SUPERIOR COURT

(Class action division)

CANADA
PROVINCE OF QUEBEC
DISTRICT OF MONTREAL

N° : 500-06-000516-100

DATE : July 3, 2013

IN THE PRESENCE OF : THE HONOURABLE YVES POIRIER, J.S.C.

FRANCK AGOSTINO
Petitioner
v.
ALLSTATE DU CANADA, COMPAGNIE D'ASSURANCE
Respondent

JUDGMENT

INTRODUCTION:

[1] In the case of a motion for authorization to exercise a class action, Franck Agostino (hereafter referred to as: "Agostino") pursues Allstate Insurance Company of Canada, (hereafter referred to as: "Allstate"). The Petitioner is a former employee of the respondent Allstate who alleges that he was constructively dismissed. The putative class members are agents of Allstate. Allstate is in the business of insurance services and products across Canada.

[2] In July 2007, Allstate issued a general announcement letter to all active Agents, advising that effective September 2009, a revised product distribution model and agent compensation would be implemented (hereafter referred to as: the "New Model").

[3] The Petitioner claims that the New Model unilaterally changed essential terms of his employment contract and that these changes constitute constructive dismissal. He ultimately resigned from Allstate and commenced a proposed class action seeking damages, particularly in relation to termination and severance pay.

THE LAW:

LEGAL PRINCIPLE IN CLASS ACTIONS

[4] The Court, at this stage of the procedures, must assume that the alleged facts are true in the allegations in order to authorize the motion to institute a class action as presented by Agostino.

[5] The Court must ensure that the factual elements alleged for the authoriZation permit it to sustain the judicial syllogism relative to the responsibility of Allstate.

[6] The syllogism must be logical and plausible. Proof of the factual elements will not be required until a hearing on the merits.

[7] An examination of the syllogism allows the Court to reject claims. The authorization process is thus a preparatory stage whose role is to act as a filtering mechanism where only claims that are trivial, frivolous or bound to failure, will be eliminated.

[8] The jurisprudence is abundant in matters of authorization to institute a class action allowing the Court to lay out some general principles that have been summed up by Justice Jean-François Buffoni[1]:

> "[35] Le *Code de procédure civile* (CPC ou le Code), interprété par la jurisprudence et la doctrine, dégage les grands principes qu'on peut résumer sommairement ainsi:
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> 35.1 Les dispositions relatives au recours collectif découlent d'une loi à portée sociale visant à favoriser l'accès à la justice;
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> 35.2 Ces dispositions reçoivent une interprétation large et libérale. Dans le doute, le recours est autorisé;
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> 35.3 L'étape de l'autorisation constitue un mécanisme de filtrage et de vérification par lequel le tribunal vérifie se [sic] les quatre conditions de l'article 1003 CPC sont réunies;
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> 35.4 Plus particulièrement, cet exercice vise à écarter les demandes frivoles, manifestement mal fondées ou dénuées de toute chance raisonnable de succès;

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[1] *Ménard* c. *Matteo et al*, 500-06-000453-080, 25 août 2011, par. 35.

35.5 Le jugement d'autorisation ne préjuge pas du sort du recours, il s'abstient de se prononcer sur le fond du litige;

35.6 Un recours collectif n'est pas refusé au seul motif que le demandeur doit faire face à des obstacles de droit, de preuve ou de procédure ou que le défendeur a de solides moyens de défenses;

35.7 Si le tribunal estime dans sa discrétion que chacune des quatre conditions de l'article 1003 CPC - à la lumière des critères jurisprudentiels et tenant compte dans chaque cas de la règle de proportionnalité de l'alinéa 4.2 CPC - est satisfaisante, il accorde normalement l'autorisation;

35.8 Le jugement d'autorisation est susceptible de révision en tout temps, y compris pour reformuler les questions en litige ou encore fragmenter ou redéfinir le groupe."

[9] Moreover, the Court must examine this authorization through the prism of article 1003 *Code of Civil Procedure*[2] (hereinafter referred to as: "C.C.P."):

> "1003. The court authorizes the bringing of the class action and ascribes the status of representative to the member it designates if of opinion that:
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> *(a)* the recourses of the members raise identical, similar or related questions of law or fact;
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> *(b)* the facts alleged seem to justify the conclusions sought;
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> *(c)* the composition of the group makes the application of article 59 or 67 difficult or impracticable; and
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> *(d)* the member to whom the court intends to ascribe the status of representative is in a position to represent the members adequately."

