

C A N A D A

PROVINCE OF QUÉBEC
DISTRICT OF MONTREAL

S U P E R I O R C O U R T
(Class Action)

N° 500-06-000824-165

ANTONIO BRAMANTE

Applicant

v.

LES RESTAURANTS McDONALD DU
CANADA LIMITÉE

Defendant

LES RESTAURANTS McDONALD DU CANADA LIMITÉE'S
APPLICATION FOR PERMISSION TO EXAMINE THE APPLICANT AND
LEAVE TO FILE RELEVANT EVIDENCE AT THE AUTHORIZATION HEARING
(Art. 574 of the *Code of Civil Procedure*)

TO AN HONOURABLE JUSTICE OF THE SUPERIOR COURT, IN AND FOR THE DISTRICT OF MONTREAL, DESIGNATED TO HEAR THE APPLICATION FOR AUTHORIZATION IN THE PRESENT FILE, RESPONDENT LES RESTAURANTS McDONALD DU CANADA LIMITÉE RESPECTFULLY SUBMITS THE FOLLOWING:

I. OBJECT OF THIS APPLICATION

1. Les Restaurants McDonald du Canada Limitée (“**McDonald’s**”) seeks leave to file the following evidence at the hearing on Applicant’s *Application to Authorize the Bringing of a Class Action and to Appoint the Status of Representative Plaintiff* (the “**Application for Authorization**”):
 - a) An extract from Burger King’s website, along with pictures of a toy received with the “Trio King Junior” children’s meal (**Exhibit D-1**), and an extract from Harvey’s website, along with a picture of the activity book received with Harvey’s children’s meal (**Exhibit D-2**), copies of which are communicated in support hereof;
 - b) A guide to the application of Section 248 of the *Consumer Protection Act* issued by the *Office de la protection du consommateur* (“**OPC**”) (**Exhibit D-3**), the OPC’s mission statement and mandate (**Exhibit D-4**), and a voluntary undertaking with the OPC signed by McDonald’s in 1985 regarding its advertising (**Exhibit D-5**), copies of which are communicated in support hereof;

- c) The artwork for the Happy Meal box used in Quebec (**Exhibit D-6A**) and in the rest of Canada (**Exhibit D-6B**) during the Trolls Happy Meal advertising campaign, the artwork for the toy polybags used in Quebec (**Exhibit D-7A**) and in the rest of Canada (**Exhibit D-7B**) during the Trolls Happy Meal advertising campaign, and the artwork for the vestibule Happy Meal posters used in Quebec (**Exhibit D-8A**) and in the rest of Canada (**Exhibit D-8B**) during the Trolls Happy Meal advertising campaign, copies of which are communicated in support hereof;
 - d) Screen shots of McDonald's French-language website relating to the Happy Meal Program (**Exhibit D-9**), copies of which are communicated in support hereof;
 - e) An affidavit from Michelle McIlmoyle, McDonald's Senior Manager of National Marketing, explaining McDonald's Happy Meal Program and its advertising practises in Quebec with respect to that program (the "**Affidavit**"), a copy of which is communicated herewith as **Exhibit D-10**.
2. McDonald's also seeks permission to examine the Applicant, Antonio Bramante, concerning the nature of the class action he proposes and his knowledge of the facts giving rise to it, the investigation that he has done in order to identify other potential class members, and his ability to act as the representative, the whole as will be detailed further below.
 3. The evidence that McDonald's seeks to obtain and adduce will enable the Court to undertake an informed analysis of the authorization criteria set out in Article 575 of the *Code of Civil Procedure* ("**CCP**").

II. PROCEDURAL CONTEXT

4. On or around November 15, 2016, the Applicant filed his *Application for Authorization*, whereby he seeks permission to institute a class action on behalf of the following group:

*Every consumer, pursuant to the terms of Quebec's Consumer Protection Act ("**CPA**"), who since November 15th, 2013 (the "**Class Period**"), purchased a toy from McDonald's (including McDonald's franchised and company-operated restaurant sites), either with or without a Happy Meal®, for any child under thirteen years of age,*

the whole as appears from the Application for Authorization.

5. The Applicant alleges that McDonald's is acting in violation of Section 248 of the Quebec *Consumer Protection Act* (the "**CPA**") because it "makes use of commercial advertising directed at persons under thirteen (13) years of age" (Application for Authorization, para. 8).

6. The Applicant adds that McDonald's "advertisements for the toys it sells directly incite children to buy (or urge another person to buy) said toys" (Application for Authorization, para. 9).
7. Pursuant to Article 575 *CCP*, at the authorization stage, this Honourable Court will have to determine if the four conditions to exercise a class action are satisfied.
8. When it facilitates such analysis, the Court may allow relevant evidence to be submitted by the Respondent, based on Article 574 *CCP*.
9. McDonald's submits that the documents communicated as Exhibits D-1 through D-10 are useful, necessary and appropriate to respond to the Applicant's allegations, to provide an accurate picture of the manner and context in which McDonald's advertises and sells Happy Meal toys, and are relevant to evaluating the criteria for authorization.

