CANADA

COURT OF APPEAL

PROVINCE OF QUEBEC
DISTRICT OF MONTREAL

ADANNA CHARLES

*APPELLANT/*Petitioner

C.A.:
S.C.M.: 500-06-000609-129

-vs.-

BOIRON CANADA INC.

RESPONDENT/Respondent

INSCRIPTION IN APPEAL

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1. The Appellant/Petitioner ("Charles") 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 Louis Lacoursière (the "Judge in the First Instance") on January 19, 2015 (the "Judgment"), which is attached hereto as **Annex 1**.

3. The Judge in the First Instance rejected Charles' Amended Motion to Authorize the Bringing of a Class Action & to Ascribe the Status of Representative (the "Motion") against the Respondent/Respondent ("Oscillo"), which is attached hereto as **Annex 2**.

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

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

A. Summary of Relevant Facts

6. Charles purchased Oscillococcinum and Children Oscillococcinum in the year preceding the original filing of the Motion; i.e. between January 2011 and April 2012, for approximately $15.49 plus taxes each.

7. Charles believed, after reading the labeling, that the products would help herself and her child, who was 5 years old at the time, fight the flu and relieve their symptoms which included fever, chills, body aches and pains.

8. Charles and her child used the product as directed, but it did not live up to its promised results, having no noticeable effect on their flu symptoms.

9. Charles discovered at some point thereafter, by learning of a U.S. class action, that the ingredients in Oscillococcinum and Children Oscillococcinum have no proven health benefit and that these ingredients are so diluted that they are not even present in the final product.

10. Had Charles known the true facts, she would neither have purchased, nor used the Oscillo products.

11. As such, Charles suffered injury at the point-of-sale (i.e. the retail price) when she purchased the Oscillo products based on Oscillo's false and/or misleading representations.

B. Faults Being Claimed Against Oscillo

12. What has become clear from the above allegations of fact is the following:

    i) Oscillo falsely and/or misleadingly represented, advertised, labelled and promoted Oscillo as a product that would reduce the duration and severity of flu symptoms, including body aches, headache, fever, chills, and fatigue, to consumers when, in fact, it was and is nothing more than a sugar pill; and

    ii) This illegal conduct is continuing at present.

13. The Judge in the First Instance determined that the criteria of 1003 b) and 1003 d) were not satisfied.

    A. With regards to the criteria of 1003 b) C.C.P.:

    (a) The question that must be put forward as it relates to the claim for a refund of the sale price of Oscillo 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 medicine and misrepresent to consumers that it contains a medicinal ingredient, when it is nothing more than a pill composed of sugar (0.85g sucrose and 0.15g lactose), and can a company profit from such false advertisement?

    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

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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.

knowing that the fact that Oscillo contains no medicinal ingredient is an "important fact", then Oscillo 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 may also give rise to punitive damages under art. 272 *LPC*;

(b) With regard to Oscillo's defence that the Oscillo products had met the requirements of and been approved by Health Canada, the question that must be asked is:

> Does Health Canada approval shield a company from liability under the *Consumer Protection Act*, the *Competition Act* and/or the C.C.Q. (the *droit commun*)?

This question is particularly relevant given the recent Supreme Court of Canada case of *Infineon*[4] which 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"[5].

(c) With regard to the question of the determination as to the efficacy of Oscillo specifically and homeopathy in general, the question that must be asked is:

> Considering that at the authorization stage all that is required of the Petitioner is to demonstrate an arguable case, is it premature to delve deeper into the merits to make a conclusion on the established argument, without a proper and complete record which will be available at the trial on the merits?
>
> and
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> Considering that the homeopathic medicine, Oscillo, which has been advertised, marketed, represented, packaged and promoted as such by the Respondent, is in fact homeopathic, can the two inextricable concepts be extricated to be separately considered and analyzed in the context of authorization? If so, can the concepts be considered and analyzed at differing levels of scrutiny?

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[4] *Infineon Technologies AG c. Option consommateurs*, 2013 CSC 59 [*Infineon*].

[5] *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 and J.-L. Baudouin, P. Deslauriers and B. Moore in *La responsabilité civile* (8th ed. 2014), vol. I, at No. 1-192.

This question is particularly relevant given that fact that Oscillo *is* a homeopathic remedy and it therefore cannot be considered in isolation from what it is, i.e. a homeopathic remedy. Furthermore, the level of scrutiny through which to analyze the specific and the general must be congruent to be that of a preliminary filter to determine whether an arguable case has been established and not to make premature conclusions on the argument itself.

