

# SUPERIOR COURT

(Class actions Chamber)

CANADA  
PROVINCE OF QUÉBEC  
DISTRICT OF MONTREAL

N° : 500-06-000794-160

DATE : June 21, 2024

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**PRESIDING THE HONORABLE PIERRE NOLLET, S.C.J.**

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**SYLVAIN GAUDETTE**

Plaintiff

c.

**WHIRLPOOL CANADA LP  
WHIRLPOOL CORPORATION.  
SEARS CANADA HOLDING CORP**

Defendants

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JUDGMENT ON APPLICATION FOR DISCONTINUANCE<sup>1</sup>

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[1] The Plaintiff seeks leave to discontinue the present class action<sup>2</sup>.

## 1.1 Context

[2] On May 5, 2020, the Court authorized the class action against the Defendants on behalf of the following group:

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<sup>1</sup> Puisqu'il est présentement impossible pour les juges de la Cour supérieure de soumettre leurs projets de jugement au Service de traduction en raison de contraintes techniques et opérationnelles, une traduction du présent jugement ne peut être jointe immédiatement et sans délai conformément à l'article 10 de la *Charte de la langue française*.

<sup>2</sup> Sworn declaration signed by Mr. Gaudette on June 18, 2024.

All residents in Quebec who currently own or have previously owned a Whirlpool, Kenmore, and/or Maytag Front-Loading Washing Machine without a steam feature, manufactured prior to December 31, 2008, but excluding models built on the Sierra platform starting in 2007, which include the following model numbers:

Whirlpool GHW9100, GHW9200, GHW9150, GHW9250, GHW9400, GHW9160, GHW9300, GHW9460, WFW8500, WFW9200, WFW8300, WFW9400, WFW8410, WFW8400, WFW9600, WFW9500, WFW8200, WFW9300, WFW9250, WFW9150;

Kenmore 110.42922, 110.42924, 110.42926, 110.42932, 110.42934, 110.42936, 110.42822, 110.42824, 110.42826, 110.42832, 110.42836, 110.44832, 110.44836, 110.44834, 110.44932, 110.44934, 110.44936, 110.45091, 110.45081, 110.45087, 110.45088, 110.45089, 110.44826, 110.44921, 110.45862, 110.45981, 110.45986, 110.43902, 110.45991, 110.45992, 110.45994, 110.45996, 110.45972, 110.45976, 110.45872, 110.46472, 110.47561, 110.47566, 110.47567, 110.47511, 110.47512, 110.49972, 110.49962, 110.47081, 110.47086, 110.47087, 110.47088, 110.47089, 110.47531, 110.47532, 110.47571, 110.47577, 110.47091, 110.47852, 110.47542;

Maytag MFW9600, MFW9700, MFW9800, MHWZ400, MHWZ600;

(collectively, the Washing Machines)

[3] In its judgment, the Court identified the principal issues of fact and law to be treated collectively as:

- 3.1. Does the design of the Washing Machines prevent the growth or accumulation of dirt, debris, scud, and/or biofilm through their intended use?
- 3.2. If not, is the design of the Washing Machines defective and if so, what are the defects?
- 3.3. Do those defects constitute latent defects under Article 1726 of the *Civil Code of Quebec* or a violation of the statutory warranties found at Articles 37, 38 and 53 of the *Quebec Consumer Protection Act*?
- 3.4. If so, did the Defendants fail to adequately disclose to Class members that the Washing Machines are defective or did they do so in a timely manner?
- 3.5. Did the Defendants breach their duty to inform the members of the Class under the *Civil Code of Quebec* and the *Quebec Consumer Protection Act*?
- 3.6. Should an injunctive remedy be ordered to force the Defendants to recall, repair, and/or replace Class Members' Washing Machines free of charge?

- 3.7. Are the Class members entitled to compensatory, moral, punitive and/or exemplary damages and if so, in what amount?