III. THE HAPPY MEAL PROGRAM

10. McDonald's submits that paragraphs 3 to 14 of the Affidavit, as well as Exhibits D-1 and D-2, constitute relevant and appropriate evidence for the purposes of the hearing on the Application for Authorization.
11. Paragraphs 3 through 11 of the Affidavit provide basic and essential information concerning the McDonald's Happy Meal Program. Such information is helpful and appropriate because the Application for Authorization refers in several occasions to the concept of "Happy Meal", namely in the proposed class definition, without providing a clear and complete explanation to the Court of what this concept represents.
12. More specifically, the Affidavit clarifies when the Happy Meal Program was introduced (para. 3), what the program involves (para. 4) and the different elements comprised in a Happy Meal (para. 5).
13. Further, paragraphs 6 through 11 of the Affidavit describe the pricing structure of the Happy Meal, indicate what type of customers purchase such meals and identify the options available with respect to the toys sold in connection with the Happy Meal.
14. In particular, paragraph 6 of the Affidavit explains that the price of a Happy Meal depends on the type of entrée chosen by the customer. The Respondent should be allowed to adduce such evidence in order to correct the Applicant's allegation that the Happy Meal sells for one single and invariable price (Application for Authorization, para. 10).
15. The information contained in paragraphs 3 through 11 is helpful in evaluating the syllogism proposed by the Applicant and in determining whether the condition under 575(2) *CCP* is satisfied. In order to appreciate, even *prima facie*, the

allegations put forth by the Applicant, the Court should be presented with a proper description of what a Happy Meal is and how the toys are sold in conjunction with it.

16. Moreover, as the proposed class definition contains an express reference to the notion of Happy Meal, in order for the Court to evaluate the proper scope and workability of such a class, it should be in possession of sufficient evidence concerning the nature and contents of a Happy Meal.
17. The Applicant also states that McDonald's, contrary to its competitors, is "one of the only fast food chains" offering and marketing toys with its children's meal (Application for Authorization, para. 15) and that "McDonald's is the only restaurant committing the prohibited practice in Quebec" (Application for Authorization, para. 43).
18. Paragraphs 12 to 14 of the Affidavit, along with supporting Exhibits D-1 and D-2, demonstrate that the Applicant's statements are factually incorrect. Hence, such information is relevant and appropriate in the context of this Court's assessment of whether the Applicant's allegations appear to justify the conclusions sought (575(2) CCP).

IV. McDONALD'S ADVERTISING

19. Paragraphs 15 through 19 of the Affidavit, along with Exhibits D-3, D-4 and D-5, provide useful information concerning the statutory and regulatory framework that governs McDonald's advertising practices in Quebec.
20. Paragraphs 15 through 17 explain that the OPC, which monitors the application of the CPA, has issued a guide specifically on the application of Section 248 CPA (Exhibit D-4), the very section that the Applicant accuses McDonald's of violating.
21. Paragraphs 18 and 19 further explain that McDonald's has never been charged, in a period of over 30 years, by the OPC for any infraction of Section 248 in relation to its advertising for the Happy Meal Program.
22. Such information is relevant and appropriate evidence for the purposes of the hearing on authorization, as it will allow this Court to evaluate the validity of the Applicant's syllogism with respect to the issue of whether there has been a breach of Section 248 CPA.
23. Furthermore, considering the Applicant's allegations that McDonald's sells toys and Happy Meals "with complete disregard for the CPA" (Application for Authorization, para. 25 and 44), that "McDonald's breached and continues to breach the CPA, without any explanation, for a significant period" (Application for Authorization, para. 42) and that "McDonald's violations are intentional, calculated, malicious and vexatious" (Application for Authorization, para. 49), the proposed

evidence will allow the Respondent to contradict these gratuitous, vague and entirely unsubstantiated claims.

24. In sum, this evidence will allow the Court to better assess whether the facts alleged by the Applicant appear to justify the conclusions sought (art. 575(2) *CCP*).

V. McDONALD'S HAPPY MEAL PROGRAM ADVERTISING IN QUEBEC

25. McDonald's submits that paragraphs 20 through 30 of the Affidavit, as well as Exhibits D-6, D-7 and D-8, constitute relevant and appropriate evidence for the purposes of the hearing on the Application for Authorization.
26. These paragraphs explain how McDonald's tailors its Happy Meal advertising specifically for Quebec, both in terms of location and content, in order to comply with the statutory regime in place in this jurisdiction.
27. That portion of the Affidavit also explains how Happy Meal advertising campaigns can have different advertising elements and may not be identical in their look or content.
28. Using the Trolls Happy Meal advertising campaign as an example, a campaign which is explicitly referred to in the Application for Authorization, the Affidavit illustrates how that campaign was adapted by McDonald's for the Quebec market. Exhibits D-6, D-7 and D-8 illustrate the differences between the advertising materials used in Quebec and in the rest of Canada for the Trolls campaign.
29. Once again, this evidence contradicts Applicant's broad and entirely unsubstantiated allegations that McDonald's is acting "with complete disregard for the CPA" (Application for Authorization, para. 25 and 44). Exhibits D-6, D-7 and D-8 also complete the partial evidence communicated by the Applicant as Exhibits P-4 and P-5. More generally, such evidence will help the Court determine whether the conditions under art. 575(1) and 575(2) *CCP* are satisfied.

