

# SUPERIOR COURT

CANADA  
PROVINCE OF QUÉBEC  
DISTRICT OF MONTREAL

N°: 500-06-000813-168

DATE: July 21, 2017

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**IN THE PRESENCE OF: THE HONOURABLE CHRISTIAN J. BROSSARD, J.S.C.**

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**Jaclyn RABIN**  
Plaintiff

v.

**HP CANADA CO.**  
and  
**HEWLETT-PACKARD (CANADA) CO.**  
Defendants

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**JUDGMENT**  
(Leave to examine)

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## **A. OVERVIEW**

[1] Jaclyn Rabin (Plaintiff) has applied for authorization to institute a class action against HP Canada Co. and Hewlett-Packard (Canada) Co. (Defendants)<sup>1</sup> (the Application for Authorization).

[2] More specifically, Plaintiff wishes to institute against Defendants “an action in [compensatory and punitive] damages, consumer protection, anti-competitive behavior, and injunctive relief”,<sup>2</sup> on behalf of two groups of persons (the Class Members), namely:

Sub-Group A, which comprises all persons in Canada who have purchased or own an HP OfficeJet printer imported, distributed, sold or otherwise put onto the marketplace by Defendants (the HP Printers); and

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<sup>1</sup> *Application for Authorization to Institute a Class Action.*

<sup>2</sup> *Ibid.* at para 48. See also para 49.

Sub-Group B, which comprises all persons in Canada who purchased third-party non-HP cartridges that were compatible with the HP Printers before September 13, 2016,

both sub-groups being more fully described in Plaintiff's application.

[3] The situation, as alleged by Plaintiff,<sup>3</sup> may be summarized as follows:

- Defendants are responsible for importing, marketing, distributing and selling a handful of technology products within Canada. Those include printers, printer hardware, printing supplies, printer ink cartridges, scanners, etc.;
- On or about September 13, 2016, thousands of HP Printer owners in Canada started experiencing problems and crashes with their HP Printers. They stopped recognizing and accepting third-party ink cartridges (i.e. ink cartridges that had not been manufactured by Defendants) that were compatible with the HP Printers before that date;
- It was subsequently revealed that the problem was caused by an HP Printer's firmware update that was programmed to affect the HP Officejet series of printers using third-party non-HP ink cartridges, by rejecting, starting on September 13, 2016, all such third-party ink cartridges, including those that had already been purchased and installed by Class Members and that had been working properly in their HP Printers;
- Defendants' goal was to reprogram the HP Printers so that they would only thereafter accept HP-branded ink cartridges, which cost a lot more than third-party replacement ink cartridges, thus allowing Defendants to increase their profits to the detriment of the Class Members;
- Plaintiff and the Class Members were not told, at the time of purchase, that their HP Printer would at some time in the future reject the less expensive third-party replacement ink cartridges. Had they been told, they would not have purchased the HP Printer, and surely not at the price paid; and
- Nor were the Class Members informed by HP of the updates or did they consent to Defendants unilaterally pushing such updates into their HP Printer, making them no longer what they had bargained for.

[4] As a result of the foregoing alleged situation, Plaintiff asserts that the Class Members sustained damages flowing "from a common nucleus of operative facts, namely [Defendants'] misconduct, faults, omissions, false advertising, misrepresentations, and/or anti-competitive behaviour".<sup>4</sup>

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<sup>3</sup> More particularly at paragraphs 3-4, 7-9, 12 and 14-15 of Plaintiff's Application for Authorization.

<sup>4</sup> *Ibid.* at para 44.

[5] Plaintiff submits<sup>5</sup> that the following are the identical, similar or related issues of law or fact raised by the claims of the Class Members:

- a) Did [Defendants] engage in unfair, anti-competitive, and/or deceptive acts or practices regarding the marketing and sale of the HP Printers and its programming/updates rendering non-HP cartridges incompatible as of September 13, 2016?
- b) Should injunctive relief be ordered to prohibit Defendants from continuing to perpetrate their unfair, false, misleading, and/or deceptive conduct and therefore to no longer prevent non-HP ink compatible cartridges from operating in any HP branded printers?
- c) Are [Defendants] liable to the Class Members for damages suffered, namely the reimbursement of the purchase price of the HP Printers and the purchase price of any not yet depleted non-HP compatible ink cartridges?
- d) Are [Defendants] responsible to pay compensatory damages to the Class Members for other damages suffered including disbursements and out-of-pocket expenses, loss of time, loss of profit, loss of goodwill, inconvenience, and in what amount?
- e) Are [Defendants] responsible to pay punitive and/or exemplary damages to the Class Member, and in what amount?

