SUPERIOR COURT

CANADA
PROVINCE OF QUEBEC
DISTRICT OF MONTREAL

No: 500-06-000609-129

DATE: January 19, 2015

IN THE PRESENCE OF THE HONOURABLE LOUIS LACOURSIÈRE, J.S.C.

ADANNA CHARLES
Petitioner

v.

BOIRON CANADA INC.
Respondent

JUDGMENT

I INTRODUCTION

[1] The Petitioner wishes to institute a 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.

(the "Group")

JL 3454

[2] The Petitioner, who was examined out of Court further to a judgment rendered on January 16, 2013, is the mother of two children.

[3] The Amended Motion to Authorize the Bringing of a Class Action and to Ascribe the Status of Representative (the "Motion") alleges that the Petitioner purchased Oscillococcinum ("Oscillo") and Children Oscillococcinum ("Children Oscillo") from a Jean Coutu drugstore in the West Island of Montreal for herself and her 5 year old son, after reading the Respondent's labelling.

[4] The original motion was served in April of 2012.

[5] Petitioner's position is summarized at the outset of the Motion:

> 3. Oscillo was falsely marketed to have the ability to cure the flu with its purported active ingredient *Anas Barbarie Hepatis et Codis extractum*, more particularly known as autolysate of the liver and heart of the duck *anas barbariae*;

[6] The Petitioner's position is therefore that she (and the members of the Group) was mislead and that Respondent induced her into purchasing a product which did not live up to its "promised results". In fact, Petitioner claims that Oscillo is nothing more than a placebo pill comprised of sugar (85% sucrose and 15% lactose).

[7] Boiron Canada Inc. ("Boiron") is a federally incorporated company whose head office is in Saint-Bruno de Montarville, Quebec.

[8] Boiron's parent company, Boiron Inc., is a French company created in 1932 which has an operating presence in some 80 countries and has some 4,000 employees worldwide.

II THE MOTION

[9] The Motion first alleges that as many as 8 000 Canadians die of influenza and its complications annually[1] and that in April 2009, a virulent pandemic known as "swine flu" or "H1N1" spread across North America; the public's fear of flu infection has fuelled the emergence of various alternative medicines, including homeopathic "remedies" such as Oscillo.

[10] The Motion states that Boiron took advantage of this situation by making various claims about the purported characteristics of Oscillo to drive enormous sales.

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[1] R-2.

[11] The Motion refers to the websites of Boiron USA[2] and Boiron[3] as follows:

> 14. The Respondent claims that "four clinical studies, including two which have been published in peer-reviewed journals, show that Oscillo reduces the severity and duration of flu-like symptoms such as feeling run down, headache, body aches, chills and fever", and that Oscillo "nips symptoms in the bud" with "clear improvement" and even "complete resolution within 48 hours", the whole as appears more fully from a copy of the Respondent's website www.oscillo.com, produced herein as **Exhibit R-3**;
>
> 15. Boiron advertises Oscillo as a treatment and cure for the symptoms of seasonal flu, also known as the common cold, by indicating that "at the first sign of flu symptoms, take OSCILLO®!" and that "OSCILLO® is recommended by Graham Rynbend, head athletic therapist for the Montreal Canadiens", the whole as appears more fully from a copy of the Respondent's website www.boiron.ca, produced herein as **Exhibit R-4**;

[12] It also reproduces the product labelling of Oscillo:

> 16. The product labelling of Oscillococcinum states:
> "Nature's #1 Flu medicine
> SYMPTOMS OF FLU:
> Fever, Chills, Body Aches and Pains
> INDICATIONS:
> For relief of symptoms of flu such as fever, chills, body aches and pains.
> DIRECTIONS
> At the onset of flu like symptoms, take one dose and repeat for 2 more doses at 6 hour intervals (3 doses total)
> Established flu symptoms, take one dose morning and evening for 3 days. One dose consists of the entire contents of one tube to dissolve in the mouth.
> Will not cause drowsiness"
> The whole as appears more fully from a copy of the product label, produced herein as **Exhibit R-5**. Oscillococcinum Children's product label is produced herein as **Exhibit R-6**;

[13] The Petitioner then reiterates that Oscillo products are nothing more than a sugar pill which contains no active ingredient and has no effect on flus, colds or their symptoms.

[14] The Motion alleges that the purported active ingredient of the Oscillo products, an extract or preparation of the heart and liver of a duck (*Anas Barbariae Hepatis et Cardis Extractum*) is not present in the product sold due to the "stupendously" high dilutions used to prepare the Oscillo product[4].

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2 R-3.
3 R-4.
4 Par. 18 to 22 of the Motion and R-7 and R-8.

[15] In particular, paragraphs 19.1, 20, 21, 22.1, 22.2, 24 and 25 of the Motion state:

> 19.1 Oscillo 200C does not contain a single molecule of the duck organs that serve as the raw materials for the production of the final "remedy." The designation "C" represents an initial dilution of 1 to 100, and 200C means repeating this 200 times. "C" is confusing to the consumer because a larger number actually means a smaller dose (contrary to what a reasonable person would think) and further the term does not conform to the Canadian Weights and Measures Act at Section 7 and Schedules I and II;
>
> 20. Even if this purported active ingredient were present in any significant way, it has no known impact on the human body whatsoever and it is nothing more that Muscovy Duck Liver and Heart, which French cooks use to prepare duck breast;
>
> 21. The active ingredient, *Anas Barbariae Hepatis et Cordis Extractum*, is neither active in combatting the flu nor is in(sic) actually an ingredient in the final product. In fact, some of the product's labeling even states that the non-medicinal ingredients are "0,85g of sucrose and 0,15g of lactose", which adds up to 1, leaving no room for any other ingredient. Consequently, and contrary to some of the product's labeling the "medicinal ingredients" in Oscillo are not even "ingredients" in the final product;
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> 22.1 Oscillo has also been criticized by Dr. Professor Joe Schwarcz as being nothing more than a placebo, the whole as appears more fully from a copy of the article entitled "Homeopathy - Delusion through Dilution", produced herein as **Exhibit R-10**;
>
> 22.2 In addition, Dr. Lynn Willis has studied the scientific literature related to Oscillo and has offered his expert opinion that:
>
> "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."
>
> the whole as appears more fully from a copy of said Expert Report, produced herein as **Exhibit R-11**;
>
> 24. Given that a significant factor in a consumer's decision to purchase a flu remedy is the presence of an effective active ingredient, the Respondent's misrepresentations and omissions of material fact induced consumers to purchase the product;
>
> 25. Boiron utilized false claims regarding the alleged presence of the active ingredient of Oscillo to persuade consumers to believe that it would significantly reduce, if not completely cure, their flu symptoms;

[16] The Motion alleges that Boiron's failure to state the truth regarding Oscillo and its purported active ingredient brings consumers to spend millions of dollars a year to no avail[5] and that its false, misleading and deceptive acts and practices allowed Boiron to "reap millions of dollars" at the expense of gullible consumers.

[17] The Motion then deals with the Petitioner's individual claim.

[18] In essence, Petitioner claims that she believed, after reading the label, that Oscillo and Oscillo Children would help her and her child relieve their flu symptoms, which they did not, in that they had "no noticeable effect on their flu symptoms"[6].

[19] She adds that she has since discovered that the ingredients in the products have no proven health benefits and are so diluted that they are not even present in the final product; had she known the true facts, she would not have purchased the Oscillo products.

[20] The facts giving rise to an individual action by each of the members of the Group are described as follows:

> 36. Every member of the class has purchased an Oscillo product believing that it contained an active ingredient that would combat their flu symptoms effectively;
>
> 37. The class members were, therefore, induced into error by the Respondent's false and misleading advertising;
>
> 38. Had the Respondent disclosed the truth about Oscillo, that the active ingredient was neither present nor medically effective, reasonable consumers would not have purchased the product;
>
> 39. Each member of the class is justified in claiming at least one or more of the following as damages:
>
> a. The purchase price of the product;
> b. Punitive damages;
>
> 40. Respondent engaged in wrongful conduct, while at the same time obtaining, under false pretences, significant sums of money from class members;
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> 41. All of these damages to the class members are a direct and proximate result of the Respondent's conduct and their false and misleading advertising;

[21] The Petitioner then states that the conditions required to institute a class action are met.

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5 Par. 23 to 25 of the Motion.
6 Par. 30 of the Motion.

[22] The composition of the class renders the application of art. 59 or 67 of the Code of Civil Procedure ("C.C.P.") difficult or impractical[7].

[23] There are, according to Petitioner, common questions which satisfy art. 1003 a) C.C.P. She identifies them as follows:

> 50. The recourses of the members raise identical, similar or related questions of fact or law, namely:
>
> a) Did the Respondent engage in unfair, false, misleading, or deceptive acts or practices regarding the marketing and sale of its Oscillo products?
>
> b) Is the Respondent liable to the class members for reimbursement of the purchase price of the Oscillo products as a result of their misconduct?
>
> c) Should an injunctive remedy be ordered to prohibit the Respondent from continuing to perpetrate their unfair, false, misleading, and/or deceptive conduct?
>
> d) Is the Respondent responsible to pay compensatory and/or punitive damages to class members and in what amount?