THE LEGAL BASIS OF CONSTRUCTIVE DISMISSAL

[10] The concept of constructive dismissal originated in common law jurisdictions but the Supreme Court of Canada in *Farber v. Royal Trust Co*[3] confirms that this concept is applicable in the province of Quebec:

> "29. Before going on to examine how the courts have applied these principles, I should pause to discuss a point raised by the statement of Fish J.A. of the Court of Appeal, with which Chamberland J.A. concurred, that the doctrine of

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2 *Code of Civil Procedure*, L.R.Q. c. C-25.

3 *Farber v. Royal Trust Co*, [1997] 1 S.C.R. 846 at par. 29 and 30.

constructive dismissal, a creature of the common law, has become part of the civil law."

30. In 1984, in Lavigne v. Sidbec-Dosco Inc., [1985] C.S. 26, aff'd C.A. Mtl., No. 500-09-001556-844, May 4, 1988, Hannan J. said at p. 28 that the common law rule concerning constructive dismissal has been adopted by Quebec civil law:

> "It is a well established principle in the law of contract of personal services under the common law, that actions of the employer in reducing the functions and salary of an employee may be held to be equivalent to a "constructive dismissal", and when the employee resigns in these circumstances he will be entitled to damages. The breach of the contract in these cases is held to have been committed by the employer, and it is this breach which allows a Court to condemn the employer to damages.
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> . . .
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> Caution must be exercised in adopting unreservedly common-law concepts of contract into cases arising under the Civil law, except where there is useful necessity and authoritative precedent. However, in the case of lease and hire of personal services, in Quebec, the doctrine of constructive dismissal has been recognized."

[Underlined by the Court]

[11] The Supreme Court of Canada defines a constructive dismissal in *Farber*[4] :

"34. In an article entitled "Constructive Dismissal", in B.D. Bruce, ed., *Work, Unemployment and Justice* (1994), 127, Justice N. W. Sherstobitoff of the Saskatchewan Court of Appeal defined the concept of constructive dismissal as follows at p. 129:

A constructive dismissal occurs when an employer makes a unilateral and fundamental change to a term or condition of an employment contract without providing reasonable notice of that change to the employee. Such action amounts to a repudiation of the contract of employment by the employer whether or not he intended to continue the employment relationship. Therefore, the employee can treat the contract as wrongfully terminated and resign which, in turn, gives rise to an obligation on the employer's part to provide damages in lieu of reasonable notice."

[Underlined by the Court]

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[4] *Idem*, par. 34.

[12] The inquiry into whether there has been a constructive dismissal "...focuses primarily upon the breach itself and its impact upon both the employee's position and the broader employment relationship"[5].

[13] When considering a change in an employee's job duties, "it is not the direction of the change but the degree of change which is critical to assessing whether altered job duties amount to a fundamental breach of the employment contract"[6].

THE FACTUAL BACKGROUND (THE EVIDENCE)

1. Agostino and Allstate

[14] Allstate is an insurance company that has offered Canadians a range of insurance products since 1953.

[15] As of July 24, 2007, Allstate employed approximately 90 agents in the province of Quebec. Firstly, although agents were working in some 30 neighbourhood office agencies ("hereinafter referred to as: NOA"), not all of the agents were working out of such NOA, as some were working in the company offices. Their job was to offer, sell and manage Allstate's insurance policies.

[16] Agostino began working for Allstate on December 29, 1986, as an agent and his job functions were to offer, sell and manage Allstate's insurance policies and other business of Allstate. His terms and conditions of employment were governed by the CR1500 written employment agreement and the Agent Employment Procedure Manual which also formed part of the terms and conditions of Agostino's employment.

[17] Agostino's CR1500 employment agreement and the Agent Procedure Manual both specifically state that Allstate has the right to modify the working conditions of its agents and their remuneration scheme.

[18] Contrary to the allegations of the Motion, Agostino was not an "entrepreneur". At all times, Allstate owned the book of business and all clients were clients of Allstate, not Agostino:

> "As a full-time employee of the Company, you agree that you will devote your entire business time and use of company facilities and equipment to the performance of this Agreement and will not engage in any other business pursuit, as, defined in the Agents Employment Procedure Manual, without the written approval of the Company. All activities in the performance of this Agreement will be conducted in accordance with the then applicable Company rules, regulations and procedures. The Company will own all business produced under the terms

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5 Echlin and Fantini, *Quitting for Good Reason: The Law of Constructive Dismissal in Canada* (Aurora: Canada Law Book, 2001), p. 31.