[6] Presently, Defendants seek leave to examine Plaintiff, who in turn opposes their application, "with regards to paragraph (2) of Article 575 [of the *Code of Civil Procedure* (CCP)] and the aforementioned common issues proposed by [Plaintiff] at paragraphs b), c), d) and e) of the Application [for Authorization]",<sup>6</sup> as well as with regards to subparagraph (4) of Article 575.<sup>7</sup>

[7] Subparagraphs (2) and (4) of Article 575 CCP read as follows:

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;

[...]; and

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

\* \*

[8] For reasons that follow, Plaintiff will be ordered to answer, by way of an affidavit, one specific question in the context of the criterion from subparagraph 575(2) CCP. And

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<sup>5</sup> *Ibid.* at para 45.

<sup>6</sup> Defendants' *Application of the Respondents for Leave to Examine Applicant* (the Application to Examine) at para 6.

<sup>7</sup> *Ibid.* at para 7.

Defendants will be allowed to examine her, as part of the hearing on the Application for Authorization, on two topics in the context of the criterion from subparagraph 575(4) CCP.

## B. APPLICABLE LAW

[9] Defendants have based their application for leave to examine Plaintiff on the third paragraph of Article 574 CCP, which empowers the court to allow “relevant evidence”<sup>8</sup> to be submitted for purposes of adjudicating on the authorization being sought to institute a class action.

[10] The guiding principles for assessing what “relevant evidence” should be allowed have been laid out extensively by the courts.<sup>9</sup> They may be summarized as follows:

1. Since the authorization process is one of filtering and verification, evidence is not always required. The court has discretion to allow relevant and proper evidence. Said discretion must be exercised judicially;
2. The court must assess whether, in light of the circumstances of the case, it is appropriate or useful to allow the evidence or examination being requested. To do so, it must be satisfied that the evidence or examination will assist in assessing the criteria of Article 575 CCP;
3. The analysis must be done having regards to the more recent teachings from the Supreme Court of Canada<sup>10</sup> and from the Court of Appeal<sup>11</sup> regarding the criteria for authorization and the required threshold to be met. Those include the “arguable case” standard, when it comes to the criterion under subparagraph 575(2) CCP.<sup>12</sup> As Justice André Prévost of this court put it in *Kramar v. Johnson & Johnson*,<sup>13</sup> it would be “*pour le moins paradoxal de*

<sup>8</sup> While the French text of Article 574 CCP refers to a “*preuve appropriée*”, as did former Article 1002 of the *Code of Civil Procedure*, CQLR, ch. C-25, the Court of Appeal, in *Option Consommateurs v. Infineon Technologies, a.g.* (2011 QCCA 2115 at para 5), underlined that, “[in] seeking out the common meaning between the two linguistic texts, it is plain that the criterion of relevancy – the guiding principle in evidentiary matters (article 2857 C.C.Q.) – is a *sine qua non* for admissibility under article 1002 C.C.P.”.

<sup>9</sup> See *Allstate du Canada, compagnie d’assurances v. Agostino*, 2012 QCCA 678 at paras 34-36; *Lambert (Gestion Peggy) v. Écolait Ltée*, 2016 QCCA 659 at para 38; *Option Consommateurs v. Banque Amex du Canada*, 2006 QCCS 6290 at para 20; *Option Consommateurs v. Brick Warehouse, L.P.*, 2011 QCCS 569 at paras 28-32; *Licari v. Johnson & Johnson Inc.*, 2016 QCCS 4266 at paras 9-15; *Option Consommateurs v. Samsung Electronics Canada Inc.*, 2017 QCCS 1751 at para 11.