[24] The Petitioner describes the action as an action in damages and seeks injunctive remedy. She asks for the following conclusions:

> 53. The conclusions that the Petitioner wishes to introduce by way of a motion to institute proceedings are:
>
> GRANT the class action of the Petitioner and each of the members of the class;
>
> ORDER the Defendant to cease from continuing their unfair, false, misleading, and/or deceptive conduct;
>
> DECLARE the Defendant liable for the damages suffered by the Petitioner and each of the members of the class;
>
> 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;

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[7] 1003 c) C.C.P.; par. 42 to 47 of the Motion.

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;

[25] Finally, Petitioner requests to be attributed the status of representative of the class[8]. She is ready to manage and direct the action in the interest of the members, has engaged a man as expert, Dr Lynn Willis, to evaluate and critique the state of the scientific literature available on Oscillo[9], has kept up to date on developments dealing with similar litigation in the USA[10] and is willing to dedicate herself to the task.[11]

III THE LAW

[26] In a recent judgment[12], the Court summarized the state of the law regarding the application of art. 1003 C.C.P.:

> [25] Deux grands principes sous-tendent l'application de l'article 1003 *C.p.c.*
>
> [26] D'abord, l'appréciation des critères doit se faire conformément à l'esprit des amendements de 2002, c'est-à-dire en évitant que la procédure d'autorisation ne se transforme en pré-enquête sur le fond.
>
> [27] Ensuite, les conditions de l'article 1003 *C.p.c.* ne doivent pas être interprétées de façon si restrictive qu'elles ne permettraient plus au recours collectif de remplir son objectif social, c'est-à-dire de permettre à des parties aux ressources limitées (et aux réclamations souvent modestes) d'obtenir réparation. Par ailleurs, une interprétation trop libérale pourrait amener l'utilisation du recours collectif à mauvais escient.
>
> [28] La Cour suprême, dans un arrêt récent[4], décrit ainsi le rôle du juge saisi d'une demande d'autorisation d'exercer un recours collectif :
>
> > [37] L'étape de l'autorisation permet l'exercice d'une fonction de filtrage des requêtes, pour éviter que les parties défenderesses doivent se défendre au fond contre des réclamations insoutenables : *Infineon Technologies AG c. Option Consommateurs*, 2013 CSC 59, par. 59 et 61. Par contre, la loi n'impose pas au requérant un fardeau onéreux au stade de l'autorisation; il doit uniquement démontrer l'existence d'une

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8 1003 d) C.C.P.
9 R-11.
10 R-12.
11 Par. 54 to 61 of the Motion.
12 *Erik Charest* v. *Dessau inc. et al.*, 2014 QCCS 1891 ; appeal dismissed on November 3, 2014, 500-09-024488-140 (Doyon, St-Pierre and Schrager, JJ.).

« apparence sérieuse de droit », d'une « cause défendable » : *Infineon*, par. 61-67; *Marcotte c. Longueuil (Ville)*, 2009 CSC 43, [2009] 3 R.C.S. 65, par. 23. En conséquence, le juge doit simplement déterminer si le requérant a démontré que les quatre critères énoncés à l'art. 1003 *C.p.c.* sont respectés. Dans l'affirmative, le recours collectif est autorisé. La Cour supérieure procède ensuite à l'examen du fond du litige. Ainsi, lorsqu'il vérifie si les critères de l'art. 1003 sont respectés au stade de l'autorisation, le juge tranche une question procédurale. Il ne doit pas se pencher sur le fond du litige, étape qui s'ouvre seulement après l'octroi de la requête en autorisation : *Infineon*, par. 68; *Marcotte*, par. 22.

[29] La jurisprudence a développé certains grands axes, applicables au dossier en l'instance, pour guider le juge saisi de la demande d'autorisation :

a) le juge doit simplement s'assurer que le requérant satisfait aux critères de l'article 1003 *C.p.c.* sans oublier le seuil de preuve peu élevé prescrit par cette disposition[5];

b) le juge jouit d'une discrétion dans l'appréciation des quatre critères de l'article 1003 *C.p.c.*[6]. Cependant, une fois ces quatre critères jugés satisfaits, il est dépouillé de tout pouvoir additionnel et il doit autoriser le recours[7];

c) l'analyse des critères d'autorisation doit bénéficier d'une approche généreuse plutôt que restrictive. Ainsi, le doute doit jouer en faveur des requérants, c'est-à-dire en faveur de l'autorisation du recours collectif[8];

d) la règle de la proportionnalité de l'article 4.2 *C.p.c.* doit être considérée dans l'appréciation de chacun des critères de l'article 1003 *C.p.c.* mais ne constitue pas un cinquième critère indépendant[9];

e) le défaut de satisfaire un seul des quatre critères de l'article 1003 *C.p.c.* devrait entrainer le rejet de la requête[10];

f) le juge doit exclure de son examen les éléments de la requête qui relèvent de l'opinion, de l'argumentation juridique, des inférences, des hypothèses ou de la spéculation. Le requérant doit alléguer des faits suffisants pour que soit autorisé le recours[11];

g) enfin, le Tribunal doit s'assurer que les parties ne soient pas inutilement assujetties à des litiges dans lesquels elles doivent se défendre contre des demandes insoutenables. Le fardeau imposé au requérant consiste à établir une cause défendable[12].

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[4] Vivendi Canada inc. c. Dell'Aniello, 2014 CSC 1.
[5] Infineon Technologies AG c. Option Consommateurs, 2013 CSC 59, par. 59.
[6]. Union des consommateurs c. Bell Canada, 2012 QCCA 1287, par. 89.
[7] Bouchard c. Agropur coopérative, 2006 QCCA 1342, par. 36.
[8] Infineon Technologies AG, précité, note 5, par. 60; Union des consommateurs, précité, note 6, par. 117.
[9] Vivendi Canada inc, précité, note 4, par. 66.

[10] Option Consommateurs c. Novopharm ltée, 2006 QCCS 118, par. 71; appel rejeté 2008 QCCA 949; demande de permission d'en appeler à la Cour suprême rejetée, 2008 CANLII 63502 (CSC).
[11] Option Consommateurs c. Bell Mobilité, 2008 QCCA 2201, par. 37-38.
[12] Infineon Technologies AG, précité, note 5, par. 61-67.

[27] The Court of Appeal recently reiterated[13] the guidelines which should be followed in assessing whether the conditions of 1003 C.C.P. have been met:

> [35] La Cour suprême a récemment saisi l'occasion du pourvoi dans *Infineon Technologies AG*[1] pour rappeler que, à l'étape de l'autorisation, le tribunal doit s'assurer que les critères de l'article 1003 *C.p.c.* sont satisfaits en ayant à l'esprit le seuil de preuve peu élevé que requiert cette disposition.
>
> [36] Une application large des conditions d'autorisation répond en effet à une volonté de faciliter l'exercice des recours collectifs comme moyen d'atteindre les objectifs de dissuasion et d'indemnisation[2].
>
> [37] On dit ainsi de la procédure d'autorisation qu'elle ne constitue pas un procès sur le fond, mais plutôt un mécanisme de filtrage servant simplement à écarter les demandes frivoles pour éviter que des parties aient à se défendre contre des demandes insoutenables.
>
> [38] À cette étape, les faits allégués sont tenus pour avérés, mais il est impératif que ceux-ci paraissent justifier les conclusions recherchées, ce qui suppose que les allégations soient suffisamment précises de façon à soutenir efficacement la reconnaissance du droit revendiqué[3].
>
> [39] Mon collègue, Jacques Dufresne, souligne à cet égard que :
>
> > Le juge autorisateur doit adopter, il est vrai, une démarche analytique souple, mais encore faut-il que les allégations de la requête ne participent pas uniquement de généralités. En effet, plus l'allégation est générale, moins les faits ressortent, et plus on court le risque de se rapprocher davantage de l'opinion. Bref, les allégations de fait doivent être suffisamment précises de manière à soutenir efficacement la reconnaissance du droit revendiqué et ainsi permettre au juge autorisateur d'en apprécier la suffisance[4].
>
> [40] Les autres éléments de preuve versés au dossier dont les pièces, les déclarations sous serment ainsi que les interrogatoires doivent également être pris en compte par le juge saisi de la demande d'autorisation[5].
>
> [41] Le requérant assume alors un fardeau de démonstration et non de preuve[6]. Il n'a pas à établir que sa demande sera probablement accueillie, il lui suffit de démontrer « l'existence d'une cause défendable eu égard aux faits et au droit applicable »[7]

[1] Infineon Technologies AG c. Option consommateurs, 2013 CSC 59, [2013] 3 R.C.S. 600, par. 67.
[2] Marcotte c. Ville de Longueuil, 2009 CSC 43, [2009] 3 R.C.S. 64, par. 22.
[3] Infineon Technologies AG, précité, note 1, par. 67; Labelle c. Agence de développement des réseaux locaux de services de santé et de services sociaux - région de Montréal, 2011 QCCA 334, par. 59-60.