6 *Idem*, p. 196.

> of this Agreement. You acknowledge that you have no vested interest in such business."[7]
>
> [Underlined by the Court]

[19] At all relevant times, Agostino was remunerated through commissions. Furthermore, Agostino had initially been designated at a place of employment, which Allstate had the right to modify and relocate Agostino elsewhere.

2. Other Contracts of Employment of the Proposed Class Members

[20] The terms of conditions of employment of the proposed class members were governed by different employment agreements, i.e. CR1500, CR1501, and 830A employment agreements.

[21] However, these three employment agreements contained a structure of distribution essentially identical and contained only minor variations from one another.

3. Allstate's New Business Model

[22] In July 2007, as a result of increased competition in the insurance market and the evolution of Allstate's customers' needs and expectations, Allstate provided all of its agents with advance notice of the upcoming implementation of a new business model, which included office relocations, all office expenses would now be paid by Allstate, and a new compensation structure to be effective as of September 1, 2009.

[23] Shortly thereafter, all of Allstate's agents were given an individual letter with respect to the terms and conditions of their ongoing employment and with respect to further provision of notice of pending changes for the particular agent, including the implementation of a minimum guaranteed income for a period of 24 months.

[24] Allstate's new business model centered around the establishment of Insurance Agencies ("AIA") located in various areas of Quebec and the identification of various roles for Allstate's agents to continue to offer, sell and manage Allstate's insurance policies and other business of Allstate. These various roles were as follows:

- *Business Development Agent*: An agent who will create and develop the relationship at new business (hereinafter called: «BDA»);
- *Relationship Development Agent*: An agent who will expand the relationship with additional features;
- *Customer care Agent:* An agent who will strengthen the relationship at renewal and provide customer service and support;

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7 Exhibit D-4, copy of the CR1500 employment agreement, par. 3.6.

- *Agency Manager*: An agent who will manage the day-to-day operations and lead growth of the agency.

[25] Moreover, it is useful to highlight particularities in Agostino's individual claim seeking two years' notice and moral damages and acknowledging that his claim was based on his own particular employment relationship with Allstate with respect to those damages.

THE COMPANION DECISION

[26] The Superior Court of Ontario refused the motion for certification in *Kafta v. Allstate Insurance Company of Canada*[8]. That decision is based on the same premises as this one. Including the same employees, contracts, advisories and modifications. At paragraph 7 of the judgment, Justice Horkins concluded that:

> "[7] In brief, it is my conclusion that this is not an appropriate case for certification. While some of the certification requirements are satisfied, the action lacks the essential element of commonality. There is no common issue capable of being determined on a class wide basis that would sufficiently advance this litigation to justify certification."[9]

[27] The Court elaborated an element of commonality, and justified its finding that the action lacked such element:

> "[159] Furthermore, the plaintiffs cannot preclude the defence from conducting an inquiry into the individual and unique circumstances of each plaintiff and each Agent. The July letter is merely the beginning of an inquiry into whether the New Model made a fundamental change to an agent's employment contract. First, the specific contract and any amendments must be reviewed. The inquiry from this point forward descends into a detailed review of how the New Model impacted each agent. Of necessity this requires the Agent's job description, office location, expenses, earnings and benefits under the Old Model to be compared with the same or similar features under the New Model. This would not be a simple exercise, since there were several variable elements to an Agent's compensation under both models (i.e. commissions for new and renewal business, bonuses, pensions, benefits and office expense reimbursement).
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> [160] The size, nature and distribution of the Agent's book of insurance business determined the Agent's compensation profile under the Old Model and directly impacted how the Agent would be compensated under the New Model. For example, under the New Model, Agents are expected to focus their efforts on securing new business. An Agent who had a history of generating new business was better positioned to earn commission income under the New Model than an Agent who relied more heavily on renewal or rollover business.

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8 *Kafta v. Allstate Insurance Company of Canada*, 2011 ONSC 2305 on April 12th, 2011.