<sup>10</sup> *Infineon Technologies v. Option consommateurs*, [2013] 3 S.C.R. 600, 2013 SCC 59; *Vivendi Canada Inc. v. Dell’Aniello*, [2014] 1 S.C.R. 3, 2014 CSC 1.

<sup>11</sup> *Lambert (Gestion Peggy) v. Écolait Ltée*, *supra* footnote 9; *Sibiga v. Fido Solutions Inc.*, 2016 QCCA 1299; *Charles v. Boiron Canada Inc.*, 2016 QCCA 1716; *Belmamoun v. Ville de Brossard*, 2017 QCCA 102; *Union des consommateurs v. Bell Mobilité Inc.*, 2017 QCCA 504.

<sup>12</sup> *Sibiga v. Fido Solutions Inc.*, *ibid.* at paras 49-50.

<sup>13</sup> 2016 QCCS 5296 at para 26. See also *Option Consommateurs v. Samsung Electronics Canada Inc.*, *supra* footnote 9.

*permettre une preuve dite « appropriée » qui inclurait plus que ce qui est strictement nécessaire à l'application de ce seuil»;*<sup>14</sup>

4. Moreover, at this stage, the allegations of the application for class action authorization must be taken as proven. The court must be cautious not to allow evidence that aims to verify their veracity. The following test may be applied: Will the evidence assist in assessing the merits of the class action, rather than assessing whether the criteria for authorization have been met? Only in the latter case should the evidence be allowed;<sup>15</sup>
5. That said, evidence is relevant and appropriate, for purposes of assessing whether the facts alleged “appear to justify the conclusions sought”,<sup>16</sup> if it aims to demonstrate that the alleged facts are implausible or evidently false, such that the sought class action is clearly doomed to failure. That, however, must be done in keeping with the summary nature of the authorization process;
6. While avoiding opening the debate on the merits, when faced with allegations in the application for authorization that are vague, incomplete or that do not provide a minimally adequate understanding of the dispute, evidence may be allowed if it is likely to provide a needed understanding of the allegations, to assist in the assessment of the criteria of Article 575 CCP;<sup>17</sup>
7. The party wishing to present evidence has the burden of establishing that it is relevant and useful at this stage; and
8. In determining whether the evidence should be allowed, the court must also comply with the principle of proportionality.

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<sup>14</sup> Justice Prévost's complete comment reads as follows:

[24] Reconnaissant que l'intention du législateur en 2003 était de « faciliter l'exercice des recours collectifs », la Cour suprême a abaissé le seuil jusque-là imposé par les tribunaux au regard des critères d'autorisation pour le fixer à la « démonstration d'une cause défendable ».

[25] Le nouveau *Code de procédure civile*, quant à lui, poursuit l'objectif de simplifier la procédure et de la rendre proportionnée à la finalité de la demande. À ce stade, la finalité de la demande se limite au seuil fixé par la Cour suprême, soit la démonstration d'une cause défendable.

[26] Dans ce contexte, il serait pour le moins paradoxal de permettre une preuve dite « appropriée » qui inclurait plus que ce qui est strictement nécessaire à l'application de ce seuil.

(References omitted; emphasis added.)

<sup>15</sup> *Patenaude v. Montréal (Ville de)*, 2011 QCCS 6977 at para 10; *Option Consommateurs v. Samsung Electronics Canada Inc.*, *supra* footnote 9.

<sup>16</sup> CCP, Art. 575, subpara (2).

<sup>17</sup> *Union des consommateurs v. Bell Canada*, 2008 QCCS 2270 at para 28; *Carrier v. Québec (Procureure générale)*, 2009 QCCS 5260 at para 26; *Labranche v. Énergie éolienne des Moulins, s.e.c.*, 2015 QCCS 918 at paras 34-35.