[13] *Toure* v. *Brault & Martineau inc.*, 2014 QCCA 1577 (Morissette, Savard, Gagnon JJ.).

[4] Fortier c. Meubles Léon ltée, 2014 QCCA 195, par. 69.
[5] Union des consommateurs c. Bell Canada, 2012 QCCA 1287, par. 68, requête pour autorisation de pourvoi à la CSC refusée, 17 janvier 2013, 34994.
[6] Martin c. Société Telus Communications, 2010 QCCA 2376, par. 32.
[7] Infineon Technologies AG, précité, note 1, par. 65.

IV GROUNDS OF CONTESTATION

[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.:

- The facts alleged by Petitioner do not seem to justify the conclusions sought[14];
- Petitioner is not in a position to represent the members of the Group adequately[15];

[29] With regards to condition b), Boiron argues that:

a) Petitioner's allegations are generalities, hypotheses, speculations and opinions which cannot be taken as true;

b) Petitioner's allegations of facts are contradicted by other allegations of the Motion and by Petitioner's owns exhibits;

c) Petitioner's allegations of facts are contradicted by the evidence adduced in the file;

d) The premises of the legal syllogism of the Petitioner are erroneous because Boiron does not represent that Oscillo contains an active ingredient nor are its representations on the efficacy of Oscillo false because, as admitted by Petitioner's own expert, Dr Willis, Oscillo is more efficient than the placebo effect;

e) In any event, the *Food and Drugs Act*[16] and the *National Health Products Regulations*[17] (the "Regulations") require that Boiron provide the information found on the Oscillo labels; Boiron therefore complies with statutory obligations;

f) Petitioner's recourse is not appropriate in the circumstances.

[30] With regards to condition d), Boiron argues that :

a) Petitioner is not competent to act as a representative;

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14 1003 b) C.C.P.
15 1003 d) C.C.P.
16 R.S.C. 1985, c. F-27.
17 SOR / 2003-196.

b) Petitioner is in a situation of conflict of interest.

V DISCUSSION

[31] Boiron's main ground of contestation is that condition b) of 1003 C.C.P. has not been met.

i) Condition b) of article 1003 C.C.P.

[32] Petitioner's proposed legal syllogism is the following: she was mislead by Boiron in the context of the sale of Oscillo and Children Oscillo products and this entails the latter's liability to refund the purchase price and to pay punitive damages.

a) The context

[33] It is useful to put Petitioner's claim in context on the basis of the allegations of the Motion, of Peritioner's examination out of Court and of the evidence authorized by the Court.

[34] The Petitioner bought the products in January or February of 2011. She felt no reaction of any kind after taking Oscillo, nor did her son after taking Children Oscillo.

[35] Some two months later, surfing on the Internet, she saw an article on the Oscillo products, read that two plaintiffs in the USA were saying that the product did not prove effective and that the pills were very diluted: "it reminded me that maybe that's why it didn't work for me and my son"[18].

[36] She spoke to her mother about this and then to a friend who suggested that she could contact a lawyer she knew who handled "Class Action cases".

[37] There is however some confusion as to the date the Petitioner read about the "U.S. plaintiffs" on the Internet as the claims against Boiron USA were brought in August of 2011[19] (Petitioner therefore had to read about the USA cases after August 2011).

[38] The evidence allowed by the Court, over and above the transcript of the Petitioner's examination on discovery, was an affidavit by Mr Philip Waddington[20] dated July 31, 2013, the Product Licenses issued by Health Canada pertaining to Oscillo and Children Oscillo[21] and, as a result of allowing the above-mentioned affidavit, the transcript of Mr Waddington's examination[22] out of Court.

[39] In summary, the affidavit enlightens the Court in the following fashion.

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18 Examination out of Court, p. 20.
19 R-9, p. 15 and 16.
20 I-2.
21 I-3.
22 I-4.

[40] Mr Waddington was Director General of the Natural Health Products Directorate of Health Canada from 2000 to 2008. He held that position when the Regulations came into force in January of 2004.

[41] He explains that the Regulations came into force following recommendations of the Standing Committee on Health and that the mandate of those overseeing them was to ensure that all Canadians "have ready access to natural health products that are safe, effective and of high quality, while respecting freedom of choice and philosophical and cultural diversity".

[42] The affidavit explains the process to obtain a Product License:

> 7. To obtain a license, a product license application must be submitted in accordance with Part 1 of the Regulations, and provide information regarding the applicant, the product, and the manufacturing practices. The Directorate reviews every application for completeness, quality of information, and acceptable interpretations and conclusions regarding this information;
>
> 8. The product licence application includes the recommended conditions of use, which identifies the recommended use or purpose of the product (often referred to as the *health claim*);
>
> 9. The applicant must submit suitable evidence to support all conditions of use, and thus include evidence for each aspect of the health claim;
>
> 10. Evidence submitted in support of a product licence application is graded from 1 to 5 depending on the type of reference provided. Level 1 evidence is the best available scientific evidence and consists of at least one randomized control trial, or the systematic reviews or meta-analyses of multiple trials;
>
> 11. The Directorate uses this evidence to assess the safety and efficacy of the product;
>
> 12. To assess the safety and efficacy of the product, scientists at the Directorate first compare it against previously evaluated information and previous licensing decisions. They then analyze the submitted evidence to evaluate ingredient safety, and the efficacy of any health claims. They also evaluate potentially unsafe ingredients or ingredient interactions, the recommended conditions of use, and any risk information regarding the product;
>
> 13. Absent sufficient evidence, the Minister informs the applicant that a license cannot be granted for the product according to the application submitted, and the applicant must then modify the application or provide additional proof, in accordance with article 15 of the Regulations;
>
> 14. The Directorate also reviews the proposed regulatory label text to ensure that the information found on the label is complete according to articles 86 and 87 of the Regulations;

> 15. Amongst the information that must be found on the label is the common and proper name of each medicinal ingredient, and its quantity per dosage unit. For homeopathic medicines, the quantity is the homeopathic potency of a product;
>
> 16. The homeopathic potency refers to the degree of attenuation (dilution) of the product, and is indicated by a number followed by any of the following letters: X, D, C, CH, K, CK, M, MK, LM, or Q;
>
> 17. A product license is issued by the Minister if Health Canada is satisfied that the application is complete, if it is believed the applicant has not made a false or misleading statement, and if Health Canada concludes that the product is efficient and is not likely to cause injury to health;
>
> 18. At this point, when the Minister issues a license, it also issues an 8 digit natural product number in accordance with article 8 of the Regulations;
>
> 19. Before the Regulations were adopted, homeopathic products were regulated as drugs under the *Food and Drug Regulations*. As such, a licensed homeopathic product would receive an 8 digit DIN (drug identification number) if it was considered safe and efficient, as there was no specific designation for homeopathic products. Since 2004, a licensed homeopathic product receives a DIN-HM;

[43] In his examination on affidavit, Mr Waddington states that level 1 evidence, the best scientific evidence available, was submitted in support of the Oscillo products[23] and that the standard required by Health Canada to determine a product as being efficient is a randomized placebo-controlled study.

[44] Finally, to conclude on the context, a few words on homeopathy. It dates back to some 200 years, mainly from a physician called Samuel Hahnemann, who was dissatisfied with the practice and results of medicine as it was then practiced.

[45] Homeopathic drugs are very much in use today around the world.

[46] There is much debate about the efficacy and scientific basis for homeopathic medicine[24] but it is not necessary, at this stage of the proceedings, to dwell on this question.

b) <u>The relevant legislation</u>

[47] The extracts of the *Consumer Protection Act*[25], the *Competition Act*[26] and the *Civil Code of Quebec* (C.C.Q.) on which Petitioner relies to justify her legal syllogism are reproduced as Annex A of the Judgment.

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23 Examination on affidavit, p.8 and p.70.
24 See Dr Willis' report, R-11, par. 37 to 40.
25 R.S.Q., c. P-40.1.
26 R.S.C. 1985, c. C-34.

c) The demonstration of the legal syllogism

[48] Petitioner has to demonstrate that she has an arguable case in that:

- there is a fault, i.e. that Boiron's representations on Oscillo and Children Oscillo are misleading;
- there is a causal link, i.e. but for these representations, Petitioner (and the other members of the Group) would not have purchased the products; and
- there are damages suffered as a result of the purchase.

[49] According to the Motion, Boiron would have made false representations as to the efficiency of the products, as to the presence of an "active ingredient"[27] (duck organs), which, in fact, is absent and would have confused the consumer because of the number used on the product label (200C) which would lead to believe that there is "more ingredient" in the product while it is in fact very diluted[28].