(d) With regard to the question of the sufficiency of the Petitioner's evidence, the question that must be asked is:

> Considering that at the authorization stage all that is required of the Petitioner is to demonstrate an arguable case, is it appropriate to disregard or to give no weight to the factual underpinning and to only consider a supplemental expert report?

This question is particularly relevant given the fact that the Petitioner is under no obligation, nor is it the norm to produce an expert report at the authorization stage (see *Infineon* at para. 128) and must only provide the factual underpinning to establish an arguable case, which often does not require expert opinions in Quebec (as opposed to the Common Law provinces).

B. With regards to the criteria of 1003 d):

(a) The question that must be put forward as it relates to Charles' competence to act as Class Representative is:

> Considering that Charles has clearly proven her interest as a purchaser of Oscillo who is entitled to a refund of the purchase price, can she act as a proper representative for a class action? What are the criteria for an adequate representative? Must a class representative personally communicate with Class members? What is a "reasonable attempt" to find other potential group members? Must a class representative personally communicate with the Respondent to complain or to ask questions? How much research must the class representative undertake?

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.

(b) With regards to the Judge in the First Instances' accusation that the "trigger of the recourse is the lawyer-induced opportunity to obtain a settlement in Canada because one was achieved in the U.S. against Boiron U.S.A.", the question that must be put forward is:

> Considering that the U.S. Settlement Agreement was entered into on March 6, 2012, and considering that it was introduced as an exhibit to the Motion (Annex 2) upon amendment dated April 29, 2013, what is the Judge in the First Instance's factual underpinning to make this assertion? Further, even if it were correct, does it operate to preclude recovery to Canadian class members?

This question is particularly relevant given the complete lack of any basis in law or fact to conclude that either the Petitioner law firm or the class representative are insincere given the allegations which must be taken for true in the Motion. In addition, knowledge of a settlement agreement in the U.S. should not preclude recovery in Canada in any case.

C. Grounds of Appeal

14. 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 Oscillo and punitive damages against the Respondent for having falsely advertised and represented Oscillo to be a medicinal product that contains a medicinal ingredient when it is in fact nothing more than a placebo pill composed of sugar (0.85g sucrose and 0.15g lactose) and thereby pocketing substantial sums of money from the sale of the product, 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.[6]]

ii. Did the Judge in the First Instance err in law by concluding that there was no fault on the part of the Respondent despite the fact that (a) the product claims to contain a medicinal ingredient; i.e. Muscovy duck liver and heart, which is neither medicinal nor actually present in the product due to tremendously high dilutions, and (b) compliance with Health Canada statutory norms and obtaining Health Canada's approval for sale does not insulate a company from liability as espoused in *Infineon* and that statutory provisions do not "have the effect of limiting the general obligation of good conduct in one's relations with others"[7] and (c) the Respondent failed to inform consumers of the truth regarding Oscillo? [art. 1003 b) C.C.P.]

iii. Did the Judge in the First Instance err in law by delving too deeply into the merits of the efficacy and scientific basis of Oscillo at the authorization stage despite the fact that (a) all that is necessary at the authorization stage is to demonstrate an

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

[7] *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 and J.-L. Baudouin, P. Deslauriers and B. Moore in *La responsabilité civile* (8th ed. 2014), vol. I, at No. 1-192.

arguable case, (b) Oscillo is a homeopathic product and he admitted that there is an established argument with regards to homeopathy, and (c) he determined that it was not necessary to question of the efficacy and scientific basis for homeopathic medicine at the authorization stage? [art. 1003 b) C.C.P.]

iv. Did the Judge in the First Instance err in law by concluding that that no weight or credibility should be given to the Petitioner's three (3) articles and that only the expert report should be considered despite the fact that (a) the Petitioner is under no obligation to produce expert reports at the authorization stage in Quebec and (b) the expert report was supplemental to the factual underpinning already established? [art. 1003 b) C.C.P.]

v. 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 as established by the relevant case law? [art. 1003 d) C.C.P.]

vi. Did the Judge in the First Instance err in law by concluding that the class action was lawyer-induced in that there was no factual underpinning to come to this assertion and whether or not it is in fact lawyer-induced should not preclude recovery for Canadian class members? [1003 d) C.C.P.]