**C. ANALYSIS****1. EXAMINATION WITH REGARDS TO SUBPARAGRAPH 575(2) CCP**

[11] Regarding her individual claim against Defendants, Plaintiff has submitted the following facts:<sup>18</sup>

- On December 18, 2014, Plaintiff purchased an HP Officejet 8620 printer;
- Plaintiff was never informed by anyone that Defendants would or could, at one point, automatically update the firmware of her HP Printer in order to program it to reject third-party ink cartridges;
- Plaintiff's HP Printer was always connected to the internet. It was automatically updated by Defendants;
- The "Extent of Limited Warranty" portion of the Instruction Manual for her HP Printer specifically mentioned the following:

For HP printer products, the use of a non-HP cartridge or a refilled cartridge does not affect either the warranty to the customer or any HP support contract with the customer. However, if printer failure or damage is attributable to the use of a non-HP or refilled cartridge or an expired ink cartridge, HP will charge its standard time and materials charges to service the printer for the particular failure or damage.

- Since September 13, 2016, the use of Plaintiff's HP Printer has become much more expensive to operate, since she can only use HP-branded ink cartridges instead of the much cheaper third-party cartridges; and
- Plaintiff would definitely not have purchased her HP Printer if Defendants had properly informed her or the public that HP Printers were to reject third-party ink cartridges at some undisclosed date in the future.

[12] As a result, Plaintiff argues that Defendants' behaviour "represents false advertising, misrepresentations, willful and intentional omissions of important facts and represents clear anti-competitive behavior".<sup>19</sup>

[13] Defendants seek to examine Plaintiff with respect to the following subjects:

1. The documents consulted by Plaintiff prior to and after her purchase of the HP Printer;
2. Plaintiff's behaviour following the representations made by Defendants prior to and after her purchase; and

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<sup>18</sup> As laid out with additional details at paragraphs 17-20 and 22-23 of her Application for Authorization.

<sup>19</sup> *Ibid.* at para 24.

3. Plaintiff's actions since Defendants announced, and then made available, a firmware update that can remove the dynamic security features from Plaintiff's printer.

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[14] Defendants argue that there are not enough facts provided in Plaintiff's Application for Authorization to support its general allegations. The examination they seek to conduct aims to complete those allegations.

[15] With one particular exception, Defendants have failed in their attempt at demonstrating that Plaintiff's allegations are so vague and incomplete that they do not provide a minimally adequate understanding of the dispute so as to assist in the assessment of the criteria of Article 575 CCP. More generally, they have not discharged their burden of establishing that the examination they seek to conduct is relevant and would be useful at this stage, subject to that one exception, which concerns Plaintiff's consultation of the warranty clause.

#### ***Subject 1 – Documents consulted***

[16] Defendants submit that it is unclear, from the Application for Authorization, what exact advertising Plaintiff consulted, prior to her purchase of an HP Printer, that was allegedly false or misleading.

[17] Yet, one understands from Plaintiff's allegations that the claim she makes personally is not predicated upon her having seen an advertisement from Defendants or having actually had knowledge of a representation made by Defendants prior to her purchase. It is based solely – rightly or wrongly at this stage – on the fact that she was not informed by anyone of the possibility or the eventuality that her HP Printer be programmed to reject third-party cartridges. In short, she claims to have been the victim of an omission of important facts regarding her HP Printer. She may also endeavour to argue that such an omission, which she has qualified as wilful and intentional, is tantamount to a misrepresentation and that it represents anti-competitive behaviour.

[18] Therefore, finding out which documents, if any, Plaintiff consulted prior to her purchase will not assist in assessing whether or not she has an arguable case against Defendants.

#### ***Subject 2 – Plaintiff's behaviour***

[19] As described in Defendants' Application to Examine (Plaintiff's "behaviour", "prior to and after purchase"), the second subject is vague and much too general. It amounts to a fishing expedition. That is so even as the subject was redefined in Defendants' *Argument Brief*, namely Plaintiff's "behaviour following the consultation of the allegedly false or

misleading advertising after her purchase”<sup>20</sup> or “her behaviour following her knowledge of [the warranty clause described in the instruction manual for her HP Printer]”<sup>21</sup>.

[20] Defendants have failed to establish how an examination of Plaintiff on the foregoing would be relevant at this stage or useful in assessing whether, based on the facts alleged, Plaintiff has an arguable case against them.