[50] The Product labels of Oscillo and Children Oscillo are reproduced as Annex B of the Judgment.

[51] In essence, the Petitioner claims that while Boiron represents that Oscillo "has the ability to cure the flu with its purported active ingredient", "reduces the severity and duration of flu-like symptoms", "nips symptoms in the bud"[29], is a "treatment and cure for the symptoms of seasonal flu"[30], is indicated as "relief of symptoms of flu"[31], in fact, Oscillo products are a placebo without any effective active ingredient.

[52] A close look at the exhibits filed by the Petitioner to assert her claim, which relate to Boiron, leads to the following conclusion.

[53] First, the Court has to exclude from the Petitioner's exhibits the website extract of Boiron USA (R-3). This site does refer to the "active ingredient", being the duck extract, but the notion of an "active ingredient" is not present in the Boiron (as opposed to Boiron USA) exhibits filed by the Petitioner.

[54] Second, the notion of a "cure" of the flu with Oscillo products is not present either in the Boiron exhibits. The labels and the Boiron website refer to a "relief of flu symptoms : Fever, chill, body aches and headaches" and to effective action "to reduce the duration of flu-like symptoms within 48 hours".

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27 Par. 3 of the Motion.
28 Par. 19.1 of the Motion.
29 Par. 14 of the Motion; R-3.
30 Par. 15 of the Motion; R-4.
31 Par. 16; R-5 and R-6.

[55] All the Children Oscillo label states is that the product is "homeopathic medicine" while Boiron's website on it refers to effective action "to reduce the length of flu symptoms"[32]. However, as the Dosage and Direction on the label refer to the administration of the product at the "onset of flu symptoms" or with "established flu symptoms", it is clear that the product has to do with relief of said symptoms.

[56] Third, the Petitioner's argument that Boiron is guilty of misrepresentations goes further. She basically suggests that Oscillo products are nothing more than sugar pellets[33] and that any ingredient it may have been created from is so diluted that it can have no effect of any kind on humans[34]. In other words, Oscillo products are placebos which can have no effect of any kind, hence the misrepresentation.

[57] The Petitioner has supported her allegations on the placebo nature of Oscillo products by filing three articles[35] and one expert report[36].

[58] The first article, *The True Story of Oscillococcinum*[37], published in August of 2003, is from a magazine called *HomeWatch, Your Skeptical Guide to Hemopathic History, Theories and Current Practices.*

[59] As is apparent from the magazine title, this article is very critical of homeopathy in general and Oscillococcinum in particular. Two paragraphs in the article provide the gist of its view on the product:

> Dubious Claims
>
> The good doctor Roy thought that his concoction worked against cancer, syphilis, scabies and tuberculosis, but Boiron only recommends it for "flu-like states" and asks just over a dollar per gram for it. Hundreds of thousands of French buy this energetically advertised nonsense product. It is recommended for prevention (one dose per week in the flu season) and as cure. And, contrary to classical homeopathic usage, one has to gobble up a one-gram doses, rather than take a single 5 mg ball as a lifetime dose.
>
> There's no logical reason to believe that anything in duck liver or heart will be an effective flu remedy. But even if there were some magic substance, the manufacturing process guarantees that it will not be in the finished product. The laws of chemistry indicate that after the 12th dilution, it is unlikely that a single molecule from the original organs will remain. Moreover, at "200C" (or "200K" or "200CK") the concentration of the original substance would be 1 part in 100^{200}, which is a 1 followed by 400 zeroes. A 1 followed by 100 zeroes is called a googol. The estimated number of particles in the universe that we can see is a

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32 R-4 and R-6.
33 Par. 17 of the Motion.
34 Par. 19 of the Motion.
35 R-7, R-8 and R-10.
36 R-11.
37 R-7.

> googol, give or take a few zeroes. So in order for one of the original molecules to be present in a container of Oscillococcinum, the mass of that container would have to be about a googol googol googol times our world, which would be incomprehensibly larger than the visible universe.

[60] This article, written by a retired Dutch mathematician, expresses a view. However, the Court, without expressing any opinion on the merits 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*[38] 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*"[39] and is most critical of Oscillo products and of homeopathy in general. The following four paragraphs of the article represent an appropriate sample of the author's critique of the product:

> Homeopathic products. They are safe enough, no doubt about that. Millions of people around the world swear by them. No doubt about that either. Furthermore, their label features the term "DIN-HM", designating approval by Health Canada. So why then do I and my colleagues at the McGill Office for Science and Society support a class action lawsuit launched against Boiron Laboratories and Shoppers Drug Mart for marketing Oscillococcinum, a homeopathic medication advertised as a remedy for colds and the flu?
>
> I have absolutely no desire to limit anyone's freedom of choice when it comes to choosing health care products or any company's right to sell items that the public wants to buy, as long as these are safe. But I do have a desire to ensure that whatever choice consumers make is based on scientifically informed opinion. In the case of homeopathy, misinformation can have consequences ranging from a needless waste of money to foregoing more effective treatments. As an educator, I am also troubled by the promotion of a practice that is based on principles that cannot be supported by the established laws of chemistry, biology or physics. Hopefully, the publicity the current lawsuit will generate should help people understand the true nature of homeopathy.
>
> [...]
>
> PART II
>
> When I dilute my chicken soup, its taste suffers. When I take one aspirin tablet instead of two, my headache doesn't resolve. When I use less detergent, my

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38 R-8.
39 R-10.

> clothes do not come out as clean. Yet, in the topsy-turvy world of homeopathy, less is more. The more a biologically active substance is diluted, the more potent it becomes. The most powerful homeopathic drugs, the ones that according to some homeopaths have to be used the most carefully, are the ones that do not even contain a single molecule of the original substance. Oscillococcinum, the purported cold and flu remedy made from the liver of a duck falls into that category. At the declared homeopathic dose of 200C, the total mass of pills that would have to be consumed to encounter a single molecule of the original substance would be billions of times greater than the mass of the Earth. Yet the label on this product says it contains a "medicinal ingredient'" And curiously it does not warn of the danger that such a "high potency" remedy presents.
>
> [...]
>
> In Canada, our Natural Health Products Directorate has a mandate "to ensure that Canadians have ready access to natural health products that are safe, effective and of high quality." Yet, it licenses homeopathic products without requiring proof of efficacy. Why should the manufacturers of these products be less accountable than those of other pharmaceuticals? Knowing this, how can pharmacists in good conscience sell sugar pills that claim to have ghostly images of molecules?

[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.

[65] Dr Willis' report deserves more scrutiny. It is at the core of the Petitioner's "appearance of right" argument.

[66] Dr Willis, Professor Emeritus at the Departments of Pharmacology and Toxicology, and Medicine, Indiana University School of Medicine, has produced a 17 page, 74 paragraph report[40].

[67] He describes his mandate as follows:

> 22. My assignment in this case was to objectively evaluate the claims of efficacy for Oscillococcinum® as noted in the Motion for Authorization. In connection with this project, I reviewed numerous documents, including but not limited to the following:
>
> a. Copies of Oscillococcinum® websites and labels, which are Exhibits R-3, R-4, R-5 and R-6 of the Motion for Authorization;

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[40] R-11.

b. The Motion for Authorization filed in this action;

c. The above-mentioned studies.

[68] The Willis report deals with Homeopathy in general to conclude, again in general, that there is no compelling scientific evidence to show that homeopathy results in anything more than a placebo effect[41].

[69] The report then concentrates on Oscillococcinum.

[70] He first provides a history of the development of the product, dating back to 1917, and offers an analysis of the 200C dilution of Oscillo.

[71] Dr Willis then expresses his opinion on the product. To do so, he first refers to a meta-analysis published by Vickers and Smith entitled *Homeopathic Oscillococcinum for preventing and treating influenza and influenza like syndromes*.

[72] A "meta-analysis" is given the following definition by Dr Willis:

> Meta-analysis pools the results of clinical studies of given therapies, as a means of gaining a clearer picture of how well a therapy actually works. By pooling the data in these studies according to effect size, and by including only those studies that included the most rigorous controls in their experimental design, a reasonably accurate estimation of the treatment's efficacy, or lack thereof, becomes possible.

[73] Since, as Dr Willis acknowledges, Boiron makes no claim that Oscillo can prevent the development of flu-like symptoms, he concentrates on the "treatment" of flu or flu-like symptoms. He states:

> 51. As regards the treatment of flu-like symptoms, Vickers and Smith (and Mathie et al) limited their meta-analysis to the two (of four) clinical trials of Oscillococcinum® that best met the stringent requirements for meta-analysis, i.e., the studies of Ferley et al. and Papp et al.
>
> 52. The data from these studies that led these reviewers to conclude that they could not recommend Oscillococcinum® as a treatment for flu-like symptoms were uniformly characterized by small differences between the responses of subjects who had been given Oscillococcinum® and those who had been given placebo treatment. That is, 1) the relative risk of still being sick 48 hours after taking Oscillococcinum® was only 7% less than that of the placebo-treated group; 2) the number of days to recovery was reduced, on average, by a mere 0.26 days (or 7hours), from 4.9 to 4.64 days; and 3) the number of days before flu sufferers felt well enough to return to work was reduced by Oscillococcinum®, on average, by only about a half-day (i.e., from 4.1 to 3.6 days).

