**CANADA**

**PROVINCE OF QUEBEC**
**DISTRICT OF MONTREAL**

**C.A.:**
**S.C.M.: 500-06-000559-118**

**COURT OF APPEAL**

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**JOSHUA WILKINSON**

*APPELLANT/*Petitioner

-vs.-

**COCA-COLA LTD.**

and

**ENERGY BRANDS INC.**

*RESPONDENTS*/Respondents

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## INSCRIPTION IN APPEAL

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1. The Appellant/Petitioner ("Wilkinson") inscribes the present matter in appeal before the Court of Appeal, sitting in and for the Judicial District of Montreal.

2. This appeal is brought from the judgment of the Superior Court, District of Montreal, rendered by the Honourable Justice Micheline Perrault (the "Judge in the First Instance") on June 11, 2014 (the "Judgment"), which is attached hereto as **Annex 1**.

3. The Judge in the First Instance rejected Wilkinson's Re-Amended Motion to Authorize the Bringing of a Class Action & to Ascribe the Status of Representative (the "Motion") against the Respondents/Respondents (together "Coca Cola"), which is attached hereto as **Annex 2**.

4. The hearing in the first instance lasted two (2) days.

5. Wilkinson respectfully asks that the Judgment be reversed and that the Motion be granted with costs in both courts.

### A. <u>Summary of Relevant Facts</u>

6. Wilkinson purchased and consumed Vitaminwater on a regular basis over the course of the year preceding the original filing of the Motion; i.e. between the years 2010 and the beginning of 2011.

7. Wilkinson believed, through Coca Cola's marketing and labelling, that Vitaminwater was a healthy alternative to sugary soft drinks.

8. After learning of the large amount of sugar contained in Vitaminwater, Wilkinson ceased to purchase and to consume the sugary beverage.

9. Had Wilkinson known the true facts, he would not have purchased and consumed the Vitaminwater, nor would he have paid the premium price that Coca Cola charged for the beverage.

10. As such, Wilkinson suffered injury at the point-of-sale (i.e. the retail price) when he purchased the Vitaminwater beverage based on Coca Cola's misrepresentations.

11. Specifically, it is alleged that Coca Cola has falsely and deceptively marketed Vitaminwater to the public as a natural health product when it is nothing more than a "sugar-sweetened beverage" that is fortified.

12. Vitaminwater has been promoted as a "Nutrient Enhanced Water Beverage" when it is just a fortified sugar beverage; the difference being that whilst it is promoted as a health food, it is merely nutrient enhanced junk food.

13. To make matters even worse, no nutritional information was even available on the label of this sugar beverage in order to properly inform the more intrepid consumer who reads the back label about the high sugar level contained in the beverage.

## B. Faults Being Claimed Against Coca Cola

14. What can be gleamed from the above facts is the following:

    i) Coca Cola falsely and misleadingly represented, advertised, labelled and promoted Vitaminwater as a natural health product to consumers when, in fact, it was and is nothing more than a sugary beverage that is fortified; and

    ii) This illegal conduct is continuing at present.

15. The question that must be put forward as it relates to the claim for a refund of the sale price of Vitaminwater and/or for punitive damages under the *Consumer Protection Act*[1], the *Competition Act*[2] and the C.C.Q.[3] must then be:

> Can a company advertise, market, represent, package and promote a product as a health product and fail to properly disclose to consumers that it actually contains a substantial amount of an unhealthy ingredient (i.e. sugar) and can a company profit from such false advertisement and failure to disclose?

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[1] *Consumer Protection Act*, CQLR c P-40.1.
[2] *Competition Act*, RSC 1985, c C-34.
[3] *Civil Code of Québec*, LRQ, c C-1991.

16. This question is particularly relevant considering the joint application of articles 228, 253, and 272 of the *Consumer Protection Act*. If one would agree that knowing that a bottle of Vitaminwater contains a large amount of sugar is an "important fact", then Coca Cola has committed a prohibited business practice. In the case of an "omission of an important fact" under art. 228 *LPC*, art. 253 *LPC* adds an extra presumption in law that "it is presumed that had the consumer been aware of such practice, he would not have agreed to the contract or would not have paid such a high price" (art. 253 *LPC*). Such a statutory violation would entitle the consumer to a refund of the purchase price paid and could also give rise to punitive damages under art. 272 *LPC*;

17. With regard to Coca Cola's defence that they were following the *Food and Drugs Act*[4], the *Food and Drugs Regulations*[5], and the *Natural Health Products Regulations*[6] in omitting to disclose the sugar content of Vitaminwater, the question that must be asked is:

> Can a company elect to classify a product as a "Natural Health Product" and, by following only the related regulatory regimes, shield itself from liability under the *Consumer Protection Act*, the *Competition Act* and the C.C.Q.?

18. This question is particularly relevant given the fact that Coca Cola chose to have Vitaminwater classified as a health product rather than as a regular food. The recent Supreme Court of Canada case of *Infineon*[7] affirms that compliance with a statutory norm does not exempt a party from liability for a civil fault and that statutory provisions do not "have the effect of limiting the general obligation of good conduct in one's relations with others"[8]. And this is even more pivotal, in the context where the company has chosen to classify a product under a particular statutory regime over another.

19. With regard to the question of damages, the question that must be asked is:

> Considering that all Class Members, including Wilkinson, were injured at the point-of-sale due to the payment of the purchase price of the product, can damages be calculated on an aggregate basis? If so, what is the quantum of such damages given the reality that the product is sold at differing retail prices?

20. With regard to the question of injunctive/declaratory relief, the question that must be asked is:

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[4] *Food and Drugs Act*, R.S.C. 1985, c. F-27 ["Food and Drugs Act"].
[5] *Food and Drugs Regulations*, C.R.C., c. 870 ["*Food and Drugs Regulations*"].
[6] *Natural Health Products Regulations*, SOR/2003-196 ["*Natural Health Products Regulations*"].
[7] *Infineon Technologies AG c. Option consommateurs*, 2013 CSC 59 [*Infineon*].
[8] *Ibid.*, at paras. 96 to 97. See also J.-L. Baudouin and P. Deslauriers in *La responsabilité civile* (7th ed. 2007), vol. I, at No. 1-188 and 1-189.

> What degree of precision is necessary in order for injunctive relief to be granted? Can a company advertise, market, represent, package and promote a product as a natural health product and discharge its obligation to disclose to consumers that it contains a substantial amount of an unhealthy ingredient (i.e. sugar) through the inclusion of a nutritional label on the back of the product?

21. Finally, with regard to Wilkinson's competence to act as Class Representative, the question that must be asked is:

> Considering that Wilkinson has clearly proven his interest as a purchaser of Vitaminwater who is entitled to a refund of the purchase price, can he act as a proper representative for a class action? What are the criteria for an adequate representative? Must a class representative personally communicate with every member of the class to ascertain whether each member has a cause of action again the Respondent(s)? If the Petitioner is mistaken about a fact, does it mean that he does not have the capacity to act as a class representative?

22. This question is particularly relevant given the fact that the adequacy of the representative is determined by only three factors: (1) interest, (2) capacity, and (3) the absence of conflict of interests with other members of the group

## C. <u>Grounds of Appeal</u>

23. The grounds of appeal stem from the following questions:

i. Did the Judge in the First Instance err in law by failing to address the Petitioner's argument to authorize a class action as it relates to the refund of the purchase price of Vitaminwater and punitive damages against the Respondents for having falsely advertised and represented Vitaminwater to be a health product when it is in fact nothing more than a fortified sugary beverage and thereby pocketing substantial sums of money from the sale of the beverage, the whole in violation of articles 41, 215, 216, 218, 219, 220, 221, 228, 239, 253, 270 and 272 of the *Consumer Protection Act*, articles 1375, 1400, 1401, 1407, 1457, and 1621 of the C.C.Q., and articles 36 and 52 of the *Competition Act*? [art. 1003 b) C.C.P.[9]]

ii. Did the Judge in the First Instance err in law by concluding that there was no fault on the part of the Respondents despite the fact that (a) the name of the product itself is misleading, as *Vitaminwater* contains a large amount of sugar (the second listed ingredient), (b) the slogan, "Nutrient Enhanced *Water* Beverage", is misleading as the combined use of the term "water" implies that it is healthy, nutrient-enhanced water, when in fact, it is more comparable to a soft drink, and (c) it was the Respondents' choice to classify Vitaminwater as a "Natural Health

[9] *Code of Civil Procedure*, CQLR c C-25.

Product" and to thus, accordingly fall under the applicable regulatory regime[10], which may or may not have precluded them from disclosing the sugar content (this is a factual question that needed to be decided on the merits), and (d) the Respondents failed to inform consumers about the amount of sugar in a bottle of Vitaminwater? [art. 1003 b) C.C.P.]

iii. Did the Judge in the First Instance err in law by concluding that there was neither individual, on the part of the Petitioner, nor aggregate damages, on the part of Class Members, despite the fact that (a) the Petitioner and the Class Members were injured at the point-of-sale due to their payment of the purchase price of Vitaminwater and the fact that (b) these damages, should they prove difficult to quantify, may be calculated as the wholesale price plus punitive damages as suggested by the Petitioner or by any other method (i.e. individual or collective recovery, as the case may be)? [art. 1003 b) C.C.P.]

iv. Did the Judge in the First Instance err in law by concluding that injunctive/declaratory relief could not be granted despite the fact that (a) the injunctive order sought in the Motion was sufficiently precise at the authorization stage, and (b) the new Health Canada labelling modifications requested and adhered to by the Respondents do not solve the false advertising issue, which is still continuing at present? (i.e. the name *Vitaminwater* and the slogan "Nutrient Enhanced *Water* Beverage) [art. 1003 b) C.C.P.]

v. Did the Judge in the First Instance err in law by concluding that there is no reason to authorize a national class action despite the fact that (a) a fault was committed in Quebec, damage was suffered in Quebec and an injurious act occurred in Quebec under art. 3148 (3) C.C.Q., (b) non-Quebec residents have a real and substantial connection to the jurisdiction due to the shared common issues based on the same material facts against the same Respondents, (c) should the possibility of different provincial statutes applying to different class members become an issue, the court can always make sub-classes under art. 1022 C.C.P., (d) it is premature to say that different provincial legislation might lead to different defences at this stage in the proceedings, and (e) access to justice, judicial economy, and behaviour modification are very good reasons to authorize a national class as articulated in the Supreme Court decision of *Western Canadian Shopping Centres c. Dutton*, 2001 RCS 534? [art. 1002 C.C.P.]

vi. Did the Judge in the First Instance err in law by concluding that the Petitioner could not act as the Representative of the class despite having an interest to sue, competence and an absence of conflict of interest? [art. 1003 d) C.C.P.]

[10] Namely, the *Food and Drugs Act*, the *Food and Drugs Regulations*, and the *Natural Health Products Regulations*.

vii. Did the Judge in the First Instance err in law by concluding that the Petitioner did not have the capacity to lead the class action and to be an adequate representative of the class [1003 d) C.C.P.]