[21] That said, in both their *Argument Brief* and their oral arguments, Defendants have focused on their wish to ascertain when Plaintiff had first consulted the warranty clause.<sup>22</sup>

[22] Indeed, paragraphs 20 and 21 of Plaintiff's Application for Authorization create a certain ambiguity, indeed a certain confusion as to what conclusion she wishes be drawn from the warranty clause in relation to her individual claim, more particularly since the clause is not mentioned as part of the *Facts Giving Rise to an Individual Action by Each of the Members of the Group*:

20. Furthermore, the “Extend (*sic*) of Limited Warranty” portion of the Instruction Manuel (*sic*) for Petitioner's 8620 HP Officejet Printer specifically mentioned the following, which obviously represents an admission by HP to the effect that third-party cartridges can be used with her HP Printer (and which represents at the very least a false-representation made by HP which gives the Class Member/Consumers the general impression that third party cartridges will work in their HP Printer):

[...]

21. Accordingly, Class Members were reasonable to assume and conclude that HP would not unilaterally (and without warning) prevent them from using third party non-HP cartridges;

(Emphasis added.)

[23] As a result, it is relevant and may be useful at this stage to have Plaintiff clarify her allegations and specify when she consulted the warranty clause, so as to provide a clearer understanding of her allegations and assist in the assessment of whether she has an arguable case against Defendants.

[24] That said, for the sake of efficiency and in compliance with the principle of proportionality, Plaintiff shall provide the information in an affidavit, to be notified to Defendants and filed approximately one month prior to the hearing of the Application for Authorization.

### ***Subject 3 – Plaintiff's actions following firmware update***

[25] Suffice it to say that, through their intended examination of Plaintiff about a firmware update that she has not mentioned in her Application for Authorization, Defendants in reality seek to introduce their own evidence in support of their anticipated defence on the merits.

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<sup>20</sup> *Argument Brief of the Respondents for Leave to Examine the Applicant* (Defendants' Argument Brief) at para 26.

<sup>21</sup> *Ibid.* at para 28.

<sup>22</sup> *Ibid.* at paras 27-28.



[26] Defendants have failed to establish that the foregoing evidence and the examination of Plaintiff about her resulting actions would assist in assessing whether the criteria for authorization have been met.

## 2. EXAMINATION WITH REGARDS TO SUBPARAGRAPH 575(4) CCP

[27] As mentioned earlier, Plaintiff, who is seeking to be appointed as representative plaintiff on behalf of the Class Members, must establish that she "is in a position to properly represent the class members".<sup>23</sup>

[28] Plaintiff's allegations, from her Application for Authorization, that relate to the foregoing criterion are found at paragraph 51:<sup>24</sup>

52. (*sic*) Petitioner, who is requesting to be appointed as Representative Plaintiff, is in a position to properly represent the Class Members (Article 575 (4) C.C.P.) since Petitioner;

- a. is a Class Member who purchased one of Respondents' HP Officejet printers;
- b. understands the nature of the action and has the capacity and interest to fairly and adequately protect and represent the interests of the Class Members;
- c. is available to dedicate the time necessary for the present action before the Courts of Quebec and to collaborate with Class Counsel in this regard;
- d. is ready and available to manage and direct the present action in the interest of the Class Members and is determined to lead the present file until a final resolution of the matter, the whole for the benefit of the Class Members;
- e. does not have interests that are antagonistic to those of other Class Members;
- f. has given the mandate to the undersigned attorneys to obtain all relevant information to the present action and intends to keep informed of all developments;
- g. has given the mandate to the undersigned attorneys to post the present matter on their firm website in order to keep the Class Members informed of the progress of these proceedings and in order to more easily be contacted or consulted by said Class Members;
- h. is, with the assistance of the undersigned attorneys, ready and available to dedicate the time necessary for this action and to collaborate with other Class Members and to keep them informed;

[29] Defendants qualify those allegations as "general and boilerplate allegations regarding [Plaintiff's] capacity and availability to act as representative plaintiff".<sup>25</sup> They further argue that Plaintiff fails to provide any detail as to what steps, if any, she has already taken to ensure the adequate representation of the Class Members.

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<sup>23</sup> CCP, Art. 575, subpara (4).

<sup>24</sup> Mistakenly numbered 51.

<sup>25</sup> Defendants' Argument Brief at para 35.