### 1.2 Reasons for Discontinuance

[4] There is no other pending action anywhere else in Canada. The parallel Ontario action was definitively dismissed on March 13, 2014, when the Supreme Court of Canada refused leave to appeal the dismissal of the plaintiff's motion for certification.

[5] The only merits decision on this matter was in the state of Ohio, where the jury, after only 2 hours of deliberations, returned a verdict in favour of Whirlpool.

[6] On April 18, 2016, the U.S. parties settled a class action certified in 2010. This national settlement was approved by the Honourable Mr. Justice Christopher Boyko, U.S. District Court Judge for the Northern District of Ohio on September 23, 2016<sup>3</sup>.

[7] The terms of the settlement in the U.S. were as follows: Class members who experienced a mold or odor problem with their class washer within 5 years of purchase were eligible to choose 1 of 3 options, either:

- 7.1. a cash payment of USD 50;
- 7.2. a rebate of 20% off the retail purchase price (excluding sales taxes, delivery fees, and installation charges) of certain new Whirlpool-manufactured washers and dryers;
- 7.3. up to USD 500 for either: 1. reimbursement of out-of-pocket costs to service a class washer as a result of a mold or odor problem (documentary proof required) or 2. reimbursement for buying a replacement washing machine as a result of a mold or odor problem with a class washer (additionally documentation must showing that, before replacing the washer, there were at least three incidents of mold and odor for which a complaint was made, there were service calls, or attempts were made to remedy the problem themselves). However, no replacement expenses were reimbursed if they were incurred after December 31, 2015;

[8] Class members who did not experienced a mold or odor problem within 5 years of purchase of their class washer were eligible to receive a rebate of 5% off the retail purchase price (excluding sales taxes, delivery fees, and installation charges) of certain new Whirlpool-manufactured washers or dryers or a washer and dryer pair.

[9] The U.S. settlement also provided for USD 7,450,000 in attorneys' fees, plus USD 7,300,000 in reimbursements of costs, and honorariums of USD 4,000 per plaintiff.

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<sup>3</sup> Case: 1:08-wp-65000-CAB Doc #: 656 Filed: 09/23/16. PageID #: 46789.

[10] The U.S. settlement does not provide any settlement fund (collective recovery) and is based on individual recovery only. Class members receive a small sum of money or a discount on a future Whirlpool washer. The terms of this deal do not appear to be a plaintiff “win”, but rather reflect the Defendants avoiding state-by- state trials that would have extended for many years, as Justice Boyko wrote in his Judgment approving the U.S. settlement at page 4<sup>4</sup>:

[11] The washing machines in question are model years 2001-2008. The average life expectancy of a washing machine according to Consumer Reports<sup>5</sup> is 10 years.

[12] At present, the Class washing machines are between 16-23 years old. As such, most Class Members will no longer be in possession of their Whirlpool washing machines; those that do have them, would have a hard time complaining, as they lasted longer than the industry standard.

[13] On August 16, 2012, the Honourable Mr. Justice Paul Perell, Judge of the Ontario Superior Court of Justice, dismissed the plaintiff’s motion for certification in the parallel class action “on behalf of Canadian residents, excluding Québec, who owned a 2001 to 2008 Whirlpool front-loading washing machine or who previously owned the machine”.<sup>6</sup>

[14] On October 31, 2013, the Court of Appeal for Ontario upheld the Superior Court decision and dismissed the appeal.<sup>7</sup>

[15] On March 13, 2014, the Supreme Court of Canada dismissed the plaintiff’s application for leave to appeal.<sup>8</sup>

[16] The file in Ontario has been terminated and closed now for 10 years.

[17] There are currently 16,974 individuals that have registered on Class Counsel’s website. That number goes back as early as 2010 and proof of their membership has not been verified.

[18] And while this may appear like an “active” Class, Class Counsel’s experience has been quite different. On October 3, 2022, Class Counsel sent an email to all of its registered individuals asking them to voluntarily submit to an examination by technological means for a maximum of 1 hour on their expectations and use of their washing machines as well as their alleged damages (this was to satisfy the judgment rendered by Justice Courchesne, J.S.C. in *Gaudette c. Whirlpool Canada*, in 2021 and upheld by the Court of Appeal.