## I) Refund and/or Punitive Damages

24. The Judge in the First Instance agreed that the criteria of 1003 a) C.C.P. were satisfied as the question of whether the Respondents marketed and sold Vitaminwater through the use of false or misleading representations is common to all Class Members:

> "[88] The Supreme Court recently decided in *Vivendi*…that the presence of only one question of law or fact which is "identical, similar or related", is sufficient to satisfy the criterion of Article 1003 (a) C.C.P., so long as it is not insignificant to the outcome of the action.
>
> [89] Petitioner submits that the clear common denominator in the present case is "Did Respondents market and sell Vitaminwater through the use of false or misleading representations?" Although there may be room for some diversity or individuality, namely with respect to the amount of the damages, it is not a bar to authorization[11]. The Court finds that the recourses of the members raise identical, similar or related questions of law or fact."

25. The Judge in the First Instance also agreed that the criteria of 1003 c) C.C.P. were satisfied given the number of purchasers of Vitaminwater (estimated at tens of thousands, if not in the hundreds of thousands) and the relatively small purchase price of Vitaminwater:

> "[92] Petitioner is unaware of the specific number of persons who have purchased Vitaminwater. He estimates that the size of the class is considerable i.e. in the tens of thousands, if not in the hundreds of thousands. Also, the price of Vitaminwater is relatively small.
>
> [93] Petitioner submits that an exhaustive search is not possible in the circumstances and that he has instructed his attorney to place information about the present class action on his website and to collect the coordinates of those class members who wish to be kept informed and to participate in any resolution of this matter.
>
> [94] Given the number of purchasers of Vitaminwater, this is a case where the application of articles 59 or 67 C.C.P. would be difficult or impracticable. The Court finds that this criterion is met."

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[11] *Picard c. Air Canada*, 2011 QCCS 5186.

26. The basis of this claim for the refund of the purchase price and/or punitive damages under the *Consumer Protection Act*, the C.C.Q., and the *Competition Act* can be explained by Coca Cola having:

    a) Falsely and misleadingly represented, advertised and promoted Vitaminwater as a natural health product to consumers which contains essentially "vitamins" and "water" when, in fact, it was and is nothing more than a sugary beverage that is fortified; and

    b) Failing to take any remedial actions, except those that were forced on them by Health Canada and continuing to falsely and misleadingly represent, advertise and promoted Vitaminwater to this very day.

    (i) The *Consumer Protection Act*

27. The Respondents committed a prohibited practice within the meaning of the *Consumer Protection Act* when they (a) created the general impression that they were selling a health product comparable to fortified water through the use of the brand name "Vitaminwater" whose literal meaning is flagrantly misleading as well as through the use of the slogan "Nutrient Enhanced Water Beverage" which produces an analogous false impression on the part of the consumer (art. 218 *LPC*), (b) falsely ascribed a special advantage of health to Vitaminwater (art. 220 (a) *LPC*), (c) falsely ascribed the characteristic of health to Vitaminwater (art. 221 (g) *LPC*), (d) failed to mention the important fact that a bottle of Vitaminwater contains significant amounts of sugar, making it essentially junk food (art. 228 *LPC*), and (e) distorted the meaning of the combined words Vitaminwater by using it to describe an uncarbonated, fortified sugary drink (art. 239 (a) *LPC*).

28. Having failed in these legal requirements, there is a legal presumption, in accordance with art. 253 *LPC*, that had such disclosure been made, consumers would not have agreed to buy Vitaminwater or would not have paid such a high price.

29. In addition to the refund of the purchase price, art. 272 *LPC* allows for punitive damages. It is respectfully submitted that the conduct of Coca Cola as alleged in these proceedings justifies, at least *prima facie*, an order for exemplary damages for both general deterrence to corporations and specific deterrence to Coca Cola to not commit prohibited business practices and to not take advantage of consumers.

30. If the Respondents are allowed to retain the money from the sales of Vitaminwater, it would be allowing Coca Cola to profit from its own turpitude.

31. A refund of the purchase price of Vitaminwater and/or punitive damages should have justified a judgment that authorizes a class action on those bases alone.

    (ii) The C.C.Q.

32. The Respondents committed a civil fault and/or civil fraud when they provided false and misleading representations regarding the health benefits of Vitaminwater to consumers.

33. This behaviour acts to vitiate the Petitioner's and Class Members' consent as it concerns their decision to purchase Vitaminwater based on the falsely attributed properties and supposed health benefits.

34. Having failed in these legal requirements, the simple fact of having purchased Vitaminwater entitles the Petitioner and Class Members to a refund of the purchase price and to claim damages in accordance with arts. 1401 and 1407 C.C.Q.

35. More generally, the Respondents failed in their duty to abide according to the "circumstances, usage or law" and are liable to reparation for the damages caused to the Petitioner and other Class Members (art. 1457 C.C.Q.).

(iii) The *Competition Act*

36. The Respondents contravened the *Competition Act* when they falsely and misleadingly represented Vitaminwater as a health product to the public to promote its purchase and consumption and its resultant profits.

37. Class Members are entitled to a refund equal to the purchase price of Vitaminwater under art. 36 of the *Competition Act*.

## II) Fault

38. The Judge in the First Instance wrongly concluded that the Petitioner did not satisfy the criteria of 1003 b) C.C.P. based on her conclusion that the Respondents had not committed any fault. This conclusion was based on a misunderstanding of the basis of the action and of the nature of the Petitioner's claims.

39. Secondly, the Judge in the First Instance wrongly concluded that the Respondents had not committed any fault based on a misreading of the case of *Infineon*[12] and of the interrelationship between the regulatory regime and the civil regime. The Judge in the First Instance concluded that since the Respondents were acting in compliance with the *Food and Drugs Act*, the *Food and Drugs Regulations*, and the *Natural Health Products Regulations* it precluded their liability for fault under the *Consumer Protection Act*, the C.C.Q ., and the *Competition Act*.

### A) False and or Misleading Advertising

40. The Judge in the First Instance had difficulty reconciling the fact that the Respondents could have falsely advertised Vitaminwater due to the inclusion of

[12] *Infineon*, *supra* note 7.

vitamins and water in the beverage. What the Judge did not account for was that the inclusion of vitamins in the product does not absolve the Respondents from liability for the false advertising and deceitful market positioning of Vitaminwater as a health product.

41. The Judge in the First Instance misunderstood the Petitioner's claim that Vitaminwater is a fortified or nutrient-enhanced beverage that comprises mostly water and sugar. In other words, the Judge in the First Instance unnecessarily analyzes whether there are vitamins in the beverage.

> "[20] ... Vitaminwater contains significant amounts of vitamins and minerals, which are dietary supplements. Petitioner also admitted as much during his out of court deposition[13].
>
> > " **… A-** Advertising where it generally is. Everywhere else that you see vitamin water it's usually pretty well identified as … as a better alternative of something healthy. It's nutrients for your body. No doubt there are nutrients, but there are … are other stuff that's included in vitamin water that are not …" (Emphasis added)
>
> [21] Thus, the record shows that Vitaminwater is more than a "sugar-sweetened beverage".
>
> [22] Petitioner's primary complaint concerns the presence of sugar in Vitaminwater, which he considers equivalent to the sugar content of Coke or other soft drinks, and unhealthy."

42. Neither the Motion nor the examination of the Petitioner of August 7, 2012 allege that Vitaminwater does not contain water and vitamins. What is alleged is that the name Vitaminwater as well as the slogan, "Nutrient Enhanced Water Beverage" is false and misleading to consumers in that it explicitly states that it is made up of essentially water and vitamins, while omitting to disclose the high sugar content, and while creating the false impression of being healthy.

43. Therefore, the Judge in the First Instance's conclusion that Vitaminwater is more than a "sugar-sweetened beverage" is correct; however, this fact was alleged throughout the proceeding as the allegation is that Vitaminwater is a fortified beverage sweetened with a large amount of sugar.

44. It is clear from the above paragraphs that the Judge in the First Instance associated the concept of the Respondents' fault with Vitaminwater being a "bad" product. This misapprehension was fundamental to the Judgment as she doubted whether sugar was unhealthy. This is not a case based on product liability; instead, it is a case

[13] Exhibit D-1, p. 16-17 (Q.87-88).

based on the Respondents having engaged in false and/or misleading advertising in representing Vitaminwater to be something that it is not – fortified water.

45. It is simply misleading to name any beverage water unless it is actually simply water, otherwise the word water would lose its distinctive meaning. After all, every beverage has water in it. Is every beverage in the world a "Water Beverage"?

46. The Judge in the First Instance concludes that Vitaminwater is "more than a "sugar-sweetened beverage""; however, this conclusion was always alleged in both the Motion and the Petitioner's out-of-court examination of August 7, 2012 where it has been consistently claimed that Vitaminwater is a fortified sugar beverage. Thus, Vitaminwater is more than just sugar and water; its ingredients consist of water, sugar, and vitamins (in that order i.e. ingredients # 1, 2, 3).

47. Similarly, at para. 22 of the Judgment reproduced above, the Judge in the First Instance concludes that the Petitioner's complaint to be the presence of sugar in Vitaminwater. This is not the Petitioner's complaint; in reality, the complaint is that the Respondents marketed, advertised, represented and labelled Vitaminwater as a health product consisting essentially of water and vitamins, when it was nothing more than a fortified sugar beverage.

48. The Judge in the First Instance erred in concluding that the Respondents had not committed a fault when they misrepresented the contents of a bottle of Vitaminwater through:

i. The use of the brand name "Vitaminwater" and of the slogan "Nutrient Enhanced Water Beverage", and

ii. The failure to inform consumers about the amount of sugar in each bottle of Vitaminwater

**i. The Misleading Use of the name "Vitaminwater" and of the slogan "Nutrient Enhanced Water Beverage"**

49. What is misleading about both the name of the product as well as the slogan "Nutrient Enhanced Water Beverage" is that the inclusion of the word "water" and the exclusion of the word "sugar" leads the consumer to the false impression that it is healthy; i.e. that it is mostly vitamins and water and does not contain an unhealthful amount of sugar like any other beverage offered for sale.

50. In short, the Respondents' use of the name Vitaminwater creates the general impression in the consumer's mind that they are drinking healthy, fortified water. The problem with this classification is that Vitaminwater is really a fortified sugary beverage and this fact is purposefully omitted from the Respondents' representations.

51. The Judge in the First Instance repeatedly agreed that Vitaminwater is a "nutrient enhanced water beverage" while simultaneously disagreeing that it is a nutrient enhanced sugar beverage all the while, focusing on the fact that it is nutrient enhanced, which was never disputed in the first place. Thus, the focus on the presence of nutrients only lends to confusion when considering the dichotomy of the words water or sugar and the use or non-use thereof in the Respondents' representations.