I) Refund and/or Punitive Damages

15. The Judge in the First Instance recognized that there was not much contestation of the criteria of 1003 a) and c) C.C.P. on the part of the Respondent who focused instead on the criteria of 1003 b) and d):

> "[28] Boiron did have arguments to make that conditions a) and c) of art. 1003 C.C.P. are not met by the Petitioner. However, it is fair to say, and Boiron did take the position, that its contestation relates to conditions b) and d), i.e.:
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> - The facts alleged by Petitioner do not seem to justify the conclusions sought;
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> - Petitioner is not in a position to represent the members of the Group adequately;"
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> [citations omitted]

16. 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 Boiron having:

a) Falsely and misleadingly advertised and represented Oscillo as containing a medicinal ingredient that would relieve symptoms of the flu such as fever, chills,

body aches and pains when, in fact, the purported medicinal ingredient is neither active in combatting the flue nor actually present as an ingredient in the product, which was and is nothing more than sugar pellets onto which minute quantities of water have been absorbed; and

b) Failed to take any remedial actions and continuing to falsely and misleadingly advertise and represent Oscillo in Canada to this very day.

(i) The *Consumer Protection Act*

17. The Respondent committed a prohibited practice within the meaning of the *Consumer Protection Act* when it (a) created the general impression that it was selling a medicinal product comparable to genuine medicinal products through the use of flagrantly false and misleading statements which produce an analogous false impression on the part of the consumer (art. 218 *LPC*), (b) falsely ascribed a special advantage of health and medicine to Oscillo (art. 220 (a) *LPC*), (c) falsely ascribed the characteristic of medicinal to Oscillo (art. 221 (g) *LPC*), (d) failed to mention the important fact that Oscillo is nothing more than a placebo, making it essentially useless to consumers (art. 228 *LPC*), and (e) distorted the meaning of medicinal by using it to describe a sugar pill (art. 239 (a) *LPC*).

18. 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 Oscillo.

19. In addition to the refund of the purchase price, art. 272 *LPC* allows for punitive damages. It is respectfully submitted that the conduct of Boiron 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 Boiron to not commit prohibited business practices and to not take advantage of consumers.

20. If the Respondent is allowed to retain the money from the sales of Oscillo, it would be allowing Boiron to profit from its own turpitude.

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

(ii) The C.C.Q.

22. The Respondent committed a civil fault and/or civil fraud when it provided false and misleading representations regarding the medicinal benefits of Oscillo to consumers.

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

24. Having failed in these legal requirements, the simple fact of having purchased Oscillo 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.

25. More generally, the Respondent failed in its duty to abide by the rules of conduct incumbent on it, according to the "circumstances, usage or law" and is liable to reparation for the damages caused to the Petitioner and other Class Members (art. 1457 C.C.Q.).

(iii) The *Competition Act*

26. The Respondent contravened the *Competition Act* when it falsely and misleadingly represented Oscillo as a medicinal product to the public to promote its purchase and consumption and its resultant profits.

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

II) Fault

28. The Judge in the First Instance erred in concluding that the Petitioner did not satisfy the criteria of 1003 b) C.C.P. based on the conclusion that the Respondent had not committed any fault. This conclusion was based on an error of mixed fact and law of the understanding of the basis of the action and of the nature of the Petitioner's claims.

29. Secondly, the Judge in the First Instance wrongly concluded that the Respondent had not committed any fault based on an error of law in the reading of the case of *Infineon*[8] and of the interrelationship between the regulatory regime and the civil law regime. The Judge in the First Instance concluded that since Oscillo had been approved for sale by Health Canada, that Boiron's liability for fault under the *Consumer Protection Act*, the C.C.Q., and the *Competition Act* was precluded or, at the very least, not convincing.

A) False and/or Misleading Advertising and Health Canada Approval

30. The Judge in the First Instance had difficulty reconciling the fact that Oscillo had met the requirement of and had been approved for sale by Health Canada, but yet was still arguably nothing more than a placebo that was falsely advertised as containing a medicinal ingredient capable of relieving symptoms of the flu such as fever, chills, body aches and pains. What the Judge in the First Instance did not account for was that Health Canada approval is not based on a contradictory debate as to the efficacy of Oscillo; this debate is neither conducted by Health Canada nor at the authorization stage, but instead, on the basis of a complete record (including

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

contradictory expert reports and testimony, as the case may be) at the trial on the merits.