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<sup>4</sup> Case: 1:08-wp-65000-CAB Doc #: 656 Filed: 09/23/16 4 of 54. PageID #: 46792

<sup>5</sup> R-2. <https://www.consumerreports.org/cro/news/2009/03/by-the-numbers-how-long-will-your-appliance-last-it-depends/index.htm>

<sup>6</sup> *Arora v. Whirlpool Canada LP*, 2012 ONSC 4642.

<sup>7</sup> *Arora v. Whirlpool Canada LP*, 2013 ONCA 657.

<sup>8</sup> 2014 CanLII 11047 (SCC).

[19] Of the thousands of individuals that received this email, only 72 responded and agreed to be examined. Recently, after 10 of these individuals were selected by the Court, only 4 of them voluntarily accepted to be examined; the other 6 either failed to respond, tried to drop out, or never agreed to show up for an examination. It is likely that 6 of the 10 persons would have required to be served with a subpoena.

[20] The document discovery process that was already underway is massive and would require months to sift through all the documents. The examinations of both sides will be lengthy. The expert reports will be expensive.

[21] When looking at proportionality and balancing the chance of recovery (the 1 trial was decided in favour of Whirlpool) and the amount of possible recovery (damages on very old washing machines) against the time and costs of proceeding to a contested trial – the case does not make financial sense to the Plaintiff or the Class.

[22] Class Counsel, who is working on a contingency basis, no longer thinks this case is viable.

[23] After multiple discussions and negotiations, the Plaintiff has agreed to seek leave to discontinue the class action without costs. The Defendants have agreed to consent to such a discontinuance application, without costs.

[24] The Defendants have also agreed to reimburse Class Counsel for its out-of-pocket expenses, in the total amount of CDN\$30,000 plus applicable taxes. However, such sum will be reimbursed to the Defendants within five business days if a replacement action on behalf the same class or a subset thereof is filed by any firm within 12 months of the discontinuance decision.

[25] The Plaintiff and Defendants' consent to the discontinuance application, without costs, is not in any way conditional upon any order, ruling or determination made by the Court with respect to this sum of \$30,000. plus applicable taxes offered as partial reimbursement of Class Counsel fees.

[26] Class Counsel requested that the notice be published on its website for a duration of 120 days. Given i) that several Class Members may never have registered with Class Counsel or may have changed their email address without advising Class Counsel since they registered, and ii) the agreed-upon 12-month period for a potential replacement action, the Court believes that the interests should be aligned by making the discontinuance order available on Class Counsel's website for a similar period of 12 months.

[27] In the present case, the email notice being the most important way to notify Class Members the Court also needs to ensure that emails are being sent to Class Members who registered with Class Counsel. A report will be requested from Class Counsel.

**POUR CES MOTIFS, LE TRIBUNAL :**

**ACCUEILLE** la demande;

**GRANTS** the application;

**AUTORISE** le Demandeur à se désister de la Demande introductive d'instance modifiée;

**AUTHORIZES** the Plaintiff to discontinue the Amended Application to Institute Proceedings;

**PERMET** au Demandeur de produire son désistement au dossier de la Cour dans les 30 jours de la date du présent Jugement;

**ALLOWS** the Plaintiff to file his discontinuance in the Court record within 30 days following the date of this Judgment;

**APPROUVE** le texte de l'avis public aux Membres du Groupe selon le texte reproduit à la Pièce R-3, une copie duquel demeure jointe au présent jugement;

**APPROVES** the text of the public notice to Class Members in accordance with Exhibit R-3 a copy of which remains attached to this judgment;

**ORDONNE** au Demandeur de veiller à la publication dudit avis public, sous forme bilingue :

**ORDERS** the Plaintiff to ensure that said public notice be published, in bilingual format:

Au Registre des actions collectives du Québec;