> "[20] … Vitaminwater contains significant amounts of vitamins and minerals…
>
> [21] Thus, the record shows that Vitaminwater is more than a "sugar-sweetened beverage".
> …
> [26] … Vitaminwater is a nutrient enhanced water beverage…
> …
> [28] At paragraph 7 of the Motion, Petitioner alleges :
> "7. In short, Vitaminwater is just fortified sugar water;"
>
> [29] The record shows this allegation is also false.
> …
> [35] The allegation at paragraph 10, that Vitaminwater is "simply a fortified snack food" is contradicted by the exhibits filed in the record.
> …
> [47] As discussed above, Vitaminwater is a "nutrient enhanced water beverage", and calling it such cannot be found to be false and misleading.
> …
> [61] … Vitaminwater contains actual vitamins…
> …
> [71] As discussed above, Vitaminwater is a "nutrient enhanced water beverage" which has special health benefits. Not only did Petitioner not demonstrate that these claims are false but he admitted that Vitaminwater is a nutrient enhanced beverage…"

52. It is indisputable that all beverages contain water. It is equally indisputable that Vitaminwater contains water and vitamins and it is thus a "nutrient enhanced beverage". What leads to the confusion is the use of the word "water" in both the slogan and the brand name itself. Had the Respondents simply named their fortified beverage "Vitaminbeverage" or "Vitamindrink" and also removed the word "water" from the slogan (i.e. so as to be read "Nutrient Enhanced … Beverage") this confusion would have been averted and consumers would have made informed decisions about which beverage to purchase and to consume.

53. The Judge in the First Instance focuses on the Petitioner's admission that Vitaminwater does actually contain vitamins; however, this was never a point of contention. All parties agree that Vitaminwater contains both vitamins and water.

54. The Judge in the First Instance concludes that Vitaminwater is "more than a "sugar-sweetened beverage""; however, this conclusion was always alleged in both the Motion and the Petitioner's out-of-court examination of August 7, 2012 where it has been consistently claimed that Vitaminwater is a fortified sugar beverage. Thus, Vitaminwater is more than just sugar and water; its ingredients consist of water, sugar, and vitamins, in that order.

55. Surprisingly, the Judge in the First Instance concludes that the statement that "Vitaminwater is just fortified sugar water" is contradicted by the record; however, she fails to indicate where the record contradicts this allegation and nowhere in the record is this allegation contradicted.

56. Importantly, the Judge in the First Instance also concluded that using the name Vitaminwater is not false and misleading as Vitaminwater is a registered trademark subject to prior approval by the Canadian Intellectual Property Office ("CIPO") which would not allow a deceptive or misdescriptive trademark to exist:

> "[45] Moreover, Vitaminwater is a registered trademark under the Trade-marks Act (the "T.M.A."), and was therefore subject to prior approval by the Canadian Intellectual Property Office ("CIPO"). The CIPO would not allow the registration of a trade-mark that is contrary to section 12(b) of the T.M.A. which reads as follows:
>
> > "**12.1** Subject to section 13, a trade-mark is registrable if it is not
> > (…)
> > (b) whether depicted, written or sounded, either clearly deceptive or deceptively misdescriptive in the English or French language of the character or quality of the wares or services in association with which it is used or proposed to be used or of the conditions of or the persons employed in their production or of their place of origin,""

57. Different regulatory regimes serve different regulatory purposes. The *Trade-marks Act*[14], was enacted to protect trademarks and to avoid confusion, whereas the *Consumer Protection Act* was enacted to protect consumers from such conduct as unfair business practices as well as to provide redress for injury.

58. As such, it was unreasonable to determine that where a trademark is approved under the CIPO, it must therefore not constitute false and misleading representations under other statutory regimes such as the *Consumer Protection Act*, the C.C.Q., or the *Competition Act*.

59. Furthermore, as will be elaborated upon in greater detail below, compliance with a regulatory norm, in this case the *Trade-marks Act*, does not exempt a party from liability for fault, whether civil or statutory.

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[14] *The Trade-marks Act*, R.S.C. 1985, c. T-13 ["Trade-marks Act"].

### ii. The failure to properly inform consumers about the amount of sugar in each bottle of Vitaminwater

60. The Judge in the First Instance stated her interpretation of the cause of action and of the Petitioner's claims in the following excerpts from the Judgment:

> "[23] Firstly, there is no allegation that Respondents marketed Vitaminwater as a sugar-free beverage. In fact, the record shows that the labels on bottles of Vitaminwater indicate that it contains sugar, although in an undisclosed quantity, as will be explained below…
>
> [24] Therefore, the allegations at paragraph 5 of the Motion are contradicted by the exhibits filed in the record and cannot be taken to be true.
>
> …
>
> [26] …Secondly, as appears from the labels filed by Petitioner and as admitted by Petitioner, Vitaminwater is a nutrient enhanced water beverage. Thirdly, as appears from the labels filed by Petitioner, Vitaminwater does not purport to be made of solely vitamins and water. Sugar is listed, among other things, as a non-medicinal ingredient…
>
> [27] Therefore, the allegations at paragraph 6 of the Motion are contradicted by the exhibits filed in the record, as well as by Petitioner's admission, and cannot be taken to be true.
>
> …
>
> [44] The use of the name Vitaminwater is not false and misleading since it does, in fact, contain vitamins and water. Petitioner submits that sugar is the second most important ingredient and should therefore appear in its name. Even an incredulous and inexperienced consumer cannot be misled into thinking Vitaminwater contains nothing more than vitamins and water when the label specifically lists other non-medicinal ingredients."

61. It is apparent from the above paragraphs that the Judge in the First Instance maintained her understanding of the action while continuing to overlook Coca Cola's omission to properly inform consumers about the sugar content of their purported fortified "water" beverage.

62. It is not necessary to conclude that Vitaminwater contains no vitamins in order to determine that the Respondents committed a fault. The question is not and never was whether Vitaminwater contains vitamins and water. Similarly, it is unnecessary to demonstrate that the Respondents represented the product to be sugar-free or to be made solely of vitamins and water. The real issue lies in the fact that the Respondents did not adequately inform consumers as to the high sugar content of the beverage; the fault is in their omission to do so and in the fact that this omission was material.

63. In addition, the Judge in the First Instance places undue weight on the fact that sugar is indeed listed as a “non-medicinal ingredient” on the back of the bottle’s labelling. Based on this she concludes that the Respondents adequately disclose the presence of sugar inside the bottle.

64. The fact that sugar is listed as a non-medicinal ingredient on the back of the bottle does not discharge the Respondents’ obligation to disclose the high amount of sugar to consumers particularly so given the fact that the very name of the product, Vitaminwater, operates to obviate the necessity in the consumer’s mind to read the entirety of the labelling to ascertain the health properties of this purported health product.

65. Further, under art. 218 *LPC*, the Quebec courts have traditionally applied the “credulous and inexperienced person test” to assess whether the misleading nature of certain business practices and to qualify them as “prohibited business practices” under the *Consumer Protection Act*.

- *Richard c. Time Inc.*, [2012] 1 R.C.S.:

  « [62] La jurisprudence récente renvoie couramment au concept du « consommateur moyen » afin de désigner le consommateur visé par les dispositions du titre II de la *L.p.c.* Certes, ce consommateur moyen n’existe pas : il demeure le produit d’une fiction juridique incarnée par un consommateur mythique auquel on impute un degré de discernement qui reflète le but de la *L.p.c.* En l’espèce, le noeud de la question consiste à déterminer si le degré de discernement du consommateur moyen conceptualisé par la Cour d’appel respecte les objectifs poursuivis par la *L.p.c.*

  […]

  [65] La *L.p.c.* appartient à l’ensemble de lois destinées à protéger les consommateurs canadiens. La jurisprudence qui découle de l’application de ces dispositions utilise souvent le critère du consommateur moyen. Cette jurisprudence attribue un faible degré de discernement à ce consommateur, afin de respecter l’objectif de protection sous-jacent à ces mesures législatives.

  [66] La jurisprudence de notre Cour en matière de marques de commerce fournit un bon exemple de cette approche interprétative. Dans l’arrêt *Mattel, Inc. c. 3894207 Canada Inc.*, 2006 CSC 22, [2006] 1 R.C.S. 772, la Cour était appelée à préciser la norme au moyen de laquelle les tribunaux doivent décider si une marque de commerce porte à confusion avec une marque enregistrée. Au nom de la Cour, le juge Binnie a conclu que le consommateur moyen que veut protéger la *Loi sur les marques de commerce* est « l’acheteur ordinaire pressé » (par. 56). Il a précisé que « [l]a norme applicable [n’était] pas celle des personnes

[TRADUCTION] “qui ne remarquent jamais rien”, mais celle des personnes qui ne prêtent rien de plus qu’une [TRADUCTION] “attention ordinaire à ce qui leur saute aux yeux” » (par. 58).

[67] Le critère de l’impression générale prévu à l’art. 218 *L.p.c.* doit être appliqué dans une perspective similaire à celle de « l’acheteur ordinaire pressé », c’est-à-dire celle d’un consommateur qui ne prête rien de plus qu’une attention ordinaire à ce qui lui saute aux yeux lors d’un premier contact avec une publicité. Les tribunaux ne doivent pas conduire l’analyse dans la perspective du consommateur prudent et diligent.

[68] Les adjectifs utilisés pour qualifier le consommateur moyen sont évidemment susceptibles de varier d’une loi à l’autre. Ces variations reflètent la diversité des réalités économiques visées par chaque loi et des objectifs qui leur sont propres. L’essentiel ne réside pas dans ces épithètes, mais plutôt dans le choix du degré de discernement attendu du consommateur.

[69] Dans l’application du critère de l’impression générale prescrit par l’art. 218 *L.p.c.*, la jurisprudence québécoise a traditionnellement utilisé les qualificatifs « crédule » et « inexpérimenté » afin de décrire le consommateur visé par la loi. Les tribunaux québécois se sont inspirés alors de l’arrêt *R. c. Imperial Tobacco Products Ltd.*, [1971] 5 W.W.R. 409 (C.S. Alb., Div. app.), pour intégrer le concept de la « personne crédule et inexpérimentée » au titre II de la *L.p.c.* (Masse, p. 828). Après des mentions occasionnelles de ce concept dans la jurisprudence des années 1980 et 1990, notamment dans l’affaire *P.G. du Québec c. Louis Bédard Inc.*, 1986 CarswellQue 981 (C.S.P.), la Cour d’appel du Québec a prononcé un jugement de principe sur cette question dans l’arrêt *Turgeon c. Germain Pelletier ltée*, [2001] R.J.Q. 291, et a confirmé à cette occasion l’applicabilité du critère du consommateur « crédule et inexpérimenté » en droit québécois de la consommation. Le juge Fish, alors de cette cour, a écrit ce qui suit à ce propos :

> Comme l’a souligné mon collègue le juge Gendreau dans l’arrêt *Nichols c. Toyota Drummondville (1982) inc.*, la *Loi sur la protection du consommateur* est une loi d’ordre public qui vise à rétablir [l’équilibre] contractuel entre le commerçant et son client. Et c’est en vertu du critère de la personne crédule et inexpérimentée qu’il faut évaluer le caractère trompeur de la publicité et des pratiques commerciales visées par la *Loi sur la protection du consommateur.* [Nous soulignons; par. 36.]