9 *Idem*, par. 7

> [161] Further, the impact of closing the neighbourhood offices and moving the Agents to new consolidated offices would not have been the same for all Agents. For example, an Agent in a neighbourhood office that was poorly located may be better off in a centrally located office. Other Agents may have been asked to give up good locations to travel a long distance to a new office.
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> [162] Resolution of this issue for the plaintiffs will not avoid individual fact finding and legal analysis for each class member. I conclude that this is not a common issue."[10]

[28] The decision was affirmed on April 4, 2012 at the Divisional Court of Ontario in *Kafka v. Allstate Insurance Company of Canada*[11]. At paragraph 84 of that judgment, Justice Harvison Young concluded:

> "[84] As the motion judge held, the central and pervasive problem with the application in this case was the lack of commonality, which drove her conclusions both with respect to the proposed common issues as well as the other elements of the *CPA* which she was required to consider. The circumstances of this case, as well as the nature of constructive dismissal pursuant to the *ESA*, were critical factors that combined to justify her conclusions. The appeal is therefore dismissed."
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> [Underlined by the Court]

[29] Questions to be resolved:

THE CRITERIA OF ARTICLE 1003 C.C.P.

- **Does the motion raise identical, similar or related questions of law or fact as per article 1003 (a) C.C.P.?**
- **Does the motion establish a *prima facie* case as per article 1003 (b) C.C.P.?**
- **Is the composition of the group appropriate as per article 1003 (c) C.C.P.?**
- **Is the designated representative appropriate as per article 1003 (d) C.C.P.?**

DISCUSSION:

1. Does the motion raise identical, similar or related questions of law or fact as per article 1003 (a) C.C.P.?

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10 *Supra,* note 8, par. 159 to 162.
11 2012 ONSC 1035, par. 84.

[30] In Quebec civil law, there is abundant jurisprudence from the Quebec Court of Appeal that establishes a wide range of interpretation of the criteria set out in article 1003 (a) C.C.P.

[31] In 1991, the Quebec Court of Appeal effectively dealt with the qualification of a common question of law or of fact:

> "Notre Cour a eu plusieurs fois l'occasion d'examiner l'application du sous-paragraphe a) de l'article 1003. Elle exige simplement la présence d'un certain nombre de questions de droit ou de fait suffisamment semblables ou connexes pour justifier le recours, mais elle ne demande pas que l'ensemble des questions de droit ou de fait soit identique (Voir *Comité d'environnement de La Baie Inc. c. Société d'électrolyse et de Chimie Alcan* (1990) R.J.Q. 655, *Tremaine c. H.R. Robins* J.E. 90-1642). Il suffit que les réclamations soulèvent un certain nombre de questions importantes, qui soient, en même temps, suffisamment communes ou connexes."[12]
>
> [Underlined by the Court]

[32] Thus, it is not necessary that a majority of the questions of fact or of law be identical. Only a few important questions of law and fact are required.

[33] In 2008, the Court of Appeal suggested that a common denominator should emerge from the totality of the questions of law and fact:

> "[57] Ici encore, avec beaucoup d'égards pour l'opinion de notre collègue et celle du juge de première instance, nous voyons les choses différemment. Il est vrai que l'utilisation du recours collectif doit permettre de concilier équité et efficacité; il serait inopportun d'autoriser un recours collectif qui n'aurait pas pour effet d'éviter « la répétition de l'appréciation des faits ou de l'analyse juridique ":
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> > La question sous-jacente est de savoir si le fait d'autoriser le recours collectif permettra d'éviter la répétition de l'appréciation des faits ou de l'analyse juridique. Une question ne sera donc « commune » que lorsque sa résolution est nécessaire pour le règlement des demandes de chaque membre du groupe. (...)"
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> [58] Le paragraphe a) de l'article 1003 *C.p.c.* exige que « les recours des membres soulèvent des questions de droit ou de fait identiques, similaires ou connexes ». Dans *Western Canadian Shopping Centres*, la Cour suprême rappelle que l'exercice du recours collectif est possible même si tous les membres ne sont pas dans la même situation et même si les questions communes à tous les membres sont moins importantes que les questions propres à chacun d'eux :

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[12] *Guilbert* c. *Vacances sans Frontière ltée.*, [1997] R.D.J. 513 (C.A.) p. 516.