On the Quebec Class Actions Registry;

Sur le site internet [www.clg.org](http://www.clg.org) durant au moins 365 jours consécutifs;

On the website [www.clg.org](http://www.clg.org) for a duration of at least 365 consecutive days;

**ORDONNE** qu'une copie dudit avis public soit transmise par courriel par les avocats du Groupe, dans les 30 jours du présent jugement, aux 16,974 personnes qui se sont inscrites sur le site web des avocats du Groupe, exprimant leur intérêt dans la présente action collective;

**ORDER** that a copy of said public notice be sent by email by Class Counsel within 30 days of this judgment, to the 16,974 individuals that have registered on Class Counsel's website, expressing an interest in the present action;

**ORDONNE** la remise d'un rapport au Tribunal par les avocats du Groupe, dans les 60 jours du présent jugement, confirmant le nombre de courriels envoyés et indiquant le nombre de courriels qui n'ont pas atteint leur destinataire.

**ORDERS** that Class Counsel provide a report to the Court, within 60 days of this judgment, confirming the number of emails sent and indicating the number of emails that did not reach their intended recipients.

**LE TOUT** sans frais de justice.

**THE WHOLE** without legal costs.

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PIERRE NOLLET, J.C.S.

Me Jeffrey Orenstein  
CONSUMER LAW GROUP INC..  
Attorneys for the Plaintiff

Me Laurent Nahmiash  
Me Josée Cavalancia  
INF LLP  
Attorneys for the Defendants

Date d'audience : Paper process

## Pièce R-3 / Exhibit R-3

<b>AVIS DE DÉSISTEMENT D'UNE ACTION COLLECTIVE</b>	<b>NOTICE OF DISCONTINUANCE OF A CLASS ACTION</b>
<p>1. Le 5 mai 2020, la Cour supérieure du Québec a autorisé l'action collective contre les Défenderesses dans le district de Montréal, sous le numéro de dossier 500-06-000794-160, au nom du groupe suivant:</p> <ul style="list-style-type: none"> <li>• <i>Tous les résidents du Québec qui possèdent actuellement ou qui ont déjà possédé une laveuse à chargement frontal Whirlpool, Kenmore et/ou Maytag sans fonction vapeur, fabriqué avant le 31 décembre 2008, mais excluant les modèles construits sur la plateforme Sierra à partir de 2007, qui inclut les numéros de modèle sont les suivants :</i></li> </ul> <ul style="list-style-type: none"> <li>- <i>Whirlpool</i>      GHW9100,      GHW9200, GHW9150,      GHW9250,      GHW9400, GHW9160,      GHW9300,      GHW9460, WFW8500,      WFW9200,      WFW8300, WFW9400,      WFW8410,      WFW8400, WFW9600,      WFW9500,      WFW8200, WFW9300, WFW9250, WFW9150;</li> <li>- <i>Kenmore</i>      110.42922,      110.42924, 110.42926,      110.42932,      110.42934, 110.42936,      110.42822,      110.42824, 110.42826,      110.42832,      110.42836, 110.44832,      110.44836,      110.44834, 110.44932,      110.44934,      110.44936, 110.45091,      110.45081,      110.45087, 110.45088,      110.45089,      110.44826, 110.44921,      110.45862,      110.45981, 110.45986,      110.43902,      110.45991, 110.45992,      110.45994,      110.45996, 110.45972,      110.45976,      110.45872, 110.46472,      110.47561,      110.47566, 110.47567,      110.47511,      110.47512, 110.49972,      110.49962,      110.47081, 110.47086,      110.47087,      110.47088,</li> </ul>	<p>1. On May 5, 2020, the Superior Court of Quebec authorized the class action against the Defendants in the district of Montreal, under file number 500-000794-160, on behalf of the following class:</p> <ul style="list-style-type: none"> <li>• <i>All residents in Quebec who currently own or have previously owned a Whirlpool, Kenmore, and/or Maytag Front-Loading Washing Machine without a steam feature, manufactured prior to December 31, 2008, but excluding models built on the Sierra platform starting in 2007, which include the following model numbers:</i></li> </ul> <ul style="list-style-type: none"> <li>- <i>Whirlpool</i> GHW9100, GHW9200, GHW9150, GHW9250, GHW9400, GHW9160, GHW9300, GHW9460, WFW8500, WFW9200, WFW8300, WFW9400, WFW8410, WFW8400, WFW9600, WFW9500, WFW8200, WFW9300, WFW9250, WFW9150;</li> <li>- <i>Kenmore</i> 110.42922, 110.42924, 110.42926, 110.42932, 110.42934, 110.42936, 110.42822, 110.42824, 110.42826, 110.42832, 110.42836, 110.44832, 110.44836, 110.44834, 110.44932, 110.44934, 110.44936, 110.45091, 110.45081, 110.45087, 110.45088, 110.45089, 110.44826, 110.44921, 110.45862, 110.45981, 110.45986, 110.43902, 110.45991, 110.45992, 110.45994, 110.45996, 110.45972, 110.45976, 110.45872, 110.46472, 110.47561, 110.47566, 110.47567, 110.47511, 110.47512, 110.49972, 110.49962, 110.47081, 110.47086, 110.47087, 110.47088,</li> </ul>