[70] Depuis lors, les tribunaux de première instance au Québec ont suivi cet arrêt, notamment à l’occasion de plusieurs recours collectifs fondés sur la *L.p.c.* (voir *Riendeau c. Brault & Martineau inc.*, 2007 QCCS 4603,

[2007] R.J.Q. 2620, par. 149, conf. par 2010 QCCA 366, [2010] R.J.Q. 507; *Adams c. Amex Bank of Canada*, 2009 QCCS 2695, [2009] R.J.Q. 1746, par. 126; *Marcotte c. Banque de Montréal*, 2009 QCCS 2764 (CanLII), par. 357; *Marcotte c. Fédération des caisses Desjardins du Québec*, 2009 QCCS 2743 (CanLII), par. 257). En somme, il est clair que depuis l'arrêt *Turgeon*, l'« impression générale » à laquelle renvoie l'art. 218 *L.p.c.* est assimilée à celle que donne une représentation commerciale chez le consommateur crédule et inexpérimenté.

[71] Ainsi, le concept du « consommateur moyen » n'évoque pas, en droit québécois de la consommation, la notion de personne raisonnablement prudente et diligente. Il renvoie encore moins à la notion de personne avertie. Afin de réaliser les objectifs de la *L.p.c.*, les tribunaux considèrent que le consommateur moyen n'est pas particulièrement aguerri pour déceler les faussetés ou les subtilités dans une représentation commerciale.

[72] Les qualificatifs « crédule et inexpérimenté » expriment donc la conception du consommateur moyen qu'adopte la *L.p.c.* Cette description du consommateur moyen respecte la volonté législative de protéger les personnes vulnérables contre les dangers de certaines méthodes publicitaires. Le terme « crédule » reconnaît que le consommateur moyen est disposé à faire confiance à un commerçant sur la base de l'impression générale que la publicité qu'il reçoit lui donne. Cependant, il ne suggère pas que le consommateur moyen est incapable de comprendre le sens littéral des termes employés dans une publicité, pourvu que la facture générale de celle-ci ne vienne pas brouiller l'intelligibilité des termes employés.

[73] Il nous faut donc constater que la Cour d'appel a modifié la norme du consommateur moyen visé par le titre II de la *L.p.c.* et n'a pas respecté l'objectif de protection de la *L.p.c.* À notre avis, le fait de définir le consommateur moyen comme « moyennement intelligent, moyennement sceptique et moyennement curieux » se concilie mal avec le libellé et l'esprit de l'art. 218 *L.p.c.* En effet, une telle définition soulève plusieurs problèmes.

[74] D'abord, l'expression « moyennement intelligent » suggère que le consommateur que le législateur a souhaité protéger au titre II de la *L.p.c.* est celui dont le degré de discernement correspond à celui de la moyenne des gens. Comme nous l'avons souligné précédemment, le droit de la consommation ne protège pas les consommateurs dans la seule mesure où ils se sont montrés prudents et avertis. Pour respecter l'objectif général de protection de la *L.p.c.*, il faut éviter d'utiliser un critère correspondant à celui du consommateur prudent et diligent.

[75] De plus, dans une perspective pratique, ce volet de la définition proposée par le juge Chamberland s'harmonise mal avec l'analyse *in abstracto* requise par l'art. 218 *L.p.c.* L'utilisation d'une norme comme le « consommateur moyennement intelligent » peut inciter les tribunaux à adopter une méthode d'analyse basée sur la détermination du degré de discernement du consommateur en cause. Une telle approche faciliterait l'exonération d'un commerçant qui aurait eu le bonheur de se faire poursuivre par un consommateur plus intelligent que la moyenne. Les tribunaux seraient alors invités à déterminer si le consommateur qui a entrepris le recours a été trompé, plutôt qu'à déterminer si la publicité en cause constituait une représentation fausse ou trompeuse. On réduirait ainsi le niveau de protection offert au consommateur par la *L.p.c.*

[76] Ensuite, le qualificatif « moyennement sceptique » substitue au critère de l'impression générale celui de l'opinion atteinte après une analyse plus poussée. Il invite les tribunaux à présumer que le consommateur moyen doit effectuer des démarches concrètes afin de découvrir le « vrai message » qui se cache derrière une publicité aux apparences avantageuses. Cette méthode d'analyse ne peut s'appliquer qu'au détriment du critère de l'impression générale. En effet, une personne sceptique aura tendance à refuser de se fier à un message publicitaire uniquement sur la base de l'impression générale qu'il dégage. La personne sceptique doutera, posera des questions et conduira peut-être ses propres recherches. Si, au terme de cet exercice, elle conclut que le contenu d'un message publicitaire est conforme à la réalité, son appréciation ne dépendra pas de l'impression générale qu'il a donnée. Elle proviendra plutôt des démarches concrètes qu'elle aura faites.

[77] Les commentaires qui précèdent s'appliquent aussi à la « curiosité moyenne » qui, selon la Cour d'appel, doit être présumée chez le consommateur moyen. Avec égards, l'utilisation de cette notion procède de la même prémisse erronée que dans le cas du scepticisme du consommateur moyen. Un consommateur « moyennement curieux » ne sera pas stupide et naïf au point de se fier aux premières impressions données par une représentation commerciale. Au contraire, il se montrera suffisamment curieux pour approfondir sa première perception. Son objectif demeurera de vérifier si l'impression générale donnée par une publicité correspond effectivement à la réalité. Sur ce point, nous rappelons que le titre II de la *L.p.c.* vise à permettre au consommateur de faire confiance aux commerçants sur la base de l'impression générale laissée par leurs publicités. Dans la mesure où cette impression générale ne correspond pas à la réalité, la publicité constitue une représentation fausse ou trompeuse et la *L.p.c.* considère que le commerçant a commis une pratique interdite, et ce, sans égard au fait qu'une analyse approfondie de la publicité pourrait permettre de comprendre le « vrai message » qu'elle véhicule. En réalité, la conceptualisation du consom-

> mateur moyen retenue par la Cour d'appel s'apparente davantage à la notion de personne diligente qui n'est pas mentionnée dans la loi et qui ne respecte pas l'esprit de celle-ci. »

66. In other words, the question of whether the Respondents' representations constitute false and misleading representations within the meaning of the *Consumer Protection Act* is determined according to an objective test; that of the "average consumer" who is "credulous and inexperienced". This average consumer should not be held to a standard that forces him or her to read a product's label and then flip it over to verify its truthfulness or reliability.

67. It is interesting to note that, as a comparison, in the United States, Vitaminwater has always stated the exact amount of sugar in each bottle (significantly clearer that what was done in Canada) and yet, in the Memorandum and Order of Justice John Gleeson in United States case of *Batsheva Ackerman et al. v. The Coca Cola Company et al*. (Exhibit R-3A-1) at pages 33-34, he states:

> "The fact that the actual sugar content of vitaminwater was accurately stated in an FDA-mandated label on the product does not eliminate the possibility that reasonable consumers may be misled…
>
> > Reasonable consumers should [not] be expected to look beyond misleading representations on the front of the box to discover the truth from the ingredient list in small print on the side of the box. . . . We do not think that the FDA requires an ingredient list so that manufacturers can mislead consumers and then rely on the ingredient list to correct those misinterpretations and provide a shield for liability for the deception. Instead, reasonable consumers expect that the ingredient list contains more detailed information about the product that confirms other representations on the packaging."[15] (reference added)

68. Under these circumstances, it is simply unreasonable to conclude that listing sugar as a "non-medicinal ingredient" on the back of the product labelling is sufficient to inform consumers about the high sugar content, especially given the fact that the amount of sugar was not even provided should a steadfast consumer actually take the time to read the entire label prior to purchasing Vitaminwater.

**B) The Relationship Between the Chosen Regulatory Regime and the *Consumer Protection Act*, the C.C.Q, and the *Competition Act***

69. The Judge in the First Instance wrongly concluded that the Respondents had not committed a civil fault nor contravened the *Consumer Protection Act* or the

[15] *Williams v. Gerber Products Co.*, 552 F.3d 934 (9th Cir. 2008) at 939-40.

*Competition Act* as they had complied with the regulatory requirements under the *Food and Drugs Act*.

> "[63] Petitioner fails to mention that Vitaminwater was regulated as a natural health product under the *Food and Drugs Act* ("F.D.A."), the *Food and Drugs Regulations* and the *Natural Health Products Regulations*, when it was launched in Canada in 2008, until it was recently reclassified.
> …
> [65] The F.D.A. and related regulations stipulated that sellers of products classified as natural health products should not list the quantity of non-medicinal ingredients, such as sugar, on their labels[16]. Furthermore, as a natural health product, Vitaminwater labels were required to contain a health claim or function/benefit claim[17] . Thus, the labels of Vitaminwater complied with the legislative and regulatory requirements and Respondents cannot be considered to have committed a civil fault by not listing the quantity of sugar in Vitaminwater or by referring to certain health benefits. (Emphasis added)
>
> [66] Petitioner does not dispute the fact that when classified as a natural health product Respondents were prohibited from listing the sugar content of Vitaminwater on its label, but argues that Respondents could have chosen a different classification. The Court fails to see how that fact, even when taken to be true, can constitute a civil fault.

70. The conclusion that the Respondents were not at fault due to compliance with the regulatory regime is fundamentally flawed for the following reasons:

i. Compliance with a regulatory norm does not exempt a party from liability for fault, whether civil or statutory; and

ii. It is premature at the authorization stage to make a determination on the arguable issue of whether compliance with the regulatory norm required the Respondents to refrain from listing the sugar content of Vitaminwater on its label without a proper and complete record which will be available at the trial on the merits.

**i. Compliance with a Regulatory Norm does not Exempt a Party from Liability for Fault, whether Civil or Statutory**

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[16] Natural Health Products Directorate, *Product Labeling Guidance Document*, August 2006, versions 2.0, p. 9: "Non-medicinal ingredients. These must be presented on the outer label in a list by common name, excluding the quantity, preceded by the words "non-medicinal ingredients." Non-medicinal ingredients may be shown as long as they are identified as non-medicinal ingredients."

[17] Natural Health Products Regulations, C.R.C., c. 870, s. 75, 86 et seq.; Natural Health Products Directorate, Product Guidance Document, *ibid*.

71. The recent case of *Infineon*[18] confirms that compliance with statutory obligations does not absolve a person from liability for civil fault.