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[41] Idem, par. 40.

> 53. Although all of these effects were reported by Ferley et al. and Papp et al. as statistically significant, Vickers and Smith judged the effects merely as "moderate", and of insufficient magnitude to warrant recommending Oscillococcinum® as an effective treatment of flu and flu-like symptoms.

[74] The expert then proceeds to expand on the opinion of Vickers and Smith, with which he agrees, that the studies of Ferley et al. and Papp et al., although statistically significant, are not proper validation of the efficacy of Oscillo. In the opinion of Vickers and Smith, validation of the efficacy of Oscillo should be measured more upon the actual magnitude of the responses to the remedy, relative to the placebo response, than to the mathematical determination that the responses to Oscillo were statistically significant.

[75] The expert expands on his views in the following manner:

> 55. Indeed, given that flu-like symptoms usually last 5-7 days, the notion that a 7-hour reduction of that time counts as a "reduced duration of flu-like symptoms", as is claimed on the Oscillococcinum® package label and websites, strikes me as ludicrous.
>
> 56. I would also argue that few flu sufferers, having been severely ill for several days, would want to return to work for only a half-day's labor, even if they actually felt well enough to do so. My sense is that such persons actually would spend that hypothetical half-day at home, electing to return to work afresh the next morning. In that context, a putative half-day "benefit" of treatment with Oscillococcinum® becomes irrelevant.
>
> 57. Not surprisingly, Boiron voices a different interpretation of the studies of Ferley et al. and Papp et al. They cite both studies directly in their promotional literature for Oscillococcinum® and indirectly on the package label as evidence that the remedy provides effective treatment of flu-like symptoms. In other words, Boiron apparently believes that because the relevant responses recorded in these studies were statistically significant in comparison to the placebo responses, the therapeutic efficacy of Oscillococcinum®, and its ability to "reduce the duration of flu-like symptoms", has thereby been established.

[76] Dr Willis then states that the crux of the matter in dispute is not necessarily that the responses to Oscillo were of moderate or small magnitude but that they were not substantially greater than the same responses that were recorded in the placebo-treated subjects. In the circumstances, he suggests that any effort to resolve the conflict over the putative efficacy of Oscillo must center on analysis and discussion of the potential impact of the placebo response on the interpretation of the response to Oscillo as observed in the clinical trials[42].

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[42] Idem, par. 59.

[77] After stating that it is recognized that placebo responses occur in all clinical (human) trials involving tests of drugs and other remedies[43], that placebo responses occur within each group in a study, regardless of whether or not they are receiving placebo treatment or active treatment[44] and that this is why the response to placebo treatment must be subtracted from the response to active treatment in order to reveal that portion of the response that can actually be attributed to the active treatment[45], Dr Willis proposes to examine the magnitude of the statistically significant differences between the Oscillo and placebo-treated groups in the Ferley and Papp studies:

> 62. The differences between the number of subjects showing 48-hours "full recovery" from flu-like symptoms in the treated and placebo groups in both studies were each statistically significant (the definition of "recovery" was similar in both studies) In Ferley et al., 39 of 228 Oscillococcinum® -treated subjects had "recovered" within 48 hours, compared with 24 of 234 subjects in the placebo-treated group. The difference between the groups, 15 subjects, was statistically significant, but amounts to only 6.5% of the subjects who had taken Oscillococcinum®. The corresponding recovery rates reported by Papp et al. were 32 of 167 Oscillococcinum®-treated subjects vs. 25 of 167 placebo-treated subjects, which represents a small but statistically significant difference of 7 subjects, but only 4.1% of the subjects who had taken Oscillococcinum®.
>
> 63. Papp et al. further classified the 48-hours recovery rates of their subjects, in addition to those showing "full recovery" (discussed above), as showing "clear improvement", "improvement", "no improvement" or "[becoming] worse". The total number reported for the first three of these categories, i.e., those subjects who showed any improvement, was 147 of the 167 subjects treated with Oscillococcinum®, and 130 of 167 subjects treated with placebo. This difference, 16 subjects, appears also to have been statistically significant, but as was the case with the "full recovery" groups, most of the "recovery" in this group can also be attributed to the placebo response, and not directly to the Oscillococcinum®. Thus, when the responses to Oscillococcinum® are viewed directly in context with the responses to placebo treatment in these pivotal studies, the number of subjects who can be said to have actually responded to the Oscillococcinum® is small, indeed.

[78] Dr Willis goes on to state that the "small but statistically significant 48-hours improvement rates that were detected" for Oscillo treatment in both the Ferley and Papp studies raise two questions:

1) Do the small numbers of people who experienced "full" or even partial recovery with Oscillo (4-6% of treated subjects) vs. placebo constitute convincing evidence of a clinically or therapeutically significant effect of the medicine?

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[43] Idem, par. 60.
[44] Idem, par. 61.
[45] Idem.

2) Do these results support the claim that Oscillo "reduces" the duration of flu-like symptoms?

[79] Dr Willis then provides a definition of "statistical" as opposed to "clinical" significance:

- A determination of statistical significance indicates to investigators 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.

[83] What is there to conclude from the allegations of the Motion, the evidence allowed and the exhibits filed with regard to the legal syllogism proposed by the Petitioner?

[84] The Court is of the view that, even adopting the liberal approach advocated by the higher Courts, the Petitioner has not met her burden of demonstration that the facts alleged in the Motion justify the conclusions sought.

[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. They may be well founded. 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.

[86] Second, as mentioned above, the report filed by Dr Willis warrants more analysis.

[87] Dr Willis looked at the proceedings and the exhibits and was specifically requested to assess the claims of efficacy of Oscillo.

[88] What is there to conclude from a study of his report? That the Oscillo products have been subjected to credible clinical trials, that the Ferley and Papp studies as to the effects of Oscillo on the duration of the flu symptoms are statistically significant and that the ability of Oscillo to relieve flu-like symptoms is slightly better than the effects of the placebo treatment. Dr Willis, however, expresses the opinion that Oscillo lacks clinical relevance and utility for the treatment of flu-like symptoms.

[89] The court disagrees with Boiron's proposition that it should totally disregard Dr Willis' opinion because of the fact that it is an "opinion". In the Court's view, the

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[46] Idem, par. 71 to 73.

invitation made by the higher Courts[47] to disregard "opinions" refers to opinions of the nature of speculation or hypothesis. This is not the case here.

[90] Dr Willis' view has to be assessed in the context of the proposed legal syllogism of the Petitioner.

[91] Even taking Dr Willis' opinion as is, the Court finds that the Petitioner does not meet her burden of demonstration as to her appearance of right.

[92] Boiron does not represent that Oscillo prevents or cures or fights the flu or even that it does so with an active ingredient. All it does represent is that it relieves the flu symptoms. As for Children Oscillo, there are no such representations.

[93] Taking Dr Willis' report as is, the Petitioner has not made the *prima facie* demonstration that the Oscillo Products are nothing more than placebo.

[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.

[95] It also appears from the evidence available at the authorization stage that "level 1 evidence", a randomized placebo-controlled study, was submitted and was accepted by Health Canada, in the process of obtaining the licence for the product.

[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 as to the efficiency of Oscillo, has not been demonstrated.

[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.

[99] The Court is very mindful of the fact that a "generous" approach has to be used in assessing the conditions of authorization and that the authorization stage is not meant by the Legislator to decide of the merits of a claim. However, the very report

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[47] See *Options Consommateur* c. *Bell Mobilité*, 2008 QCCA 2201, par. 37-38.

which is at the basis of the "arguable case" of the Petitioner concludes to some efficiency of the Oscillo products.

[100] As the rules of proportionality have to be considered in assessing each of the conditions of art. 1003 C.C.P., it seems to the Court that, in this particular case, given the particular allegations of the Motion pertaining to Petitioner's appearance of right and the report filed in their support, it would be contrary to the imperatives of proportionality for the Court to hold that the condition of article 1003 b) C.C.P. has been satisfied and to allow the parties to spend considerable time and energy and make use of substantial Court resources to take the matter to trial.

[101] In the Court's view, the Petitioner fails on the issue of fault in that she has not demonstrated a *prima facie* case of false representations.

[102] In the absence of a demonstration of fault, it is not necessary to assess the "arguable case" of damages and causation.

[103] While this conclusion on the application of 1003 b) C.C.P. is sufficient to dispose of the Motion, the Court will nevertheless deal with the condition of art. 1003 d) C.C.P.

ii) Condition d) of article 1003 C.C.P.