[30] As a result, Defendants seek to examine Plaintiff with respect to the following topics:

1. Plaintiff's investigation with regards to the existence of the group and her efforts and results with regards to the identification of Class Members; and
2. Any other facts related to Plaintiff's ability to adequately represent the Class Members.

\* \*

[31] In *Infineon Technologies v. Option consommateurs*,<sup>26</sup> the Supreme Court of Canada enunciated the factors that need to be taken into account when assessing the criterion of proper representation, namely: interest in the suit, competence of the representative and absence of conflict with the group members. Those factors are to be interpreted liberally<sup>27</sup> and the threshold is low, including when it comes to demonstrating competence.<sup>28</sup>

[32] That said, in order to determine whether a petitioner has the "*compétence minimalement requise*", the Court of Appeal indicated<sup>29</sup> that it may be useful to know what steps or actions he or she has taken to ascertain the existence of a group of putative class members and how such steps or actions, or lack thereof, tend to demonstrate or, on the contrary, disprove the petitioner's true interest and ability to represent the group.

[33] In this case, Plaintiff's allegations that relate to the steps or actions she has taken are limited to the assertions found at subparagraphs 51 f and g of her Application for Authorization. It is relevant at this stage, and may be useful in assessing Plaintiff's competence to represent the Class Members, for Defendants to verify what other steps, if any, Plaintiff has taken. If no other steps were taken, whether or not the mandates given by Plaintiff to her lawyer are nevertheless sufficient to establish her competence may be debated at the hearing on the Application for Authorization.

[34] The same can be said of Plaintiff's assertion that she "has the capacity and interest to fairly and adequately protect and represent the interests of the Class Members". More of an opinion or argument, what facts, if any, is she basing herself to make the assertion? What those facts are, if any, may be useful in assessing Plaintiff's actual capacity and interest.

[35] That said, there is no compelling reason to justify holding an examination out of court, ahead of the hearing on the Application for Authorization. On the contrary, the principles of proportionality, of efficiency and of proper case management speak in favour of the opposite.

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<sup>26</sup> *Supra* footnote 10 at para. 149.

<sup>27</sup> *Id.*

<sup>28</sup> *Fortier v. Meubles Léon Ltée*, 2014 QCCA 195 at para 141 and 150 *in fine*; *Lévesque v. Vidéotron, s.e.n.c.*, 2015 QCCA 205 at para 23; *Sibiga v. Fido Solutions Inc.*, *supra* footnote 11; *Charles v. Boiron Canada Inc.*, *supra* footnote 11 at paras 55-56 and 66.

<sup>29</sup> In *Fortier v. Meubles Léon Ltée*, *ibid.* at paras 148-150, and in *Lévesque v. Vidéotron, s.e.n.c.*, *ibid.* at paras 24-27. See also *Kramar v. Johnson & Johnson*, *supra* footnote 13 at paras 44 ff.

**FOR THOSE REASONS, THE COURT:**

**GRANTS** in part the defendants HP CANADA Co. and HEWLETT-PACKARD (CANADA) CO.'s *Application of the Respondents for Leave to Examine Applicant*;

**ORDERS** the plaintiff, JACLYN RABIN, to answer the following question, in an affidavit to be notified to the defendants and filed in the court record no later than August 18, 2017, namely:

When did Plaintiff first consult the "Extent of limited warranty" clause from the instructions manual for her HP Printer (Exhibit P-4), in relation to the date of her purchase of the printer and in relation to the date of September 13, 2016?

**AUTHORIZES** the defendants to examine the plaintiff during the hearing of her application for authorization to institute a class action, for a maximum duration of 30 minutes, on the following topics:

1. the investigation made by Plaintiff with regards to the existence of the group and to the identification of putative class members; and
2. the facts upon which Plaintiff bases her assertion that she has the capacity and interest to fairly and adequately protect and represent the interests of the class members;

**THE WHOLE**, with the legal costs to follow the outcome of the application for authorization to institute a class action.



CHRISTIAN J. BROSSARD, J.S.C.

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LEX GROUP INC.  
Lawyer for the plaintiff

M<sup>re</sup> Anne Merminod  
BORDEN LADNER GERVAIS LLP  
Lawyer for the defendants

Hearing date: March 2, 2017