> « [96] Les appelantes affirment à bon droit que le respect des obligations imposées par la loi peut régler le sort des questions relatives aux obligations de droit civil. Toutefois, le respect de ces obligations ne constitue pas toujours un facteur déterminant pour trancher la question de la faute civile. Comme l'affirme à juste titre le juge Kasirer au par. 88 de ses motifs, [TRADUCTION] « [i]l faut faire attention [. . .] de ne pas confondre la notion de faute civile et la violation d'une norme fixée par la loi, que ce soit ou non dans un contexte commercial ». Il souligne avec raison que le simple fait qu'un manquement à une obligation d'origine législative mène à la démonstration d'une faute dans tous les cas, sauf les plus exceptionnels, n'emporte pas nécessairement le pardon de la faute civile en l'absence d'une telle violation. Les auteurs J. L. Baudoin et P. Deslauriers s'expriment d'ailleurs comme suit, sur ce sujet, dans *La responsabilité civile* (7e éd. 2007), vol. I, no 1 188 :
>
> > La transgression d'une obligation spécifique imposée par la loi ou le règlement, surtout si elle est intentionnelle ou lourde, constitue en principe une faute civile, puisqu'il y a alors violation d'une norme de conduite impérativement fixée par le législateur. Par contre, le simple respect de celle-ci ne dégage pas, pour autant, de la responsabilité.
>
> [97] Au no 1 189, ils poursuivent en ces termes :
>
> > …le simple fait qu'à propos d'un incident le défendeur ait respecté les normes législatives ou réglementaires n'exclut pas automatiquement la possibilité que sa responsabilité puisse malgré tout être retenue en vertu du régime de droit commun. Les dispositions réglementaires n'ont donc pas pour effet de limiter l'obligation générale de se bien comporter à l'égard d'autrui et, en contrepartie, il n'est pas nécessaire de démontrer la violation d'une règle statutaire ou légale pour engager la responsabilité d'autrui. »

- Jean-Louis BAUDOUIN, Patrice DESLAURIERS et Benoit MOORE, *La responsabilité civile, Vol. I – Principes généraux*, 8e éd., Cowansville, Éd. Yvon Blais, 2014, paragr.1-192:

> « 1-192 – *Effets* – Inversement, étant donne l'existence d'un devoir général de prudence et de diligence à l'égard d'autrui, le simple fait qu'à propos d'un incident le défendeur ait respecte les normes législatives ou

[18] *Infineon*, *supra* note 7.

> réglementaires n'exclut pas automatiquement la possibilité que sa responsabilité puisse malgré tout être retenue en vertu de régime de droit commun. Les dispositions réglementaires n'ont donc pas pour effet de limiter l'obligation générale de se bien comporter à l'égard d'autrui et, en contrepartie, il n'est pas nécessaire de démontrer la violation d'une règle statutaire ou légale pour engager la responsabilité d'autrui. »

- Pierre DESCHAMPS, *Chapitre I - Les conditions générales de la responsabilité civile du fait personnel*, Collection de droit 2013-2014 Volume 4 – Responsabilité Titre I - *La responsabilité civile extracontractuelle*, École du Barreau du Québec, 2013 :

> « Il convient enfin de rappeler que le respect d'une norme de conduite fixée par un règlement, une loi ou encore une profession ne constitue pas pour autant un paravent mettant à l'abri un débiteur de toute condamnation civile. En effet, il est maintenant acquis, depuis l'arrêt rendu par la Cour suprême du Canada dans l'affaire *Roberge c. Bolduc*, que le respect d'une norme professionnelle ou autre peut constituer une faute si la conduite découlant du respect de la norme n'était pas raisonnable dans les circonstances. »

72. It is important to distinguish between the civil law regime, the statutory regime and the regulatory regimes as they were all enacted to serve different legislative purposes. The civil law seeks to restore the balance between persons who, through their activities, are likely to cause injury to others, and the *Consumer Protection Act* aims to protect consumers from such things as unfair business practices. The *Food and Drugs Act* and the accompanying regulations[19] serve different legislative purposes, those of food and drug safety. These regulations aim to prevent activities that are detrimental to the sphere it which they operate, in this context, to ensure that Vitaminwater is safe for human consumption.

73. Most importantly, the *Food and Drugs Act* and the related regulations do not operate to preclude the application of the *Consumer Protection Act*, the C.C.Q. or the *Competition Act* under any circumstances.

74. In determining the norm of conduct to which the Respondents should have adhered to in this case, the fact that it was the Respondents' election to classify Vitaminwater as a "Natural Health Product" and to thus, accordingly fall under the applicable regulatory regime is a highly relevant consideration. If, in fact, this regulatory regime does not allow them to respect the law, then it was the wrong choice. The goal of Health Canada approval is not to insulate them from the application of other laws.

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[19] Namely, the *Food and Drugs Act*, the *Food and Drugs Regulations*, and the *Natural Health Products Regulations*.

**ii. It is premature at the authorization stage to make a determination on the arguable issue of whether compliance with the regulatory norm required the Respondents to refrain from listing the sugar content of Vitaminwater on its label without a proper and complete record which will be available at the trial on the merits**

75. It has been well-established that the authorization stage should not be confused or combined with the trial on the merits. At the authorization stage, the court exercises the role of filter where it must only dismiss frivolous actions which are destined for failure and there is a low threshold required to meet the criteria of 1003 C.C.P. The motion for authorization should be authorized if the Petitioner has an arguable case on the facts and applicable law.

76. The Judge in the First Instance prematurely concluded that the Respondents were prohibited from disclosing the amount of sugar contained in a bottle of Vitaminwater:

> "[59] As for failing to disclose the amount of sugar contained in a bottle of Vitaminwater, Respondents were prohibited from doing so, as will be discussed below."

77. It becomes difficult to conclude without a proper and complete record which will be available at the trial on the merits that the Respondents were prohibited from listing the sugar content on the label of Vitaminwater bottles based solely on a cursory reading on the *Food and Drugs Act* and the related regulations.

- *Infineon Technologies AG c. Option consommateurs,* 2013 CSC 59 :

> « [58] Au moment d'entreprendre l'analyse relative à l'autorisation du recours collectif, il est essentiel de ne pas combiner ni confondre la procédure d'autorisation avec l'instruction d'un recours dont l'exercice a été autorisé. Chacune de ces étapes répond à un objectif différent, et l'analyse effectuée doit en tenir compte.
>
> [59] À l'étape de l'autorisation, le tribunal exerce un rôle de filtrage. Il doit simplement s'assurer que le requérant a satisfait aux critères de l'art. 1003 C.p.c., sans oublier le seuil de preuve peu élevé prescrit par cette disposition. La décision du tribunal saisi de la requête en autorisation est de nature procédurale puisqu'il doit décider si le recours collectif peut être autorisé à aller de l'avant.
> ….
>
> [61] À la présente étape, le tribunal, dans sa fonction de filtrage, écarte simplement les demandes frivoles et autorise celles qui satisfont aux exigences relatives au seuil de preuve et au seuil légal prévus à l'art. 1003. Le but de cet examen n'est pas d'imposer un lourd fardeau au requérant, mais simplement de s'assurer que des parties ne soient pas

inutilement assujetties à des litiges dans lesquels elles doivent se défendre contre des demandes insoutenables. La Cour d'appel a décrit l'exigence relative au seuil comme suit : « le fardeau en est un de démonstration et non de preuve » ou, en anglais, [TRADUCTION] « the burden is one of demonstration and not of proof » (*Pharmascience inc. c. Option consommateurs*, 2005 QCCA 437 (CanLII), par. 25; voir également *Martin c. Société Telus Communications*, 2010 QCCA 2376 (CanLII), par. 32).

…

[65] Comme nous pouvons le constater, la terminologie peut varier d'une décision à l'autre. Mais certains principes bien établis d'interprétation et d'application de l'art. 1003 C.p.c. se dégagent de la jurisprudence de notre Cour et de la Cour d'appel. D'abord, comme nous l'avons déjà dit, la procédure d'autorisation ne constitue pas un procès sur le fond, mais plutôt un mécanisme de filtrage. Le requérant n'est pas tenu de démontrer que sa demande sera probablement accueillie. De plus, son obligation de démontrer une « apparence sérieuse de droit », « a good colour of right » ou « a *prima facie* case » signifie que même si la demande peut, en fait, être ultimement rejetée, le recours devrait être autorisé à suivre son cours si le requérant présente une cause défendable eu égard aux faits et au droit applicable.

[66] Un examen de l'intention du législateur confirme également l'existence de ce seuil peu élevé. Des modifications successives au C.p.c. témoignent clairement de l'intention de la législature du Québec de faciliter l'exercice des recours collectifs. Par exemple, l'art. 1002 C.p.c. exigeait auparavant que le requérant dépose une preuve par affidavit à l'appui de la requête en autorisation, ce qui le soumettait ainsi, comme affiant, à un interrogatoire à l'étape de l'autorisation aux termes de l'art. 93. L'abolition de l'exigence de l'affidavit et les restrictions sévères apportées aux interrogatoires à l'étape de l'autorisation dans la dernière réforme de ces dispositions relatives au recours collectif (L.Q. 2002, ch. 7, art. 150) envoient le message clair qu'il serait déraisonnable d'exiger d'un requérant qu'il établisse plus qu'une cause défendable.

[67] À l'étape de l'autorisation, les faits allégués dans la requête du requérant sont tenus pour avérés. Le fardeau imposé au requérant à la présente étape consiste à établir une cause défendable, quoique les allégations de fait ne puissent être « vague[s], générale[s] [ou] imprécise[s] » (voir *Harmegnies c. Toyota Canada inc*., 2008 QCCA 380) (CanLII), par. 44).

[68] Tout examen du fond du litige devrait être laissé à bon droit au juge du procès où la procédure appropriée pourra être suivie pour

présenter la preuve et l'apprécier selon la norme de la prépondérance des probabilités. »

78. Thus, in order to satisfy the criteria on 1003 C.C.P., the Petitioner can satisfy the low threshold by demonstrating that he has an arguable case and nothing more is required.

## III) <u>At the Authorization Stage, the Allegations Contained in the Motion must be Taken for True unless Contradicted by the Evidence</u>

79. An action should be authorized if the allegations, taken for true, disclose an arguable case in light of the facts and the applicable law.

80. At the authorization stage, the burden of proof is not preponderant, but rather to demonstrate legal reasoning, without considering possible defences.

- *Union des consommateurs c. Air Canada*, 2014 QCCA 523:

  « [50] …Tenant les faits pour avérés, faits qui ne semblent d'ailleurs pas contestés, il convient d'examiner si la réponse à ces questions conduit à reconnaître que l'appelante a un recours défendable à proposer. »

- *Infineon Technologies AG c. Option consommateurs*, 2013 CSC 59:

  « [62] Plus particulièrement, dans le contexte de l'application de l'al. 1003b), notre Cour et la Cour d'appel ont utilisé divers termes, tant en français qu'en anglais, pour décrire et qualifier la fonction de filtrage exercée par le tribunal saisi d'une requête en autorisation d'un recours collectif. En 1981, le juge Chouinard écrivait qu'à l'étape de l'autorisation, la question est de déterminer si « les allégués justifient les conclusions prima facie ou dévoilent une apparence de droit » (Comité régional des usagers, p. 426). À son avis, le tribunal « écarte d'emblée tout recours frivole ou manifestement mal fondé et n'autorise que ceux où les faits allégués dévoilent une apparence sérieuse de droit » (p. 429).