> "[63] Again, the Court is reluctant to hold that there is an arguable case to be made that Oscillo products have no effect on the symptoms of flu sufferers strictly on the basis of these articles alone, notably because of the fact that Oscillo products have successfully met the requirements of Health Canada, have been approved for sale and, also, because these articles seem, at first glance, to be all out attacks on homeopathy.
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> [64] The Court will not, at this stage, enter into this arena.
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> …
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> [96] As a consequence of these findings, which are taken as true at this stage of the proceedings, the Court is of the view that the very premise of Petitioner's legal syllogism, i.e. that she was mislead *[sic]* as to the efficiency of Oscillo, has not been demonstrated.
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> [97] Petitioner's claim, as the Court understands it, suggests that, based on Dr Willis' opinion, the efficiency of the Oscillo Products should be assessed on the basis of clinical rather than statistical evidence, the latter which seems to satisfy Health Canada.
>
> [98] This may be an interesting debate. However, in authorizing a class action, the Court has to base itself on concrete and objective facts as opposed to hypotheses. While the merits of homeopathy and the nature of the evidence required by Health Canada to issue a licence for a homeopathy product may be challenging subjects, the Court has to be concerned with the Petitioner's allegations and whether she has an "arguable case" to present. "
>
> [emphasis added]

31. It is clear from the above paragraphs that the Judge in the First Instance erroneously associated the concept of the Respondent's fault with compliance or noncompliance with a regulatory regime – in this case, being Health Canada regulations – and accordingly, adherence thereto has operated to insulate the Respondent from liability for the consequences of its actions.

32. In addition, the Judge in the First Instance has readily admitted that (a) whether the efficiency of the Oscillo Products should be evaluated based on clinical evidence or statistical evidence, (b) the merits of homeopathy, and (c) the nature of the evidence required by Health Canada to issue a license may be an "interesting debate" and/or "challenging subjects"; however, he fails to acknowledge that these admissions clearly indicate that there is an arguable case to be had at the trial on the merits on the basis of a full and complete record (including contradictory expert reports and testimony, as the case may be), which should not have be precluded or cut short at the authorization stage.

33. What is most clear is that Health Canada approval or regulatory compliance does not absolve the Respondent from liability for the false advertising and deceitful market positioning of Oscillo as a medicinal product and, at the very least, cannot and should not preclude the Petitioner from establishing a preliminary and arguable case.

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

34. The case of *Infineon* 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 :
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> > 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.
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> [97] Au no 1 189, ils poursuivent en ces termes :
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> > …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 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. »

35. 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. Health Canada it its regulatory scheme serve different legislative purposes. These regulations aim to prevent activities that are detrimental to the sphere it which they operate, in this context, to ensure that Oscillo is safe for human consumption.

36. 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.

37. 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.

38. The conclusion that the Respondent 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 has any impact whatsoever without a proper and complete record which will be available at the trial on the merits.

C. Selective and Unbalanced Merits Pursuit and the Resultant Selective and Unbalanced Factual Consideration

39. It is evident that from the beginning of the Judgment, the Judge in the First Instance had elected to evade making a determination on the efficacy of homeopathic products in general. This position is meritorious as, at the authorization stage, a determination on the efficacy of homeopathic products in general or Oscillo in particular was unnecessary. What was necessary was to demonstrate an arguable case. It is respectfully submitted that this arguable case has been established.

40. The Judge in the First Instance's election to not "dwell" on the questionable efficacy and scientific basis for homeopathic medicine operated to exclude all evidence related to the efficacy and scientific basis for the specific homeopathic medicine, Oscillo. As Oscillo is a homeopathic product, the factual underpinning and arguable case cannot be extricated from the more general case against homeopathic products as a whole and the Judge in the First Instance's premature and conclusory decision to exclude arguments related to homeopathy in general operated to wrongly negate the Petitioner's factual underpinning for Oscillo in specific.

> "[46] There is much debate about the efficacy and scientific basis for homeopathic medicine[9] but it is not necessary, at this stage of the proceedings, to dwell on this question.
> …
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> [54] All the Children Oscillo label states is that the product is "homeopathic medicine"…
> …
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> [60] This article, written by a retired Dutch mathematician, expresses a view. However, the Court, without expressing any opinion on the merits

[9] See Dr Willis' report, R-11, par. 37 to 40.

of homeopathy, is reluctant, in the circumstances, to give it any weight or credibility as it may be nothing more than a pamphlet or charge against homeopathy.

[61] The same is true of the article from the U.S. News and World Report magazine entitled Flu Symptoms? Try Duck dated February 9, 1997. This article, however, does refer to studies showing that homeopathic medicines work better than a placebo but that they have been attacked by the medical establishment for being unscientific.