> "Il n'est pas essentiel que les membres du groupe soient dans une situation identique par rapport à la partie adverse. Il n'est pas nécessaire non plus que les questions communes prédominent sur les questions non communes ni que leur résolution règle les demandes de chaque membre du groupe. Les demandes des membres du groupe doivent toutefois partager un élément commun important afin de justifier le recours collectif. Pour décider si des questions communes motivent un recours collectif, le tribunal peut avoir à évaluer l'importance des questions communes par rapport aux questions individuelles. Dans ce cas, le tribunal doit se rappeler qu'il n'est pas toujours possible pour le représentant de plaider les demandes de chaque membre du groupe avec un degré de spécificité équivalant à ce qui est exigé dans une poursuite individuelle.
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> [...]
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> Troisièmement, en ce qui concerne les questions communes, le succès d'un membre du groupe signifie nécessairement le succès de tous. Tous les membres du groupe doivent profiter du succès de l'action, quoique pas nécessairement dans la même mesure. Le recours collectif ne doit pas être autorisé quand des membres du groupe sont en conflit d'intérêts.
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> [59] Dans tous les cas, il s'agit de voir si les réclamations présentent un dénominateur commun – «des questions de droit ou de fait identiques, similaires ou connexes» selon le texte du Code de procédure civile – justifiant l'exercice du recours collectif, au bénéfice de tous les membres du groupe."[13]
>
> [Underlined by the Court]

[34] In 2011, the Court of Appeal in *Collectif* c. *Suroît*[14] mentioned that a common denominator need not have the effect of bringing about a complete solution. It could, once resolved, even bring about a series of small trials at the stage of the individual claims:

> "[22] Or, la seule présence d'une question de droit commune, connexe ou similaire est suffisante pour satisfaire la condition à l'article 1003 *a) C.p.c.* si elle n'est pas insignifiante sur le sort du recours; elle n'a cependant pas à être déterminante pour la solution du litige : *Comité d'environnement de la Baie inc. c. Société de l'électrolyse et de chimie de l'Alcan ltée*, [1990] R.J.Q. 655 (C.A.), paragr. 22 et 23. Il suffit en fait qu'elle permette l'avancement des réclamations sans une répétition de l'analyse juridique (Pierre-Claude Lafond, *Le recours*

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13 *Vermette* c. *General Motors du Canada Ltée*, 2008 QCCA 1793, par. 57, 58, 59.

14 *Collectif de défense des droits de la Montérégie (CDDM)* c. *Centre hospitalier régional du Suroît du Centre de santé et de services sociaux du Suroît*, [2011] QCCA 826, par. 22, 23.

> *collectif, le rôle du juge et sa conception de la justice*, Cowansville, Yvon Blais, 2006, p. 92; *Western Canadian Shopping Centres Inc. c. Dutton*, [2001] 2 R.C.S. 534, paragr. 39).
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> [23] Il est fort possible que la détermination des questions communes ne constitue pas une résolution complète du litige, mais qu'elle donne plutôt lieu à des petits procès à l'étape du règlement individuel des réclamations. Cela ne fait pas obstacle à un recours collectif."
>
> [Underlined by the Court]

[35] However, the Supreme Court of Canada established that the question of whether there has been a constructive dismissal is a question of fact:

> "[35] However, each constructive dismissal must be decided on its own facts, since the specific features of each employment contract and each situation must be taken into account to determine whether the essential terms of the contract have been substantially changed."[15]
>
> [Underlined by the Court]

[36] A claim for constructive dismissal is ultimately an individual claim. An assessment and examination of the actual terms and conditions of the individual's contract of employment marks the beginning of the Court's inquiry. A Petitioner in claim for constructive dismissal must demonstrate, based on his or her own unique circumstances, that changes were implemented unilaterally by his or her employer and without reasonable notice of the change, and without the employee's agreement or the employer's entitlement to do so pursuant to the terms of the employment contract itself. At minimum, the Petitioner must establish that the changes were made to essential terms and conditions of the employee's employment contract and that the impact of these changes was substantial and to the employee's disadvantage.

[37] Furthermore, the employee must further establish, based on their own individual circumstances, that he or she resigned or left employment with the employer as a result of these changes within a reasonable period of time, and without condoning or acquiescing to the changes. Moreover, there must be further individual assessment of whether the Petitioner failed to stay in his or her position which may constitute a failure to mitigate and whether or not the individual mitigated any claimed damages through employment or self-employment after he or she left.

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[15] *Supra,* note 3, par. 35.