[104] The Supreme Court adopted Professor and author Pierre-Claude Lafond's position that adequate representation requires the consideration of three factors: interest in the suit, competence and absence of conflict with the group members[48]. It specifies that, in determining whether these criteria have been met, the Court should interpret them liberally.

[105] The Motion describes as follows the facts which justify attributing to the Petitioner the status of representative:

> A) The Petitioner requests that she be attributed the status of representative of the Class
>
> 54. Petitioner is a member of the class;
>
> 55. Petitioner is ready and available to manage and direct the present action in the interest of the members of the class that they wish to represent and is determined to lead the present dossier until a final resolution of the matter, the whole for the benefit of the class, as well as, to dedicate the time necessary for the present action before the Courts of Quebec and the *Fonds d'aide aux recours collectifs*, as the case may be, and to collaborate with her attorneys;
>
> 56. Petitioner has the capacity and interest to fairly and adequately protect and represent the interest of the members of the class. In fact, Petitioner has

[48] *Infineon Technologies AG* v. *Option Consommateurs*, [2013] 3 S.C.R. 600, par. 149.

already engaged an expert to evaluate and critique the state of the scientific literature available on Oscillo and who will also continue to consult in this case going forward (see Exhibit R-11);

57. Petitioner has given the mandate to her attorneys to obtain all relevant information with respect to the present action and intends to keep informed of all developments. 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**;

58. Petitioner, with the assistance of her attorneys, is ready and available to dedicate the time necessary for this action and to collaborate with other members of the class and to keep them informed. In fact, Petitioner's attorneys have set up a website with a description of the present class action, copies of court documents, file updates, and a sign up form for potential class members to join the class and receive email notifications of important events;

59. Petitioner is in good faith and has instituted this action for the sole goal of having her rights, as well as the rights of other class members, recognized and protected so that they may be compensated for the damages that they have suffered as a consequence of the Respondent's conduct;

60. Petitioner understands the nature of the action;

[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. The situation, however, is not that clear inasmuch as her competence is concerned.

[108] The Petitioner, mother of two children, bought the Oscillo Products at a Jean Coutu drugstore in January or February of 2011[49], after her 5 year old son got the flu and transmitted it to her. She did not keep the invoices nor the packages.

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[49] Examination out of Court, May 24, 2013, p.13.

[109] Petitioner recognized the labels when shown to her by Boiron's attorney. She states that she took the capsules of Oscillo as recommended and that neither her son's nor her own symptoms went away.

[110] Internet surfing triggered her interest in enquiring further about the product[50]:

A- Well, after I took the medication, I didn't really think anything of it in January or February, and it's later on, a couple of months after, I was just on the Internet surfing and I saw an article on the Oscillo product. I think there was two (2) Plaintiffs in the States that was basically saying that, you know, the product didn't work as well, and I was just reading up all the information. And when I saw that they were saying that the pills were diluted it reminded me that maybe that's why it didn't work for me and my son because of what they were finding in the product.

Q- Okay. And what did you do after that?

A- Well, I was talking to my mom and telling her and she didn't really think anything of it. And I spoke to my friend Ann and she is the one who suggested that maybe her lawyer handled Class Action cases, so I should call him.

Q- Your friend Ann, what's her name?

A- Ann Simons.

Q- Ann Simmons?

Me Jeffrey Orenstein :

Q- Sanderson.

A- Sanderson, sorry.

Me Richard Vachon :

Q- Ann Sanderson. And she's also involved in a Class Action, is that right?

A- Yes, she was.

Q- As a representative?

A- I have no idea. At the time, she just said she had a lawyer and she referred me to Jeff.

Q- She referred you to maître Orenstein?

A- Yes, yes.

Q- So, other than going on the Internet seeing the website or consulting...

A- Right.

Q- ... the information that you mentioned, talking to your mom and talking to your friend Ann, did you do anything else before contacting maître Orenstein?

A- No.

Q- No?

A- Just read up on everything that I could find.

Q- Okay. Anything else?

A- No.

Q- Okay. Before calling or contacting maître Orenstein, did you contact Boiron Canada?

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[50] Idem, p.20-23.

A- If I called them?
Q- Yes.
A- No.
Q- Did you write to them?
A- No.
Q- Before calling maître Orenstein did you attempt to find if other people has used the product Oscillo?
A- Just my friends, asked if they used it, and they didn't.
Q- They did not? So, you've asked around to your friends?
A- Yes, just people I talk with. After I saw the article I asked if they used the product and no, they didn't.
Q- How many people did you talk to?
A- My friends?
Q- Yes.
A- Oh, I don't know, just...
Q- Not the exact numbers, but approximately.
A- I'd say under ten (10).
Q- Under ten (10)?
A- Yes.
Q- Other than your friend Ann, before contacting maître Orenstein, did anyone else encourage you or bring you to undertake a Class Action or to take legal action against Boiron?
A- No.
Q- No?
A- No.
Q- No. With your friend Ann Sanderson, right, are you the one who initiated the discussion about the product itself with her or she's the one who initiated that discussion with you?
A- No, I was the one asked. Like I was telling her about the product and what was happening and it wasn't working – that it didn't work and that I saw online about the case in California and she said, "Well, maybe you should talk to my lawyer," and she gave me his business card, that's it.
Q- And her lawyer was maître Orenstein, that's right?
A- Yes.
Q- Okay. And she gave you his business card?
A- His business card.

[111] Petitioner reviewed the Motion prepared by her attorney. She read Dr Willis' report but never contacted him nor spoke to him[51]. She went over Dr Willis' report briefly and reviewed the Motion before it was filed[52]. 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"...[53]

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51 Idem, p.24.
52 Idem, p.26.
53 Idem, p.27.

[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[54].

[113] What is there to conclude on the Petitioner's competence from the Motion and from the Petitioner's examination authorized by the Court?

[114] Petitioner was "reminded", while surfing on the Internet and reading about Oscillo products, some six months after buying and using Oscillo herself and her son using Children Oscillo, that "maybe that's why it didn't work for them".

[115] As the claims against Boiron USA were brought in August of 2011, it is then, at the earliest, that the Petitioner read on the internet that recourses had been brought involving Oscillo Products. From then on, aside from speaking to her mother, to a friend who referred her to her lawyer and to more friends who had never used Oscillo Products, there was no involvement to speak of on the part of the Petitioner.

[116] Basically, all Petitioner did was read the article on the internet, consult a lawyer and let him manage the matter from there on.

[117] A liberal approach should be adopted in assessing whether a member of a proposed group meets the criterion of art. 1003 d) C.C.P. However, there has to be some notion of representativity of a member for art. 1003 d) to be satisfied.

[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.

[120] In a recent judgment[55], Mr Justice Yergeau, citing Pierre-Claude Lafond, referred to the role, often critical, of lawyers in Class Action litigation:

> [149] Ce qui n'enlève rien au rôle que jouent maintenant les avocats, comme le note avec à propos l'auteur Pierre-Claude Lafond lorsqu'il écrit :
>
> > La vocation d'«entrepreneur» des avocats œuvrant en matière de recours collectifs est trop souvent négligée dans la littérature juridique. Dans bien des cas, l'âme dirigeante d'une telle procédure n'est nul autre que le

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[54] Idem.

[55] Sibiga v. Fido Solutions Inc. et al., 2014 QCCS 3235 (in appeal 500-09-024648-149).

> procureur au dossier. Plusieurs recours collectifs québécois sont le fruit de l'initiative d'avocats soucieux de participer à la justice sociale pour certains, ou de satisfaire leurs ambitions, pour d'autres. Par sa politique d'accorder un tarif horaire maximum de 100$ à titre d'honoraires extrajudiciaires, le Fonds d'aide évoque l'idée du partage du risque et de l'assumation d'une partie du financement du recours par le procureur. (...)[67]

[67] Pierre-Claude LAFOND, *Le recours collectif comme voie d'accès à la justice pour les consommateurs*, Montréal, Thémis, 1996 à la p.523.

[121] The Court agrees with Justice Yergeau. However, for the word "adequately" of art. 1003 d) C.C.P. to have any meaning, the proposed group representative has to be more than a mere "figurant", whose essential feature is to have met the bare minimum condition to be a member of the proposed group; such representative has to show the Court that, through some steps, albeit small ones, he or she distinguishes himself or herself from a group member, through enquiries or initiatives which illustrate his or her interest to play the role of representative.

[122] Justice Guy Gagnon of the Court of Appeal expressed, in general terms, the gist of what the Court means when he wrote[56]:

> [86] [...] Si tant est qu'elle eût possédé un droit d'action valable à l'égard des intimées, ce qui n'a pas été démontré, elle n'a, de toute manière, pas établi qu'elle était cette personne «par qui les membres accepteraient d'être représentés si la demande était formée selon l'article 59 C.p.c. [...] »[38].