  [63] Dans une décision ultérieure, le juge Gonthier a expliqué que le requérant, à l'étape de l'autorisation, doit établir « une apparence sérieuse de droit », « un droit prima facie » ou, en anglais, « a good colour of right, [. . .] a prima facie right » (Guimond c. Québec (Procureur général), [1996] 3 R.C.S. 347, par. 9 11). Il a en outre souligné que la Cour d'appel utilisait sensiblement les mêmes expressions, exigeant que le requérant établisse un « droit d'action qui paraisse sérieux » ou un « droit prima facie » (Berdah c. Nolisair International Inc., [1991] R.D.J. 417 (C.A.), p. 420 421, le juge Brossard) ou « une apparence sérieuse de droit » (Comité d'environnement de La Baie, p. 661, le juge Rothman).

> [64] Dans un arrêt prononcé quelques années auparavant, dans l'affaire Marcotte, les juges majoritaires et dissidents s'entendaient pour reconnaître que le requérant devait satisfaire au critère préliminaire de la « preuve à première vue » ou d'une « apparence de droit sérieuse » ou, en anglais, « a good colour of right », d'une « prima facie case » (par. 23, le juge LeBel, et par. 90 et 94, la juge Deschamps; voir également Breslaw c. Montréal (Ville), 2009 CSC 44, [2009] 3 R.C.S. 131, par. 27; Option consommateurs c. Novopharm Ltd., 2008 QCCA 949, [2008] R.J.Q. 1350, par. 8 et 23).
>
> [65] Comme nous pouvons le constater, la terminologie peut varier d'une décision à l'autre. Mais certains principes bien établis d'interprétation et d'application de l'art. 1003 *C.p.c*. se dégagent de la jurisprudence de notre Cour et de la Cour d'appel. D'abord, comme nous l'avons déjà dit, la procédure d'autorisation ne constitue pas un procès sur le fond, mais plutôt un mécanisme de filtrage. Le requérant n'est pas tenu de démontrer que sa demande sera probablement accueillie. De plus, son obligation de démontrer une « apparence sérieuse de droit », « *a good colour of right* » ou « *a prima facie case* » signifie que même si la demande peut, en fait, être ultimement rejetée, le recours devrait être autorisé à suivre son cours si le requérant présente une cause défendable eu égard aux faits et au droit applicable.
>
> …
>
> [67] À l'étape de l'autorisation, les faits allégués dans la requête du requérant sont tenus pour avérés. Le fardeau imposé au requérant à la présente étape consiste à établir une cause défendable, quoique les allégations de fait ne puissent être « vague[s], générale[s] [ou] imprécise[s] » (voir *Harmegnies c. Toyota Canada inc*., 2008 QCCA 380) (CanLII), par. 44).
>
> [68] Tout examen du fond du litige devrait être laissé à bon droit au juge du procès où la procédure appropriée pourra être suivie pour présenter la preuve et l'apprécier selon la norme de la prépondérance des probabilités. »

81. As such, the Judge in the First Instance erred in law when she failed to take the allegations contained in the Motion for true and required definitive proof thereof.

## IV) <u>Damages</u>

### i) The Petitioner and the Class Members were Injured at the Point-of-Sale due to Payment of the Purchase Price of Vitaminwater

82. The Judge in the First Instance concluded that the Petitioner failed to allege what damages he has suffered as a result of purchasing Vitaminwater.

> "[76] Petitioner has not alleged what damages he has suffered as a result of purchasing Vitaminwater. He states that he has stopped purchasing Vitaminwater when he learned that it contained sugar, claiming that sugar is responsible for various health issues including obesity and diabetes. However, Petitioner does not allege that he suffers from any such health conditions as a result of his consumption of Vitaminwater.
>
> [77] As for the fact that Petitioner would not have paid a "premium price" for Vitaminwater, other than the general conclusion that Vitaminwater sells at a premium price, the only allegation of fact is that a 591 ml bottle of Vitaminwater sells for $2.29 and there is no allegation as to how that compares with the price of other beverages.
> …
> [79] In light of the foregoing, even if Petitioner had fulfilled his burden and demonstrated that Respondents had committed a civil fault, he has failed to demonstrate that he has suffered any prejudice as a result thereof."

83. Paragraph 19 of the Motion clearly states:

> "19. Had he known the true facts, the Petitioner would not have purchased the Vitaminwater, nor paid the premium price that the Respondents charged for it."

84. This allegation must be taken for true at this stage and, the Petitioner also benefits from the legal presumption provided for in art. 253 *LPC*.

85. The Petitioner and all Class Members suffered damages at the point-of-sale; in other words, by simply purchasing Vitaminwater. No other damages must be proven in order to satisfy the damage criterion and they are entitled to a refund of the purchase price.

**ii) Aggregate Loss**

86. The Judge in the First Instance also concluded that there was no aggregate loss due to differing retail prices of Vitaminwater.

> "[81] The notion of "aggregate loss" developed by the Supreme Court in *Infineon* does not help in the present case. There is no allegation demonstrating an aggregate loss and the fact that the sales volume of Vitaminwater is estimated at more than $500 million annually does not demonstrate an aggregate loss of the same amount for the members of the proposed class."

87. The simple argument of refund of purchase price can operate to return the aggregate of all sales to Class Members.

88. If the differences in retail prices operated to disable a petitioner from proving damages thereby barring authorization, no class actions would ever exist, particularly so for an action based in false advertising, where different retail prices is the norm.

89. Even if the different retail prices could operate to impede the Petitioner from proving damages, it was suggested that the wholesale price of Vitaminwater; i.e. the sale of Vitaminwater to retail stores, combined with punitive damages could comprise the damages.

90. It is also possible that a judgment on the merits could choose to award damages on an individual claim basis (as opposed to collectively recovery) [Art. 1028 C.C.P.]. This would mean that, once the common issue of whether or not Coca Cola's representations are false and misleading is authorized, each class member would come forward and claim their individual damages.

**iii) Art. 1009 C.C.P.**

91. Article 1009 C.C.P. provides:

> "1009. In the case of an application for a declaratory judgment, the notice replaces, with respect to the members, the service provided for by article 454."

92. Even if it were appropriately determined that the Petitioner's damages were not properly alleged or that there was no aggregate loss due to divergent retail prices, the application of art. 1009 C.C.P. allows the Judge in the First Instance to authorize an injunctive/declaratory class; that is, to declare that the Respondents committed a fault and to provide injunctive relief to Class Members by ordering the Respondents to cease from continuing their unfair and/or deceptive conduct.

93. Therefore, even if damages were difficult to ascertain or to quantify, it still does not act as a bar to authorization.

## V) <u>Injunctive Relief</u>

94. The Judge in the First Instance concluded that the order sought by the Petitioner was too imprecise and that the recent modification of the labels of Vitaminwater products disclosing the quantity of sugar found in each bottle on the label solved the problem of disclosure, making an injunction no longer necessary in any case.

> "[82] Petitioner is also seeking the following injunctive order:

> "ORDER the Defendants to cease from continuing its unfair and/or deceptive conduct;"
>
> [83] Firstly, the order sought is imprecise and it is not possible for the Court to determine on the face of the Motion what sort of injunctive relief Petitioner is seeking and, therefore, whether Petitioner has an arguable case to make.
>
> [84] Secondly, in October 2011, Health Canada commenced a transition process whereby certain natural health products were to become regulated as foods. As a result of this new classification, the Respondents have been requested to modify the labels of Vitaminwater products which now disclose the quantity of sugar found in each bottle. These new labels appeared in October 2013 and in February 2014. Therefore, this point is now moot.
>
> [85] For these reasons, the Court would not authorize the conclusion ordering Respondents to "cease from continuing its unfair and/or deceptive conduct"."

**i) Imprecision**

95. The injunctive/declaratory relief being sought is for the Respondents to permanently cease from continuing to engage in conduct that constitutes false advertising. This order is not so imprecise and it is entirely possible to determine that the injunctive relief sought is for the Respondents to stop falsely advertising Vitaminwater as a health product. This can be achieved in a number of ways, including, but not limited to (a) changing the name of the product, (b) adding the words "sugar" or "sweetened" to either the name of the product or displayed prominently and clearly visibly on the front of the beverage, and (c) ceasing to use the slogan "Nutrient Enhanced Water Beverage" and/or modifying the slogan by removing the word "water" or by adding the words "sugar" or "sweetened" to it.

96. In any case, even if the injunctive relief sought does appear difficult to implement due to imprecision, it is premature at the authorization stage make this determination without a proper and complete record which will be available at the trial on the merits.

97. Further, if, at the hearing on the merits, the injunctive order remains too imprecise and appears incapable of execution, the court or the Petitioner may revise the conclusions under art. 1022 C.C.P and 1016 C.C.P. respectively.

- *Carrier c. Québec (Procureur général*), 2011 QCCA 1231:

> ***« iv) L'injonction***
>
> [61] L'intimé … avance que les conclusions en injonction contenues à la procédure introductive d'instance sont vagues, irréalisables et, par conséquent, illégales. À l'égard de ces deux moyens, il a tort.
>
> …
>
> [68] Quant au caractère imprécis et subjectif de ces ordonnances, je reconnais que les conclusions de la requête paraissent pour l'instant difficilement exécutoires. Il serait toutefois prématuré à l'étape de l'autorisation de décréter que dû à l'imprécision des mesures correctives recherchées, celles-ci sont de fait illégales. La règle de l'apparence de droit suffisante n'exige pas en matière d'autorisation l'obligation pour les appelants de faire une preuve exhaustive de leurs prétentions.
>
> [69] La preuve sur le fond permettra de mesurer l'ampleur des ordonnances recherchées et d'évaluer si celles-ci entraînent des conséquences économiques disproportionnées. Si, lors de l'audition au fond, les appelants ne sont pas en mesure de préciser le remède recherché de manière satisfaisante et de faire la preuve de son applicabilité, ces conclusions pourront alors être l'objet de l'une des mesures prévues à l'article 1022 *C.p.c*.[20], à moins que le représentant du groupe, avec l'autorisation du tribunal, se soit déjà prévalu de l'un des moyens prévus à l'article 1016 *C.p.c*.[21]

### ii) Continuing Necessity of Injunctive/Declaratory Relief

98. The Respondents' recent label modification does not serve to offset the false advertising and misrepresentations being perpetrated by the Respondents.

99. The objective "credulous and inexperienced person test" is traditionally applied by the courts to assess the misleading nature of certain business practices and their qualification under the *Consumer Protection Act*[22]. This credulous and inexperienced consumer cannot be expected to "look beyond misleading representations on the front of the box to discover the truth from the ingredient list in small print on the side of the box"[23]. Thus, the Respondents cannot use the ingredient list to shield themselves from liability for their misrepresentations and consequently, the injunctive/declaratory relief sought; i.e. for the Respondents to

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[20] Le tribunal peut alors modifier le jugement qui autorise l'exercice du recours collectif ou l'annuler, ou permettre au représentant de modifier les conclusions recherchées 1022 al. 2 *C.p.c*.