[62] The third article, undated, is from Dr Joe Schwarcz whose credentials are not clear from the evidence. It is entitled "Homeopathy – Delusion through Dilution" and is most critical of Oscillo products and of homeopathy in general…
…

[63] Again, the Court is reluctant to hold that there is an arguable case to be made that Oscillo products have no effect on the symptoms of flu sufferers strictly on the basis of these articles alone, notably because of the fact that Oscillo products have successfully met the requirements of Health Canada, have been approved for sale and, also, because these articles seem, at first glance, to be all out attacks on homeopathy.

[64] The Court will not, at this stage, enter into this arena.
…

[85] First of all, the Court, as mentioned above, is not swayed by the views expressed in the articles filed as Exhibits R-7, R-8, and R-10. They are very critical of homeopathy in general and Oscillo products in particular. <u>They may be well founded</u>. However the Court is most reluctant to base itself on such generalities to conclude, even on a prima facie basis, that the product at issue is a mere placebo and should be taken off the shelves.
…
[98] This may be an interesting debate. However, in authorizing a class action, the Court has to base itself on concrete and objective facts as opposed to hypotheses. <u>While the merits of homeopathy and the nature of the evidence required by Health Canada to issue a licence for a homeopathy product may be challenging subjects, the Court has to be concerned with the Petitioner's allegations and whether she has an "arguable case" to present</u>."

[Emphasis added]

41. Further, the Judge in the First Instance admits that the factual underpinning to the Petitioner's case "may be well founded"; however, he fails to consider the professed-"well founded" evidence due to the fact that there is a relation to the general topic of

homeopathy when assessing Oscillo products in particular. It is unreasonable to expect that Oscillo be considered in a vacuum, without considering its more general sphere of in which it operates – namely, homeopathy. Even on the product packaging itself[10], Oscillo is advertised and represented to be a homeopathic medicine.

42. Nonetheless, what is true of one is true of the other; both in terms of efficacy and in terms of the premature nature of any conclusions thereupon prior to the trial on the merits where a full and complete record will be available to the trial judge in order to make a fully informed decision on the matter.

43. In sum, while it may have been correct for the Judge in the First Instance to avoid making a final determination on homeopathy in general, he should equally have not made determinations on the efficacy of Oscillo in particularly; in any case, the factual underpinning that homeopathy in general is no better than placebo should have supported (not undermined) the factual underpinning that Oscillo too is nothing more than placebo.

44. The Judge in the First Instance erred in his exclusion of the factual underpinning of the Petitioner's evidence due to its focus on homeopathy in general and, he determined that the only factual evidence to give weight to was the expert report by Dr. Lynn Willis (Exhibit R-11), which was supplementary evidence. As is clear from the case of *Infineon* which states:

> "[128] … Les requérants de ces ressorts doivent présenter des témoignages d'experts et proposer une méthodologie susceptible de prouver une perte globale touchant les acheteurs tant directs qu'indirects. Or, la présentation de ce type de témoignage d'expert ne constitue pas la norme à l'étape de l'autorisation au Québec. Le seuil d'application de l'art. 1003 serait outrepassé si les requérants étaient tenus de présenter une telle preuve et de proposer une méthodologie sophistiquée pouvant démontrer une perte globale et la façon dont celle-ci a traversé des canaux de distribution complexes."[11]

45. But even if we are too delve into the expert report by Dr. Lynn Willis (Exhibit R-11), the Trial Judge decided to, prematurely and without a contradictory debate, give more credence to the "statistical significance" of a study over its "clinical relevance and utility" by stating:

> "[79] Dr Willis then provides a definition of "statistical" as opposed to "clinical" significance:
>
> - A determination of statistical significance indicates to investigators

[10] Annex B to the Judgment (Annex A).
[11] *Infineon*, at para. 128.

the probability that an observed difference between two or more treatment groups in a study is real and did not occur merely by chance;

- Clinical significance, by comparison, is defined in the scientific community as denoting whether or not an observed treatment effect is of therapeutic, or practical, importance.

[80] Dr Willis then gives his opinion:

68. Granted, there was a statistically significant difference between the number of Oscillococcinum®- and placebo®-treated subjects who exhibited full recovery from their flu-like symptoms within 48 hours in the studies of Ferley et al. and Papp et al., but that difference, in both studies, actually was quite small (15 in the Ferley study, and 7 in the Papp study). Thus, when these small differences are viewed in context (i.e., that each of these studies involved several hundred flu sufferers), these differences hardly seem clinically or therapeutically, significant. I submit that, indeed, they are not.