[38] The test to determine if the claim of the proposed members raise questions of fact and law that are identical, similar or related is to establish whether the proposed class members' claims share a substantial common denominator. This is elaborated in *Western Canadian Shopping Centres Inc.* v. *Dutton*[16] at par. 39:

> "[...] The underlying question is whether allowing the suit to proceed as a representative one will avoid duplication of fact-finding or legal analysis. Thus an issue will be "common" only where its resolution is necessary to the resolution of each class member's claim. It is not essential that the class members be identically situated *vis-à-vis* the opposing party. Nor is it necessary that common issues predominate over non-common issues or that the resolution of the common issues would be determinative of each class member's claim. However, the class members' claims must share a substantial common ingredient to justify a class action. Determining whether the common issues justify a class action may require the court to examine the significance of the common issues in relation to individual issues. In doing so, the court should remember that it may not always be possible for a representative party to plead the claims of each class member with the same particularity as would be required in an individual suit."

[39] For questions of fact or law to be common to all the proposed class members, the favourable resolution of a common issue entails that each member of the class will benefit from the successful prosecution of the action, although not necessarily to the same extent:

> "Third, with regard to the common issues, success for one class member must mean success for all. All members of the class must benefit from the successful prosecution of the action, although not necessarily to the same extent. A class action should not be allowed if class members have conflicting interests."[17]

[40] Therefore, the underlying question of article 1003 (a) C.C.P. is whether allowing the suit to proceed as a class action will avoid duplication of fact-finding or legal analysis and if the resolution of the proposed common issue will significantly move forward the claims of the proposed class members.

[41] In the current case, the common issue cannot be resolved at once for the benefit of all the proposed class members, it will not avoid duplication of fact-finding and legal analysis, and the individual issues to be adjudicated for the successful prosecution of the cause of action are predominant and significant.

[42] It is useful once more to stress the Supreme Court of Canada's analysis in *Farber*, in which it states that "*each constructive dismissal case must be decided on its own facts, since the specific features of each employment contract and each situation*

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16 *Western Canadian Shopping Centres Inc.* v. *Dutton*, [2001] 2 R.C.S. 534, 2001 CSC 46, par. 39.
17 *Idem*, par. 40.

must be taken into account to determine whether the essential terms of the contract have been substantially changed."[18]

(Underlined by the Court)

[43] With this in mind, there exist several individual issues in the current case which would need to be reviewed before addressing a "common issue" for all the proposed class members. They include, but are not limited to:

- Each proposed class member's unique history within Allstate, such as the terms of the individual's contract, previous amendments to that contract and changes to compensation previously, location, role, and Allstate's book of business, etc;
- Every proposed class member received an individual letter and had an individual meeting regarding their ongoing role;
- Every proposed class member benefited from their own 24 month Guarantee, which varied per agent;
- Every proposed class member was offered one of the four different roles in the new model (i.e. Business Development Agent, Relationship Development Agent, Customer Care Agent, and Agency Manager), all of which entail different functions and duties.

[44] Ultimately, as per the criteria set out in *Farber*, the Court must consider the impact of the change on the individual employee, considering the number of different employment agreements, the number of roles under Allstate's new business model and the various bonus plans that could have been offered to the proposed class members. An objective comparison of the positions is not possible for every class member at once in order to conclude that Allstate's new business model substantially altered each member of the class' respective employment agreements.

[45] In particular, the comparative analysis of the positions in question and their attributes called for by *Farber*, may very well lead the Court to the conclusion that in some cases, no substantial modifications occurred to the essential terms of the employment agreement that occurred, or even that Allstate's new business model represented a promotion to some proposed class members. However, this would require individual fact-finding for the various proposed class members.

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[18] *Supra*, note 3, par. 35.

[46] Thus, the proposed common issue, that is, "whether by the advent of the new business model of the Respondent, did the Petitioner and the members of the group see imposed upon themselves substantial changes to essential conditions of their employment contract", will not avoid duplication of fact-finding or legal analysis as each proposed class member would be the subject of individual enquiries and would necessitate a multitude of trials to address such questions.

[47] The claims of the members do not raise identical, similar or related questions of law or fact.

2. Does the motion establish a *prima facie* case as per article 1003 (b) C.C.P.?

[48] Article 1003(b) C.C.P. requires Agostino to demonstrate that the facts alleged in the Motion seem to justify the conclusions sought. To satisfy this criterion, Agostino must advance a *prima facie* case against Allstate, i.e. a **serious** appearance of right.