[38] Pierre Claude Lafond, *Le recours collectif, le rôle du juge et sa conception de la justice : impact et évolution*, Cowansville, Éditions Yvon Blais, 2006, p. 420.

[123] Petitioner has not demonstrated that she is in a position to represent the members of the proposed group adequately.

FOR THESE REASONS, THE COURT:

[124] **DISMISSES** the Amended Motion to Authorize the Bringing of a Class Action and to Ascribe the Status of Representative;

[125] **WITH COSTS.**

LOUIS LACOURSIÈRE, J.S.C.

[56] *Isabelle Perreault* c. *McNeil PDI Inc et al*, 2012 QCCA 713; Motion for leave to the Supreme Court dismissed (S.C. Can 2012-10-25, dossier 34877).

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Dates of hearing : November 17 and 18, 2014.

ANNEX A

- *Consumer Protection Act*, R.S.Q., c. P-40.1

41. The goods or services provided must conform to the statements or advertisements regarding them made by the merchant or the manufacturer. The statements or advertisements are binding on that merchant or that manufacturer.	**41.** Un bien ou un service fourni doit être conforme à une déclaration ou à un message publicitaire faits à son sujet par le commerçant ou le fabricant. Une déclaration ou un message publicitaire lie ce commerçant ou ce fabricant.
215. Any practice contemplated in sections 219 to 251 ... constitutes a prohibited practice for the purposes of this title.	**215.** Constitue une pratique interdite aux fins du présent titre une pratique visée par les articles 219 à 251 ...
216. For the purposes of this title, representation includes an affirmation, a behaviour or an omission.	**216.** Aux fins du présent titre, une représentation comprend une affirmation, un comportement ou une omission.
218. To determine whether or not a representation constitutes a prohibited practice, the general impression it gives, and, as the case may be, the literal meaning of the terms used therein must be taken into account.	**218.** Pour déterminer si une représentation constitue une pratique interdite, il faut tenir compte de l'impression générale qu'elle donne et, s'il y a lieu, du sens littéral des termes qui y sont employés.
219. No merchant, manufacturer or advertiser may, by any means whatever, make false or misleading representations to a consumer.	**219.** Aucun commerçant, fabricant ou publicitaire ne peut, par quelque moyen que ce soit, faire une représentation fausse ou trompeuse à un consommateur.
220. No merchant, manufacturer or advertiser may, falsely, by any means whatever, (a) ascribe certain special advantages to goods or services	**220.** Aucun commerçant, fabricant ou publicitaire ne peut faussement, par quelque moyen que ce soit: a) attribuer à un bien ou à un service un avantage particulier;
221. No merchant, manufacturer or advertiser may, falsely, by any means whatever, (g) ascribe certain characteristics of performance to goods or services.	**221.** Aucun commerçant, fabricant ou publicitaire ne peut faussement, par quelque moyen que ce soit: g) attribuer à un bien ou à un service une certaine caractéristique de rendement.
228. No merchant, manufacturer or advertiser may fail to mention an important fact in any representation made to a consumer.	**228.** Aucun commerçant, fabricant ou publicitaire ne peut, dans une représentation qu'il fait à un consommateur, passer sous silence un fait important.

239. No merchant, manufacturer or advertiser may, by any means whatever, (a) distort the meaning of any information, opinion or testimony; (b) rely upon data or analyses falsely presented as scientific.	**239.** Aucun commerçant, fabricant ou publicitaire ne peut, par quelque moyen que ce soit: a) déformer le sens d'une information, d'une opinion ou d'un témoignage; b) s'appuyer sur une donnée ou une analyse présentée faussement comme scientifique.
253. Where a merchant, manufacturer or advertiser makes use of a prohibited practice in case of the sale, lease or construction of an immovable or, in any other case, of a prohibited practice referred to in paragraph a or b of section 220, a, b, c, d, e or g of section 221, d, e or f of section 222, c of section 224 or a or b of section 225, or in section 227, 228, 229, 237 or 239, 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.	**253.** Lorsqu'un commerçant, un fabricant ou un publicitaire se livre en cas de vente, de location ou de construction d'un immeuble à une pratique interdite ou, dans les autres cas, à une pratique interdite visée aux paragraphes a et b de l'article 220, a, b, c, d, e et g de l'article 221, d, e et f de l'article 222, c de l'article 224, a et b de l'article 225 et aux articles 227, 228, 229, 237 et 239, il y a présomption que, si le consommateur avait eu connaissance de cette pratique, il n'aurait pas contracté ou n'aurait pas donné un prix si élevé.
270. The provisions of this act are in addition to any provision of another act granting a right or recourse to a consumer.	**270.** Les dispositions de la présente loi s'ajoutent à toute disposition d'une autre loi qui accorde un droit ou un recours au consommateur.
272. If the merchant or the manufacturer fails to fulfil an obligation imposed on him by this Act, by the regulations or by a voluntary undertaking made under section 314 or whose application has been extended by an order under section 315.1, the consumer may demand, as the case may be, subject to the other recourses provided by this Act, (a) the specific performance of the obligation; (b) the authorization to execute it at the merchant's or manufacturer's expense; (c) that his obligations be reduced; (d) that the contract be rescinded; (e) that the contract be set aside; or (f) that the contract be annulled, without prejudice to his claim in damages, in all cases. He may also claim punitive damages.	**272.** Si le commerçant ou le fabricant manque à une obligation que lui impose la présente loi, un règlement ou un engagement volontaire souscrit en vertu de l'article 314 ou dont l'application a été étendue par un décret pris en vertu de l'article 315.1, le consommateur, sous réserve des autres recours prévus par la présente loi, peut demander, selon le cas: a) l'exécution de l'obligation; b) l'autorisation de la faire exécuter aux frais du commerçant ou du fabricant; c) la réduction de son obligation; d) la résiliation du contrat; e) la résolution du contrat; ou f) la nullité du contrat, sans préjudice de sa demande en dommages-intérêts dans tous les cas. Il peut également demander des dommages-intérêts punitifs.

- *Competition Act*, R.S.C. 1985, c. C-34

36. (1) Any person who has suffered loss or damage as a result of (a) conduct that is contrary to any provision of Part VI, or (b) the failure of any person to comply with an order of the Tribunal or another court under this Act, may, in any court of competent jurisdiction, sue for and recover from the person who engaged in the conduct or failed to comply with the order an amount equal to the loss or damage proved to have been suffered by him, together with any additional amount that the court may allow not exceeding the full cost to him of any investigation in connection with the matter and of proceedings under this section.	36. (1) Toute personne qui a subi une perte ou des dommages par suite : a) soit d'un comportement allant à l'encontre d'une disposition de la partie VI; b) soit du défaut d'une personne d'obtempérer à une ordonnance rendue par le Tribunal ou un autre tribunal en vertu de la présente loi, peut, devant tout tribunal compétent, réclamer et recouvrer de la personne qui a eu un tel comportement ou n'a pas obtempéré à l'ordonnance une somme égale au montant de la perte ou des dommages qu'elle est reconnue avoir subis, ainsi que toute somme supplémentaire que le tribunal peut fixer et qui n'excède pas le coût total, pour elle, de toute enquête relativement à l'affaire et des procédures engagées en vertu du présent article.
52. (1) No person shall, for the purpose of promoting, directly or indirectly, the supply or use of a product or for the purpose of promoting, directly or indirectly, any business interest, by any means whatever, knowingly or recklessly make a representation to the public that is false or misleading in a material respect. (1.1) For greater certainty, in establishing that subsection (1) was contravened, it is not necessary to prove that (a) any person was deceived or misled; (b) any member of the public to whom the representation was made was within Canada; or (c) the representation was made in a place to which the public had access. (1.2) For greater certainty, a reference to the making of a representation, in this section or in section 52.1, 74.01 or 74.02, includes permitting a representation to be made.	**52.** (1) Nul ne peut, de quelque manière que ce soit, aux fins de promouvoir directement ou indirectement soit la fourniture ou l'utilisation d'un produit, soit des intérêts commerciaux quelconques, donner au public, sciemment ou sans se soucier des conséquences, des indications fausses ou trompeuses sur un point important. (1.1) Il est entendu qu'il n'est pas nécessaire, afin d'établir qu'il y a eu infraction au paragraphe (1), de prouver : a) qu'une personne a été trompée ou induite en erreur; b) qu'une personne faisant partie du public à qui les indications ont été données se trouvait au Canada; c) que les indications ont été données à un endroit auquel le public avait accès. (1.2) Il est entendu que, dans le présent article et dans les articles 52.1, 74.01 et 74.02, la mention de donner des indications vaut mention de permettre que des indications soient données.