69. Vickers and Smith implied a similar view of Oscillococcinum® when they questioned the need, or lack thereof, for additional research with Oscillococcinum® aimed at providing more convincing validation of the efficacy of Oscillococcinum®. In declaring that any future studies of Oscillococcinum® for the treatment or prevention of the flu would require inordinately large numbers of subjects (~ 1,500) just to be able to detect even a minimal treatment effect (5%) they were, in essence, saying that the effects of Oscillococcinum® that had been observed in the two studies were clinically insignificant. Such studies, they argued, would be highly time consuming and expensive, and therefore "questionable given the equivocal nature of the current date".

70. I concur with the judgment of Drs. Vickers and Smith, and I believe, based on the data discussed in this Declaration, that more such studies of Oscillococcinum® are bot unnecessary and unwarranted. The study of Papp et al. was designed to determine "whether the successful treatments of influenza-like syndromes with Oscillococcinum® reported by Ferley et al. could be repeated". This objective was achieved. The results of both studies clearly showed that the number of flu-sufferers who took Oscillococcinum® stood, at best, only a slightly better chance of improving their symptoms within the first 48 hours than did the flu sufferers who took placebo medication. In my view, such minimal prospects for improvement render Oscillococcinum® no better than placebo, and therefore of insufficient clinical or therapeutic significance to be offered for sale to consumers at all.

[81] In the last section of his report[46], Dr Willis concludes that there is insufficient support to justify any of the marketing statements on the labels and website pertaining to Oscillo.

[82] He concludes as follows:

> VI CONCLUSION
>
> 74. Both of the most rigorous clinical trials of Oscillococcinum® available (Ferley et al. and Papp et al.) have demonstrated that the ability of Oscillococcinum® to relieve flu-like symptoms is only slightly better than the effects of placebo treatment. Accordingly, it is my opinion that Oscillococcinum® lacks clinical relevance and utility for the treatment of flu-like symptoms."

…

[94] It may very well be that, in Dr Willis' opinion, Oscillo products lack clinical relevance and utility; however, the same expert acknowledges an ability of said products, based on credible studies, to relieve flu-like symptoms that is "slightly better" than the effects of placebo treatment."

[Emphasis added]

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

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

47. 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. »

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

IV) Adequacy of the Representative

49. 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 she failed to keep the invoices or packaging of a used product, had not personally communicated with class members, had not made a "reasonable attempt" to find other potential class members other than those who had registered on her attorneys' website, had not personally communicated with Boiron, and had not undertaken sufficient research by the time of the authorization hearing:

> "[108] … She did not keep the invoices nor the packages.
> …
>
> [111] …She read Dr Willis' report but never contacted him nor spoke to him…
>
> [112] The Petitioner did not speak with potential members of the proposed group directly nor did she take steps to find some other than through her attorney's website.
>
> [113] What is there to conclude on the Petitioner's competence from the Motion and from the Petitioner's examination authorized by the Court?
> ..
> [116] Basically, all Petitioner did was read the article on the internet, consult a lawyer and let him manage the matter from there on.
> …
> [118] In this instance, there is no allegation that Petitioner communicated with Boiron, complained, asked questions. There is no allegation that she attempted to find people who had used the Oscillo products and were dissatisfied. What seems, prima facie, to be the real trigger of the recourse is the lawyer-induced opportunity to obtain a settlement in Canada, because one was achieved in the U.S. against Boiron U.S.A., based, prima facie, on different circumstances, including the representations by Boiron U.S.A. on the presence of an "active ingredient".

> [119] The sequence of events described above suggests to the Court that the Petitioner made no reasonable research on Oscillo Products and that she made no reasonable attempt to find other potential group members."

50. 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[12].
>
> [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.* »

51. 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[13]. »

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

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[12] *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.

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

> « [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 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. »

52. 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 have systematically reversed by the Court of Appeal and found insufficient to deny the Petitioner 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. »

53. The Judge in the First Instance added additional factor to consider other than the three factors – failure to keep invoices or packaging of a used product, failure to communicate directly with an expert, failure to speak directly with potential members of the class, failure to find more potential class members being those from the website, and failure to communicate directly with the Respondent. These are not appropriate reasons to deny the Petitioner to act as a representative as none of these are necessary in order to be an adequate representative.

