of Service.[7]

[20] The Defendants admit that WhatsApp's terms of service are nonetheless mostly referenced in Exhibits P-1 to P-3 filed in support of the Application to authorize the bringing of a class action.

[21] P-1 to P-3 do not disclose the entire WhatsApp Terms of Service. Since it is those Terms of Services that Plaintiff alleges to have been broached, the Court shall rely on the complete evidence rather than selected parts of same.

[22] The Application for leave to adduce relevant evidence is sufficiently circumscribed and precise to provide the necessary guidance for the analysis of the authorization criteria without going any further.

2. ORAL REQUEST FOR THE EXAMINATION OF THE AFFIANT

2.1 Context

[23] Counsel for the Plaintiff wishes to cross-examine the Affiant, Mr. Baig, out of court prior to the leave hearing.

2.2 Legal principles

[24] Article 222 C.C.P. states:

> When a party submits testimonial evidence by affidavit, another party may call the affiant to attend in order to be examined on that affidavit. The examination may pertain not only to evidence attested to in the affidavit but also to any other relevant fact. If the affiant fails to attend, the affidavit is rejected.

[25] In *Lussier* v. *Luft*, the Court [8]of Appeal concluded that, notwithstanding the general wording of section 222 C.C.P., the right to examine the Affiant was not absolute. It may be restricted by the Court where the situation so warrants.

[26] The 3rd paragraph of article 158 C.C.P. allows the Court, as a case management measure, to determine whether and under what conditions pre-trial examinations are

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7 Exhibit D-2.

8 2017 QCCA 1392

necessary. According to the Court of Appeal, this includes the power to limit the scope of these examinations.

2.3 Discussion

[27] As an example, in the *Lussier* v. *Luft* case (see above), the motion to institute proceedings for damages brought by plaintiff Luft sought $750,000 from the defendant Lussier. In the course of the proceedings, Luft filed an application for a declaration of disqualification of defendant Lussier's lawyers (motion for disqualification). Lussier then asked to examine the plaintiff Luft on both the motion for disqualification and the motion initiating proceedings for damages.

[28] Plaintiff Luft objected and successfully argued that the motion for disqualification should be heard first and that if Lussier's lawyers were disqualified, there was no reason for her to submit to an examination by Lussier's counsel of the other facts found in the motion initiating proceedings for damages.

[29] The Court of Appeal upheld the Superior court's decision on the basis that, at the pre-trial disclosure stage, the court's case management powers and article 158 C.C.P. allowed for it.[9]

[30] In our case, there are a few other things to consider. We are at a purely procedural stage, that of authorization. The burden of proof to obtain the authorization to the bringing of a class action rests with the Plaintiff. The Application to authorize the bringing of a class action must be considered on the merits of its allegations considered to be true, the supporting exhibits and any authorized evidence produced.

[31] It is not for the Plaintiff to attempt to improve his or her case by examining the Defendant's representative on all the facts of the case. The case does not even exist yet.

[32] Given the Defendants' intention to plead the overly broad and vague allegations in the leave application not being supported by factual evidence, it may be tempting for the Plaintiff to try to improve his case through cross-examination. This will only lead to objections that may delay the debate on the Application to authorize the bringing of a class action.

[33] Accordingly, the Court considers that the examination of the Affiant should be carried out at the authorization hearing so that the Court can rule on any objection that may arise in this context.

FOR THOSE REASONS, THE COURT:

[34] **ALLOWS the** Defendants' request for leave to file relevant evidence as follows:

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[9] article 221 C.C.P.

34.1. Affidavit of Mr. Attaullah Baig (D-1).

34.2. WhatsApp Terms of Service (D-2).

[35] **ALLOWS** the Plaintiff's motion for cross-examination and Mr. Baig;

[36] **DECLARES** that this cross-examination shall take place at the authorization hearing**.**

[37] **LEGAL COSTS** to follow**.**

Signature numérique de
Honorable Pierre Nollet j.c.s.
Date : 2023.08.16 22:17:54
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PIERRE NOLLET, J.S.C.

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Date of hearing: June 21, 2023