[21] Avec la permission du tribunal, le représentant peut amender ou se désister totalement ou partiellement de sa demande 1016 *C.p.c.*

[22] *Richard c. Time Inc*., [2012] 1 R.C.S., at paras. 62 to 77.

[23] *Batsheva Ackerman et al. v. The Coca Cola Company et al*. (Exhibit R-3A-1) at pages 33-34.

cease from continuing their unfair and/or deceptive conduct is still highly relevant as the false advertising remains unresolved.

## VI) National Class

100. The Judge in the First Instance concluded that there was no reason to authorize a national class action due to the fact that the fault or the false and misleading advertising was provincially segregated; i.e. Quebec residents were exposed to advertisements within Quebec and non-Quebec residents were exposed to advertisement outside of Quebec.

> "[97] With respect to the national class, given that the allegations of the Motion are deemed to be true, the Court finds that the criteria set out in article 3148 C.C.Q. is met with respect to Quebec residents. What about residents outside Quebec?
>
> …
>
> [99] … Furthermore, the false and misleading advertising alleged in the Motion which may have led residents outside Quebec to purchase Vitaminwater must have occurred outside Quebec. Therefore, there was no fault committed in Quebec against non-residents.
>
> [101] The Court, applying the same reasoning used in *Fitflop,* finds that there is no reason in the present case to authorize a national class action and therefore such class action will be limited to Quebec residents."

101. The Judge in the First Instance was correct in her judgment that the criteria of art. 3148 (3) C.C.Q. was satisfied with respect to the Petitioner and with respect to Quebec residents. However, it was incorrect to then *re-apply* the same codal article to non-Quebec residents. Art. 3148 C.C.Q. need only be applied once to the class as whole (i.e. "all residents in Canada").

102. From a constitutional perspective, the next question to consider becomes whether Class Members residing in any other Canadian province have sufficient ties to the Quebec forum. In other words, can a Judgment emanating from a Quebec court affect the rights of non-Quebec residents? The answer should be in the affirmative for the reasons that follow.

103. In establishing whether a national class is possible under the circumstances, it is necessary to consider (a) whether the Respondents are common across Canada, (b) whether there are common questions of fact and law across the country, and (c) whether the Respondents' representations were common across Canada.

104. In the present context, the Respondents sold and marketed Vitaminwater throughout Canada thereby engaging their liability across the country. Secondly, the questions of fact and law put forward are the same across Canada (see para. 42 of the Motion). Lastly, the Respondents launched their marketing campaign on a

national level, that is, the same representations were made across the country irrespective of the provincial borders and the Vitaminwater labelling was consistent all across Canada

105. The way to view the class is as a whole, not as a by-product of many provincial groups joined together. Nor should the class be looked at as Quebec residents and non-Quebec residents – the class is one large indivisible circle that engulfs "all residents in Canada".

106. At the authorization stage, it is only the Petitioner's personal situation that is at issue as it relates to the criteria of art. 1003 C.C.P. Once article 3148 (3) C.C.Q. is applied to the Petitioner, then the entire case is attached to Quebec. The private international law (internal test) is therefore satisfied.

107. As far as the second test being a constitutional test, a "real and substantial connection" to the jurisdiction is justified by the fact that the entire class (even non-Quebec residents) share the same common issues because they are based on the same material facts and are against the same Respondents.

108. The question of whether or not the Quebec court's judgment will be recognized by other provincial courts in Canada does not enter into the debate at this time. Instead, it is something to be resolved in another action, if necessary.

109. The issue that different laws may apply to different class members is also surmountable. When a federal law applies (for example articles 36 and 52 of the *Competition Act* relating to false advertising), there is no need to distinguish between Class Members. However, even if different provincial statutes could apply to different Class Members, the Court can make sub-classes under article 1022 C.C.P. It is also possible that Quebec laws will not be materially different from other provinces' laws.

110. If a particular defence rests on the application of a different province's law, then the Respondents will eventually plead this issue within the proceedings, but it is premature to assume this circumstance at the authorization stage. The approach should be to "wait-and-see" how the conflict of law issues may or may not develop and the court will deal with them appropriately by either adjusting the common issues or by recognizing sub-classes as appropriate.

111. Finally, when deciding whether or not a province's court should exert national jurisdiction, the three objectives in the Supreme Court decision of *Western Canadian Shopping Centres c. Dutton*, 2001 RCS 534 should be taken into account, namely: access to justice, judicial economy, and behaviour modification.

112. It is respectfully submitted that the present class definition be national for the following reasons:

a. The damages/injurious acts of the Petitioner, who is the only relevant person to consider at the authorization stage, took place in Quebec where he bought Vitaminwater;
b. The common issues in this matter are the same for all Class Members, regardless of their domicile;
c. The representations made by the Respondents (for example, on the Vitaminwater labeling) are the same for everyone across the country;
d. Persons in other jurisdictions will be able to opt out if they do not wish to be bound by a decision rendered in the Province of Quebec;
e. The laws relating to class actions are not that different across the country;
f. The *Competition Act* is a federal law that would apply equally to all Class Members anywhere in Canada;
g. The trial judge is permitted to apply other provinces' laws when necessary;
h. It is premature to say that different provincial legislation might lead to different defences at this stage;
i. The Court can always create provincial sub-classes or redefine the common questions to tailor the issues at a later stage, should it become necessary; and
j. There is no reason to believe that the law of other provinces is substantially different from Quebec law as it relates to consumer claims and false or misleading representations (See para. 125 of *Union des consommateurs* c. *Bell Canada*, 2012 QCCA 1287).

## VII) <u>Adequacy of the Representative</u>

113. The Judge in the First Instance concluded that the Petitioner was not in a position to represent the members adequately due to the fact that he had not personally contacted any of the 13 persons who had registered on his attorney's website by August 2012, nor had he personally contacted the 45 persons who had registered at the time of the authorization hearing:

> "[108] When Petitioner was examined out of court in August 2012, he testified that 13 people from Quebec had registered on his attorney's website. Other than speaking to some friends and to his sister, Petitioner had not contacted any of these 13 people to determine whether they actually had a cause of action against Respondents. At the hearing, Petitioner filed a more recent list. On this list 45 have an address in Quebec. However, there are no allegations that Petitioner has made any effort to contact any of those people either. In other words, Petitioner has made no investigation in order to determine whether a proper class exists."

114. It is a well-established principle that the criteria to be an adequate representative for the class are not very demanding.

- *Fournier c. Banque de Nouvelle-Écosse*, 2011 QCCA 1459 :

> « b) La capacité de la représentante (art. 1003 d))
>
> [49] Le représentant du groupe au sens de l'article 1003 d) *C.p.c.* doit être en mesure de représenter adéquatement le groupe. L'attribution du statut de représentant n'est pas particulièrement exigeante[24].
>
> [50] Le juge conclut que l'appelante ne satisfait pas à la condition de l'article 1003 d) *C.p.c.* au motif qu'elle n'a pas de recours personnel valable. Comme la requête de l'appelante satisfait aux exigences de l'article 1003 a), b) et c) *C.p.c.*, rien, par ailleurs, ne permet de conclure qu'elle n'est pas en mesure d'assurer une représentation adéquate des membres du groupe. Le juge était dans une position privilégiée dans la présente affaire pour évaluer les capacités de l'appelante à représenter le groupe, puisqu'elle a témoigné, et il ne relève rien de son témoignage qui pourrait faire obstacle à ce que le statut de représentant lui soit attribué. L'appelante satisfait en l'espèce aux exigences de l'article 1003 d) *C.p.c.* »

115. The adequacy of the Representative is determined by three, and only three factors: (1) interest, (2) capacity, and (3) the absence of conflict of interests with other members of the group.

- *Union des consommateurs c. Air Canada*, 2014 QCCA 523:

> « [82] … Au risque de me répéter, aucun représentant ne doit être exclu s'il satisfait à trois conditions : l'intérêt à poursuivre, qui est ici celui de la personne désignée, la compétence et l'absence de conflit avec les membres du groupe[25]. »

- *Infineon Technologies AG c. Option consommateurs*, 2013 CSC 59:

> « [149] Selon l'alinéa 1003*d*) *C.p.c.*, « le membre auquel il entend attribuer le statut de représentant [doit être] en mesure d'assurer une représentation adéquate des membres ». Dans *Le recours collectif comme voie d'accès à la justice pour les consommateurs* (1996), Pierre-Claude Lafond avance que la représentation adéquate impose l'examen de trois facteurs : « l'intérêt à poursuivre [. . .], la compétence [. . .] et l'absence de conflit avec les membres du groupe [. . .] » (p. 419). Pour déterminer s'il est satisfait à ces critères pour l'application de l'al. 1003*d*), la Cour devrait les interpréter de façon libérale. Aucun représentant proposé ne devrait être exclu, à moins que ses intérêts ou

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[24] *Western Canadian Shopping Centres Inc.* c. *Dutton*, [2001] 2 R.C.S. 534, 2001 CSC 46, para. 41; *Regroupement des CHSLD Christ-Roy (Centre hospitalier, soins longue durée)* c. *Comité provincial des malades*, [2007] R.J.Q. 1753 (C.A.), 2007 QCCA 1068, para. 27-30.

[25] *Infineon*, *supra* note 7 at para. 149; *Bouchard c. Agropur Coopérative*, [2006] R.J.Q. 2349, 2006 QCCA 1342, para. 78 and 88.

> sa compétence ne soient tels qu'il serait impossible que l'affaire survive équitablement.
>
> [150] Même lorsqu'un conflit d'intérêts peut être démontré, le tribunal devrait hésiter à prendre la mesure draconienne de refuser l'autorisation. D'après Lafond à la p. 423, « [e]n cas de conflit, le refus de l'autorisation nous apparaît une mesure trop radicale qui porterait préjudice aux membres absents, d'autant plus que le juge siégeant au stade de la requête pour autorisation a le pouvoir d'attribuer le statut de représentant à un autre membre que le requérant lui-même ou le membre proposé ». Puisque l'étape de l'autorisation vise uniquement à écarter les demandes frivoles, il s'ensuit que l'al. 1003*d*) ne peut avoir pour conséquence de refuser l'autorisation en présence d'une simple possibilité de conflit. »

116. Attempts by judges to add additional factors such as: the Applicant only tried to find some other potential members, the Applicant did not testify or is not present for the entire hearing, and allegations that the law firm is the real driving force behind the class action were systematically reversed by the Court of Appeal and found insufficient to deny the Applicant to act as adequate representative.