[49] To meet that test, the Motion must allege all of the facts required to establish, if proven, the liability of Allstate not only for the individual claim of Agostino, but for that of all the members of the class. The factual allegations in the Motion must be set out in some detail and developed to the extent required to support *prima facie* the cause of action and justify the conclusions sought. Thus, the allegations of the Motion must demonstrate the legal syllogism underlying the recourse in light of the applicable law.

[50] In the case at hand, Agostino's claim is that the implementation of Allstate's new business model amounted to a constructive dismissal of each member of his proposed class. He therefore is alleging that it constituted a unilateral modification by Allstate of each member's individual contract of employment.

[51] In addition to the governing principles set out in paragraphs 34 and 35 of *Farber*, as previously noted, the Supreme Court of Canada[19] also lays out the following basic principles:

> "[26] To reach the conclusion that an employee has been constructively dismissed, the court must therefore determine whether the unilateral changes imposed by the employer substantially altered the essential terms of the employee's contract of employment. For this purpose, the judge must ask whether, at the time the offer was made, a reasonable person in the same situation as the employee would have felt that the essential terms of the employment contract were being substantially changed. The fact that the employee may have been prepared to accept some of the changes is not conclusive, because there might be other reasons for the employee's willingness to accept less than what he or she was entitled to have."

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[19] *Supra,* note 3, par. 26.

[52] In order to satisfy the criteria of Article 1003 (b) C.C.P., the Court must conclude that Agostino has successfully advanced a *prima facie* case against Allstate. Thus, the Court must assess, in light of the facts alleged and the evidence adduced by the parties, whether on a *prima facie* basis a reasonable person would conclude that the elements pertaining to a claim for constructive dismissal are met.

[53] Moreover, in *Brown* c. *B2B Trust*[20], Justice Jacques Fournier added:

> "[40] Au stade de l'autorisation, le fardeau de l'appelant n'en est pas un de preuve prépondérante. Il lui suffit de faire la démonstration d'un syllogisme juridique qui mènera, si prouvé, à une condamnation et le juge saisi de la requête ne peut considérer les moyens de défense qui pourrait être soulevés."

[54] Allstate provided Agostino with substantial advance notice of the upcoming implementation of a new business model. However, in any event, Agostino's CR1500 employment agreement and the Agent Procedure Manual both provide that Allstate had the right to modify the working conditions of its agents, including his location and his remuneration scheme. Also, Agostino never remained at Allstate, let alone experienced it's new business model, having resigned from Allstate before being relocated to his new **AIA**, thus never fulfilling the functions of a **BDA** and never having any change in his compensation model. Based on the allegations of the Motion and the evidence it cannot be objectively assessed that Agostino would have been negatively impacted by Allstate's new business model.

[55] The law of constructive dismissal requires that substantial changes to the fundamental terms of the employment agreement must be imposed by the employer. From an objective standpoint, it is not possible to conclude, even on a *prima facie* basis, that a reasonable person in the same situation as Agostino would have felt that the fundamental terms of the employment contract were being substantially changed.

[56] Thus, it seems that Agostino has failed to address the prerequisite conditions to claim constructive dismissal. His legal syllogism is deficient.

[57] However, there remains a larger deficiency in the case at hand. While arguably, the legal syllogism for Agostino is deficient, largely related to the above-mentioned issue of commonality, the legal syllogism for the other members in this claim is incomplete. Without an individual inquiry into the unique circumstances of each of the members of the class, the Court cannot establish there to be a *prima facie* case against Allstate.

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[20] *Brown* c. *B2B Trust,* 2012 QCCA 900, par. 40.

3. Comparison of the group appropriate as per article 1003 (c) C.C.P.?

[58] On that criteria, we can conclude that the group is appropriate. The description of the proposed members is adequate. The group is small probably 60 to 70 people will comprise the group.

4. Representative appropriate (article 1003 (d) C.C.P.)

[59] Petitioner can ascribe the status of representative. There is no evidence of a conflict of interest or that the Petitioner will be incompetent. He takes the initial procedure and he wants to represent the group. The criteria of article 1003 (d) C.C.P. is established.

FOR THESE REASONS, THE COURT:

[60] **REJECTS** the motion of Franck Agostino for authorization to exercise a class action against Allstate du Canada, Compagnie d'Assurance.

[61] **THE WHOLE WITH COSTS.**

YVES POIRIER, J.S.C.

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Dates of hearing : February 4 and 5, 2013