<p>110.47086, 110.47087, 110.47088, 110.47089, 110.47531, 110.47532, 110.47571, 110.47577, 110.47091, 110.47852, 110.47542;</p> <p>- <i>Maytag MFW9600, MFW9700, MFW9800, MHWZ400, MHWZ600</i></p> <p>(collectivement, les Lave-linges)</p> <p>2. Le 21 juin 2024, la Cour supérieure du Québec a autorisé le Demandeur à se désister des procédures judiciaires, mettant ainsi fin à l'action collective.</p> <p>SOYEZ AVISÉ que le Tribunal ayant maintenant permis le désistement, l'action collective est terminée. <b>Les délais de prescription ne sont plus suspendus. Par conséquent, les Membres du Groupe ne seront plus représentés par l'action collective et il leur appartient d'instituer une action distincte, s'ils le désirent.</b></p> <p>Pour plus d'informations sur cette action collective, vous pouvez consulter <a href="https://www.clq.org/Recours-Collectif/Liste-des-recours-collectifs/Whirlpool--laveuse-avec-moisissure--recours-collectif">https://www.clq.org/Recours-Collectif/Liste-des-recours-collectifs/Whirlpool--laveuse-avec-moisissure--recours-collectif</a></p> <p>Sur ce site, vous pourrez télécharger et consulter les documents suivants : (a) le Jugement accordant l'autorisation ; (b) les procédures judiciaires ; et (c) le Jugement autorisant le désistement.</p>	<p>110.47089, 110.47531, 110.47532, 110.47571, 110.47577, 110.47091, 110.47852, 110.47542;</p> <p>- <i>Maytag MFW9600, MFW9700, MFW9800, MHWZ400, MHWZ600;</i></p> <p>(collectively, the Washing Machines)</p> <p>2. On June 21, 2024, the Superior Court of Quebec authorized the Plaintiff to discontinue the legal proceedings, thereby putting an end to the class action.</p> <p>BE AWARE that now that the Court has allowed the discontinuance, the class action will be terminated. <b>Limitation periods (i.e. prescription) are no longer suspended. Therefore, Class Members will be required to pursue their own legal claims, should they so desire.</b></p> <p>For more information on this class action, you may visit <a href="https://www.clq.org/Class-Action/List-of-Class-Actions/Whirlpool-Washing-Machine-Mould-Class-Action">https://www.clq.org/Class-Action/List-of-Class-Actions/Whirlpool-Washing-Machine-Mould-Class-Action</a></p> <p>On this website, you can also download and view the following documents: (a) the Judgment granting authorization; (b) the Court proceedings; and (c) the Judgment allowing the discontinuance.</p>
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