- *Comtois c. Telus Mobilité*, 2010 QCCA 596:

> « [28] Par ailleurs, la juge de la Cour supérieure se dit d'avis que l'appelante n'est pas en mesure d'assurer une représentation adéquate des membres. À ce propos, elle écrit:
>
> > [62] Tout ce que le Tribunal constate à la lecture de la requête, c'est que madame Comtois a payé pour des frais d'itinérance qu'elle estime avoir été facturés illégalement ; elle est donc membre du groupe proposé.
> > [63] Elle a également réussi à retracer quelques autres personnes dans la même situation.
> > [64] Encore aujourd'hui, le Tribunal ignore qui, de madame Comtois ou de ses avocats, a réellement initié les procédures. Le tribunal note que le même cabinet d'avocats s'est vu refuser une autre demande d'autorisation d'exercer un recours collectif en matière de téléphonie en raison d'un conflit d'intérêts potentiel entre le représentant et l'avocat et, tel que déjà mentionné, que le même cabinet agit également dans le dossier Dubuc c. Bell Mobilité.
> > [65] Madame Comtois n'a pas témoigné et a même quitté la salle d'audience avant la fin de l'audience.
> > [66] Le Tribunal ignore comment madame Comtois entend financer ce recours et quelles démarches elle a entreprises.
>
> …
>
> b) La capacité de la représentante

> [43] Quant à la capacité de l'appelante d'assurer une représentation adéquate des membres, je suis d'avis que l'appelante a cette capacité.
> [44] Rien dans la preuve ne permettait à la juge de la Cour supérieure de tirer quelques inférences négatives du fait que l'appelante n'a pas témoigné et qu'elle a quitté la salle avant la fin de l'audience. De même, soit dit de nouveau avec égards, les observations contenues au jugement entrepris m'apparaissent à tout le moins spéculatives :
> …
> [45] Il est vrai que l'appelante (ou son avocat) a initié un recours en autorisation sans avoir de copie du contrat signé. Cela étant, suivant les allégations de la requête, l'appelante a un intérêt personnel. Elle a effectué des démarches, d'une part, auprès de l'intimée pour être remboursée et, d'autre part, pour rechercher d'autres personnes appartenant au groupe. Ces éléments, me semble-t-il, suffisaient à qualifier l'appelante. »

117. The Judge in the First Instance added an additional factor to consider other than the three factors – personal contact with class members who sign up via their attorney's website. This is not an appropriate reason to deny the Petitioner to act as a representative as neither personal contact with all putative class members who sign up via their attorney's website, nor even having the website at all are necessary in order to be an adequate representative.

118. Furthermore, the Judge in the First Instance concluded that the Petitioner "has made no investigation in order to determine whether a proper class exists" based solely on the fact that he had not personally contacted the 13 or subsequently, 45 individuals, who signed up on his attorney's website; however she neglected to consider the investigation that he did perform.

119. In his out-of-court examination of August 7, 2012, the Petitioner explained that he had already spent between 10 and 30 hours on his investigations and on the class action proceedings, at pages 25-26:

> "149Q-Since the beginning of your endeavour with Mr. Orenstein, how much time did you spend on this class action proceeding?
> …
> 161Q-On the investigation...speaking with Mr. Orenstein.
> A- So in my own research and everything else, let's say more than ten (10) and less than thirty (30) [hours]."

120. The fact that the Petitioner can demonstrate, through a website, that other members of the group are in the same situation as him, that he has provided the Court with documentation to help the cause, that he has spent many hours investigating and preparing the case, was examined out-of-court, and was present at the authorization hearing shows that he is an adequate representative.

- *Martin c. Société Telus Communications*, 2010 QCCA 2376:

« [39] La juge a également déterminé que l'appelante n'est pas en mesure d'assurer une représentation adéquate aux fins du recours. Elle lui reproche d'avoir déposé son contrat la veille de l'audition et est d'avis que la preuve offerte était minimaliste. Elle s'exprime ainsi :

> [40] Trois facteurs sont pris en compte pour déterminer si la Requérante est en mesure d'assurer une représentation adéquate aux fins du recours : 1) l'intérêt à poursuivre; 2) la compétence; 3) l'absence de conflit avec les membres du groupe.
> [41] La requérante assume le fardeau de démontrer qu'elle satisfait ces critères.
> [42] Avec égards, elle a échoué, il ne suffit pas d'alléguer sa bonne foi et avoir l'intention « de se tenir informé des développements en cours » pour se qualifier.
> [43] La Requérante n'a déployé aucun effort ou démarche personnelle pour justifier sa capacité d'agir. Elle n'a déposé son contrat que la veille du procès et après que Telus l'ait fait. La preuve versée par celle-ci est minimaliste et non complète. N'eut été de la preuve autorisée en faveur de l'intimée, le Tribunal n'avait pas l'information élémentaire pour comprendre l'étendue des obligations contractuelles des parties.
> [44] Bien que la barre ne soit pas très haute, la requérante doit néanmoins la franchir. Il ne revient pas à la Cour d'inférer ou de supposer que le critère est satisfait.
>
> [REFERENCES OMISES]

[40] La présente affaire est de nature contractuelle. La composition du groupe est relativement facile à établir. L'appelante soutient que 360 personnes se sont manifestées en s'inscrivant sur le site Web dédié au recours.
[41] Par ailleurs, bien qu'elle n'ait fourni une copie de son contrat que la veille de l'audition, l'appelante a déposé plusieurs documents, dont son relevé de compte, un contrat standard, les pages du site Web de Telus qui expliquent les modalités standards des contrats et le document faisant état de son forfait au moment de l'avis, en juin 2008. Il est vrai que les dépliants saisonniers de Telus, en vigueur en 2007, ont été déposés par un témoin de Telus. Ce dernier a toutefois mentionné qu'il a lui-même eu de la difficulté à les retracer.
[42] Dans les circonstances, l'appelante a démontré qu'elle possède les qualités requises pour agir à titre de représentante. Elle était d'ailleurs présente lors de l'audition de la requête et elle pouvait être interrogée sur cette question.

[43] Pour ces motifs, je propose d'accueillir l'appel avec dépens. »

121. Therefore, given that there are three (3) factors to consider when determining whether the Petitioner is an adequate representative, namely, interest, capacity and absence of conflict of interest, it is clear that the Petitioner has more than satisfied the threshold.

## V. Capacity and Credibility of the Representative

122. The Judge in the First Instance concluded that the Petitioner did not have the capacity to lead the class action due to "various flaws" in the Motion and that he was not credible enough due to his confusion as to whether the origin of the slogan "vitamins+water=all you need" was used in Canada:

> "[109] Moreover, the various flaws presented by the Motion raise reasonable doubt as to Petitioner's capacity to lead this class action, especially when considering that he has made no effort to investigate the subject matter at the root of his proceedings.
>
> [110] Finally, Petitioner gave testimony during his examination out of court that was contradicted by the exhibits filed in the record and nevertheless maintained that his answers were true[26]. The Motion was subsequently amended and his attorney at the hearing admitted that the slogan "vitamins+water=all you need" had never been used in Canada.
>
> [111] Therefore, the Court finds that Petitioner is not in a position to represent the members adequately."

123. The Judge in the First Instance refers to "various flaws" in the proceeding to impair the Petitioner's capacity to lead the class action; however, she does not elaborate on what these flaws are. Moreover, flaws in a class action proceeding cannot be used to establish that the Petitioner does not have the capacity to be an adequate representative. As expounded in the previous section, the Petitioner has satisfied the three criteria to be an adequate representative.

124. As for the question as to whether the Petitioner was mistaken as to where he had seen the slogan "vitamins+water=all you need", this should not determinative of his credibility.

**FOR THESE REASONS, THE APPELLANT/PETITIONER RESPECTFULLY REQUESTS THAT THE COURT OF APPEAL:**

**ALLOW** the appeal and sets aside the Judgment of the Superior Court dated June 11, 2014;

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[26] Exhibit D-1, p. 51-53 and Exhibit D-4, par. 11.

**GRANT** the Appellant/Petitioner's Re-Amended Motion seeking authorization to institute a class action;

**ASCRIBE** to the Petitioner the status of representative for the purpose of exercising the class action on behalf of the following group:

- all residents in Canada (excluding … B.C. and Alberta residents) who have purchased the drink Glacéau VITAMINWATER®, or any other group to be determined by the Court;

Alternately (or as a subclass)

- all residents in Quebec who have purchased the drink Glacéau VITAMINWATER®, or any other group to be determined by the Court;

**AUTHORIZES** the bringing of a class action in the form of a motion to institute proceedings in damages and/or injunctive relief;

**IDENTIFIES** the principle questions of fact and law to be treated collectively as the following:

- Did the Respondents engage in unfair, false, misleading, or deceptive acts or practices regarding the marketing and sale of its Vitaminwater?

- Are the Respondents liable to the class members for reimbursement of the purchase price or the additional premium in the purchase price as a result of their misconduct?

- Should an injunctive remedy be ordered to prohibit the Respondents from continuing to perpetrate their unfair and/or deceptive conduct?

- Are the Respondents responsible to pay punitive damages to class members and in what amount?

**IDENTIFIES** the conclusions sought by the class action to be instituted as being the following:

GRANT the class action of the Petitioner and each of the members of the class;

ORDER the Defendants to cease from continuing its unfair and/or deceptive conduct;

DECLARE the Defendants solidarily liable for the damages suffered by the Petitioner and each of the members of the class;

CONDEMN the Defendants to pay to each member of the class a sum to be determined in compensation of the damages suffered, and ORDER collective recovery of these sums;

CONDEMN the Defendants to pay to each of the members of the class, punitive damages, and ORDER collective recovery of these sums;

CONDEMN the Defendants to pay interest and additional indemnity on the above sums according to law from the date of service of the motion to authorize a class action;

ORDER the Defendants to deposit in the office of this court the totality of the sums which forms part of the collective recovery, with interest and costs;

ORDER that the claims of individual class members be the object of collective liquidation if the proof permits and alternately, by individual liquidation;

CONDEMN the Defendants to bear the costs of the present action including expert and notice fees;

RENDER any other order that this Honourable court shall determine and that is in the interest of the members of the class;

**DECLARE** that all members of the class that have not requested their exclusion, be bound by any judgement to be rendered on the class action to be instituted in the manner provided for by law;

**FIXE** the delay of exclusion at thirty (30) days from the date of the publication of the notice to the members, date upon which the members of the class that have not exercised their means of exclusion will be bound by any judgement to be rendered herein;

**ORDER** the publication of a notice to the members of the group in accordance with article 1006 C.C.P. within sixty (60) days from the judgement to be rendered herein in LA PRESSE and the GLOBE & MAIL if for a national class or in LA PRESSE and the MONTREAL GAZETTE if for a Quebec-only class;

**ORDERS** that said notice be available on the Respondents' website with a link stating "Notice to Vitaminwater Users";

**REMANDS** the file to the Chief Justice of the Superior Court for determination of the judicial district in which the class action will proceed and for appointment of the judge charged with hearing the case;

**THE WHOLE** with costs in appeal and in the first instance, including publications fees.

Montreal, July 11, 2014

(S) Andrea Grass

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CONSUMER LAW GROUP INC.
Per: Me Andrea Grass
Attorneys for the Petitioner