54. In her out-of-court examination of May 23, 2013, the Petitioner explained that she threw out the packaging of the Oscillo product upon finishing the contents at page 13:

> “Q- Did you keep the packages, the boxes?
>
> A- The box? No, we finished it, so I just threw it.”

55. The Judge in the First Instance erred in giving any weight whatsoever to the fact that the Petitioner discarded an empty package of purported medication and particularly

so in that it was improperly used as an indication that she was not an adequate representative. It is unusual for individuals to retain packages of items after they are consumed and the Petitioner should not be held to a higher standard that the average class member.

56. Importantly, in order for the Petitioner to be an adequate representative of the class, she must demonstrate an absence of conflict of interest with other class members. Had the Petitioner retained the packaging of the Oscillo products, it may actually have indicated that she was expecting to sue.

57. Similarly, the Petitioner does not need to have communicated directly with the expert, this is what she had mandated her attorneys to do. In a regular non-class action case, often it is the lawyers who engage the experts and communicate directly with them – this is why a person hires an attorney and does not prosecute their case themselves – to depend on a qualified legal representative.

58. In her out-of-court examination of May 23, 2013, the Petitioner explained that she was aware of and kept up-to-date with regards to the expert at page 26:

> "A- Well, I've kept up to date with my lawyer and when he got Dr. Lynn to do his own evaluation, I was aware of that."

59. In addition, setting up the website into which potential class members could sign up and to receive their information is sufficient in terms of representative adequacy.

60. In her out-of-court examination of May 23, 2013, the Petitioner explained that she put up a link of her attorney's website to communicate with class members at page 27:

> "A- We put up a link on my lawyer's website, so anybody in Canada or whoever in Montreal that did use the product, there's a page of information: name, address, stuff like that, so ...

61. Lastly, the Judge in the First Instance erred in law where he gives weight to the fact that the Petitioner did not communicate with Boiron directly as it is clear that such communication would have served no purpose.

62. There is no requirement for the Petitioner to communicate with the Respondent prior to filing suit; articles 1595-1597 ss. C.C.Q. states:

> "1595. The extrajudicial demand by which a creditor puts his debtor in default shall be made in writing.
>
> The demand shall allow the debtor sufficient time for performance, having regard to the nature of the obligation and the circumstances;

> otherwise the debtor may perform the obligation within a reasonable time after the demand.
>
> 1596. Where a creditor files a judicial demand against the debtor without his otherwise being in default, the debtor is entitled to perform the obligation within a reasonable time after the demand. If the obligation is performed within a reasonable time, the costs of the demand are borne by the creditor.
>
> 1597. A debtor is in default by the sole operation of law where the performance of the obligation would have been useful only within a certain time which he allowed to expire or where he failed to perform the obligation immediately despite the urgency that he do so."

63. While it is true that the Petitioner could have send an extrajudicial demand to the Respondent to demand her money back, there is no requirement to do so and, most informative perhaps, is the fact that at no time in the approximate 2.5 years during the time of the filing of the original Motion until the authorization hearing did the Respondent offer to reimburse the Petitioner, or any class member for that matter, for their purchase of Oscillo. It is also clear that the representations being made by Boiron have also not changed in the past 2.5 years either. As such, it is clear, *ex post facto*, what the result of such this extrajudicial demand would have been - nothing.

64. The fact that the Petitioner can demonstrate, through a website, that other members of the group are in the same situation as her, that she has provided the Court with documentation to help the cause, that she has spent hours investigating and preparing the case, was examined out-of-court, and was present at the authorization hearing shows that she 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. »

65. 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.

66. Finally, when the Trial Judge concludes what it is that the Petitioner had done, this should have been sufficient:

> “[106] Petitioner’s attorney summarizes his argument on her ability to be an adequate representative as follows. The fact that the Petitioner is able to demonstrate that other class members are in the same position as herself through the means of a website, has furnished the Court with documentation to assist in the case, was examined out of Court and was present at the

> authorization hearing is enough to indicate that she is an adequate representative. He argues that she has an understanding of the legal opinions provided and of the issues, is sincere and motivated, depends on experienced attorneys and is willing to dedicate the necessary time to the case.
>
> [107] The Court finds that the Petitioner has a legal interest to sue in that she purchased Oscillo Products and alleges that she did so on the basis of representations…
> …
> [111] Petitioner reviewed the Motion prepared by her attorney. She read Dr Willis' report but never contacted him nor spoke to him. She went over Dr Willis' report briefly and reviewed the Motion before it was filed. She "kept up to date" with her lawyer. She saw that a Class Action suit had been settled in California and "we put up a link on my lawyer's website"…