VI. McDONALD'S WEBSITE

30. McDonald's submits that paragraphs 31 through 34 of the Affidavit, as well as Exhibit D-9, are relevant for the purposes of the hearing on the Application for Authorization.
31. This part of the Affidavit provides information concerning the www.mcdonalds.ca website, information that is missing from the incomplete evidence filed by the Applicant as Exhibit P-3 and referenced at paragraph 16 of the Application for Authorization.
32. Firstly, the Applicant does not include, as part of Exhibit P-3, any pages from the French version of www.mcdonalds.ca, thereby painting an incomplete and inaccurate picture. McDonald's should therefore be permitted to file Exhibit D-9,

which contains screen shots of the French-language pages of www.mcdonalds.ca related to the Happy Meal.

33. Secondly, paragraph 16 of the Application for Authorization incorrectly gives the impression that the pages communicated by the Applicant as Exhibit P-3 are accessible directly from the www.mcdonalds.ca home page, whereas, as explained at paragraph 34 of the Affidavit, several actions were required from the user in order to view the toys on the English-language website during the Trolls campaign.
34. In sum, such evidence is relevant and appropriate at the authorization stage, as it will complete the fragmentary evidence filed by the Applicant and provide the Court with a complete picture of McDonald's website as it relates to the Happy Meal.

VII. EXAMINATION OF THE APPLICANT

35. McDonald's also seeks permission to examine the Applicant, Antonio Bramante, on the following topics:
 - a) The nature of the action and his knowledge of the facts giving rise to it; more specifically, the circumstances which brought him to purchase Happy Meals and toys as alleged at paragraphs 29 to 39 of the Application for Authorization;
 - b) The investigation that he has done in order to identify other potential members of the class;
 - c) His ability to act as the representative of the potential class and whether he meets the legislative conditions.
36. The requested examination will provide key information that will allow the Court to make an informed decision as to whether the Applicant is in a position to properly represent the potential class members (art. 575(4) *CCP*) and whether the facts alleged appear to justify the conclusions sought (art. 575(2) *CCP*).
37. The Respondent submits that the examination of the Applicant could be limited to a duration of two hours and that it should be held out of Court for reasons of judicial economy and to allow the parties to better prepare for the hearing on authorization.

VIII. CONCLUSION

38. Both the examination of the Applicant and the filing of the evidence contained in Exhibits D-1 through D-10 are necessary to allow McDonald's to respond to the allegations put forth by the Applicant in his Application for Authorization, several of which are either inaccurate or incomplete, and will further enable this Court to decide whether the conditions for authorization have been met.

39. This application is well founded in fact and in law.

FOR THESE REASONS, MAY IT PLEASE THIS HONOURABLE COURT TO:

GRANT the present *Application*;

AUTHORIZE Respondent Les Restaurants McDonald du Canada Limitée to examine out of Court the Applicant, Antonio Bramante, for a maximum duration of two hours, on the following topics:

- a) The nature of the action and his knowledge of it; more specifically the circumstances which brought him to purchase Happy Meals and toys as alleged at paragraphs 29 to 39 of the Application for Authorization;
- b) The investigation that he has done in order to identify other potential members of the class;
- c) His ability to act as the representative of the potential class and whether he meets the legislative conditions.

AUTHORIZE Respondent Les Restaurants McDonald du Canada Limitée to file the following evidence at the hearing on the motion for authorization of the class action:

- a) An extract from Burger King's website, along with pictures of a toy received with the "Trio King Junior" children's meal (**Exhibit D-1**), and an extract from Harvey's website, along with a picture of the activity book received with Harvey's children's meal (**Exhibit D-2**);
- b) A guide to the application of Section 248 of the *Consumer Protection Act* issued by the *Office de la protection du consommateur* (**Exhibit D-3**), the OPC's mission statement and mandate (**Exhibit D-4**), and a voluntary undertaking with the OPC signed by McDonald's in 1985 regarding its advertising (**Exhibit D-5**);
- c) The artwork for the Happy Meal box used in Quebec (**Exhibit D-6A**) and in the rest of Canada (**Exhibit D-6B**) during the Trolls Happy Meal advertising campaign, the artwork for the toy polybags used in Quebec (**Exhibit D-7A**) and in the rest of Canada (**Exhibit D-7B**) during the Trolls Happy Meal advertising campaign, and the artwork for the vestibule Happy Meal posters used in Quebec (**Exhibit D-8A**) and in the rest of Canada (**Exhibit D-8B**) during the Trolls Happy Meal advertising campaign;
- d) Screen shots of McDonald's French-language website relating to the Happy Meal Program (**Exhibit D-9**);

- e) An affidavit from Michelle McIlmoyle, McDonald's Senior Manager of National Marketing, explaining McDonald's Happy Meal Program and its advertising practises with respect to the program (**Exhibit D-10**).

THE WHOLE without costs, except in the event of contestation.

MONTRÉAL, February 6, 2017

(s) Irving Mitchell Kalichman LLP

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