V. <u>Unfounded Conclusion of Lawyer-Inducement and the Non Sequitur, Consequential Conclusion that is Not in the Best Interests of Class Members</u>

67. The Judge in the First Instance concluded that the Motion was "lawyer-induced" based on nothing more than the fact that a settlement had been reached in the U.S. based on a substantially similar claim against Boiron Inc.:

> "[118] … What seems, *prima facie*, to be the real trigger of the recourse is the lawyer-induced opportunity to obtain a settlement in Canada, because one was achieved in the U.S. against Boiron U.S.A…."

68. While it is accurate that a claim was filed in the U.S. against Boiron Inc. which was subsequently settled, it was neither known to Class Counsel nor to the Petitioner prior to the filing of the original Motion. The U.S. Settlement Agreement was entered into on March 6, 2012, and it was introduced as an exhibit to the Motion (Annex 2) upon an amendment dated April 29, 2013.

69. In her out-of-court examination of May 23, 2013, the Petitioner explained that she had seen that the U.S. class action had been settled during her research after having filed the original Motion at pages 26-27:

> "Q- Okay. Since the filing of the Class Action in April eleven (11), two thousand and twelve (2012), can you tell us what you've done, the positive steps that you've done as a representative?
> …
>
> A- I've been on the Internet just looking for any new information, I also saw that the Class Action suit that was for the company, I saw that it also was settled as well. So I have been just finding as much information as I can…"

70. Similarly, the Motion reiterates the subsequent knowledge of the settlement at paragraphs 32 and 57 in the amendments which are underlined in the Motion (indicating that they are being added as an amendment):

> 32. Petitioner has since discovered, while researching online, that at least two (2) class actions were filed in the United States for this same product due to the false advertising relating to the presence of an active ingredient as well as the ability to provide any health benefit whatsoever, the whole as appears more fully from a copy of said Class Action Complaints, produced herein *en liasse* as Exhibit R-9. More recently, Petitioner has discovered that these actions have been settled (see paragraph 57 below and Exhibit R-12);
> …
>
> 57. …As part of her ongoing research to keep up-to-date on the subject matter, the Petitioner has recently learned that the Respondent has reached a settlement in the case of Gallucci et als. v. Boiron, Inc. et als., Case No 3:11-cv-02039, United States District Court, Southern District of California (Exhibit R-9), whereby consumers received product refunds, as well as, certain labeling changes, the whole as appears more fully from a copy of said Settlement Agreement, produced herein as Exhibit R-12;"

71. All this to say that the original Motion for Authorization made no mention of a U.S. settlement only of a U.S. class action. Had the Petitioner or Class Counsel been aware of it, surely reference would have been made to it and it would have been submitted as an exhibit.

72. More importantly, and in addition, the Judge in the First Instance erred in law by failing to put the best interests of the class members at the forefront in that, even if there was some basis in fact (which it is submitted there wasn't) to conclude that the Motion was "lawyer-driven", there is no reason to thereafter conclude that class members should not receive compensation and be prejudiced by this fact, assuming that such persons are entitled to damages.

73. The rejection of an otherwise valid class action, deprives class members of their rights – how could that serve their interests or society's greater good?

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 January 19, 2015;

GRANT the Appellant/Petitioner's 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 who have purchased Oscillococcinum and Children Oscillococcinum (together “Oscillo”), or any other group to be determined by the Court;

  Alternately (or as a subclass)

- all residents in Quebec who have purchased Oscillococcinum and Children Oscillococcinum (together “Oscillo”), 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 for injunctive relief;

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

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

- Is the Respondent liable to the class members for reimbursement of the purchase price of the Oscillo products as a result of its misconduct?

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

- Is the Respondent 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 Defendant to cease from continuing its unfair and/or deceptive conduct;

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

CONDEMN the Defendant 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 Defendant 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 Defendant 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 judgment to be rendered on the class action to be instituted in the manner provided for by law;

FIX 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 judgment 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 NATIONAL POST;

ORDERS that said notice be available on the Respondent' website with a link stating "Notice to purchasers of Boiron Oscillo products";

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, February 18, 2015

(S) Jeff Orenstein

_____
CONSUMER LAW GROUP INC.
Per: Me Jeff Orenstein
Attorneys for the *APPELLANT*/Petitioner