(2) For the purposes of this section, a representation that is

(a) expressed on an article offered or displayed for sale or its wrapper or container,

(b) expressed on anything attached to, inserted in or accompanying an article offered or displayed for sale, its wrapper or container, or anything on which the article is mounted for display or sale,

(c) expressed on an in-store or other point-of-purchase display,

(d) made in the course of in-store, door-to-door or telephone selling to a person as ultimate user, or

(e) contained in or on anything that is sold, sent, delivered, transmitted or made available in any other manner to a member of the public,

is deemed to be made to the public by and only by the person who causes the representation to be so expressed, made or contained, subject to subsection (2.1).

(2.1) Where a person referred to in subsection (2) is outside Canada, a representation described in paragraph (2)(a), (b), (c) or (e) is, for the purposes of subsection (1), deemed to be made to the public by the person who imports into Canada the article, thing or display referred to in that paragraph.

(3) Subject to subsection (2), a person who, for the purpose of promoting, directly or indirectly, the supply or use of a product or any business interest, supplies to a wholesaler, retailer or other distributor of a product any material or thing that contains a representation of a nature referred to in subsection (1) is deemed to have made that representation to the public.

(4) In a prosecution for a contravention of this section, the general impression conveyed by a representation as well as its literal meaning shall be taken into account in determining whether or not the representation is false or

(2) Pour l'application du présent article, sauf le paragraphe (2.1), sont réputées n'être données au public que par la personne de qui elles proviennent les indications qui, selon le cas :

a) apparaissent sur un article mis en vente ou exposé pour la vente, ou sur son emballage;

b) apparaissent soit sur quelque chose qui est fixé à un article mis en vente ou exposé pour la vente ou à son emballage ou qui y est inséré ou joint, soit sur quelque chose qui sert de support à l'article pour l'étalage ou la vente;

c) apparaissent à un étalage d'un magasin ou d'un autre point de vente;

d) sont données, au cours d'opérations de vente en magasin, par démarchage ou par téléphone, à un utilisateur éventuel;

e) se trouvent dans ou sur quelque chose qui est vendu, envoyé, livré ou transmis au public ou mis à sa disposition de quelque manière que ce soit.

(2.1) Dans le cas où la personne visée au paragraphe (2) est à l'étranger, les indications visées aux alinéas (2)a), b), c) ou e) sont réputées, pour l'application du paragraphe (1), être données au public par la personne qui importe au Canada l'article, la chose ou l'instrument d'étalage visé à l'alinéa correspondant.

(3) Sous réserve du paragraphe (2), quiconque, aux fins de promouvoir directement ou indirectement soit la fourniture ou l'utilisation d'un produit, soit des intérêts commerciaux quelconques, fournit à un grossiste, détaillant ou autre distributeur d'un produit de la documentation ou autre chose contenant des indications du genre mentionné au paragraphe (1) est réputé avoir donné ces indications au public.

(4) Dans toute poursuite intentée en vertu du présent article, pour déterminer si les indications sont fausses ou trompeuses sur

misleading in a material respect. (5) Any person who contravenes subsection (1) is guilty of an offence and liable (a) on conviction on indictment, to a fine in the discretion of the court or to imprisonment for a term not exceeding 14 years, or to both; or (b) on summary conviction, to a fine not exceeding $200,000 or to imprisonment for a term not exceeding one year, or to both. (6) Nothing in Part VII.1 shall be read as excluding the application of this section to a representation that constitutes reviewable conduct within the meaning of that Part. (7) No proceedings may be commenced under this section against a person against whom an order is sought under Part VII.1 on the basis of the same or substantially the same facts as would be alleged in proceedings under this section.	un point important il faut tenir compte de l'impression générale qu'elles donnent ainsi que de leur sens littéral. (5) Quiconque contrevient au paragraphe (1) commet une infraction et encourt, sur déclaration de culpabilité : a) par mise en accusation, l'amende que le tribunal estime indiquée et un emprisonnement maximal de quatorze ans, ou l'une de ces peines; b) par procédure sommaire, une amende maximale de 200 000 $ et un emprisonnement maximal d'un an, ou l'une de ces peines. (6) Le présent article s'applique au fait de donner des indications constituant, au sens de la partie VII.1, un comportement susceptible d'examen. (7) Il ne peut être intenté de poursuite en vertu du présent article contre une personne contre laquelle une ordonnance est demandée aux termes de la partie VII.1, si les faits qui seraient allégués au soutien de la poursuite sont les mêmes ou essentiellement les mêmes que ceux qui l'ont été au soutien de la demande.

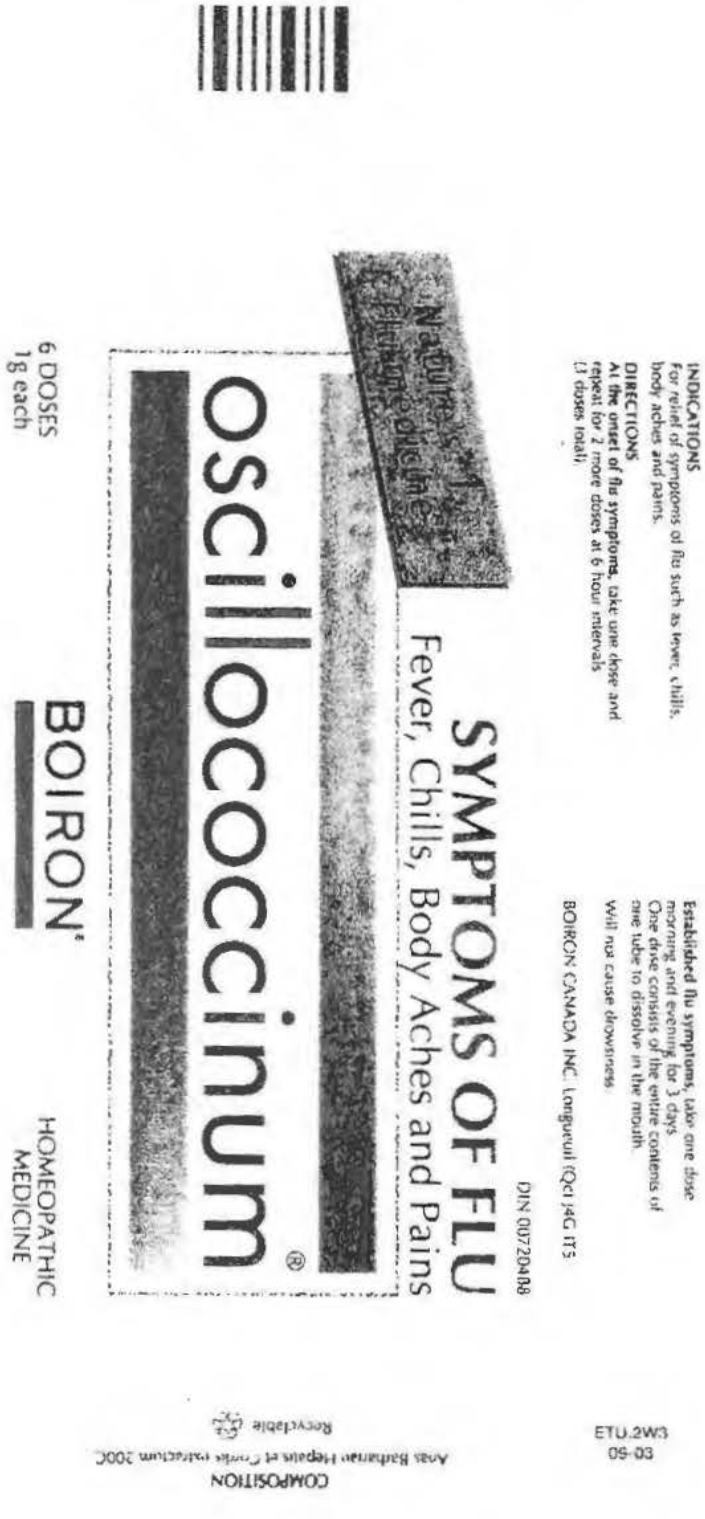
- *Civil Code of Québec*, L.R.Q., c. C-1991

1400. Error vitiates consent of the parties or of one of them where it relates to the nature of the contract, the object of the prestation or anything that was essential in determining that consent. An inexcusable error does not constitute a defect of consent.	**1400.** L'erreur vicie le consentement des parties ou de l'une d'elles lorsqu'elle porte sur la nature du contrat, sur l'objet de la prestation ou, encore, sur tout élément essentiel qui a déterminé le consentement. L'erreur inexcusable ne constitue pas un vice de consentement.
1401. Error on the part of one party induced by fraud committed by the other party or with his knowledge vitiates consent whenever, but for that error, the party would not have contracted, or would have contracted on different terms. Fraud may result from silence or concealment.	**1401.** L'erreur d'une partie, provoquée par le dol de l'autre partie ou à la connaissance de celle-ci, vicie le consentement dans tous les cas où, sans cela, la partie n'aurait pas contracté ou aurait contracté à des conditions différentes. Le dol peut résulter du silence ou d'une réticence.

1407. A person whose consent is vitiated has the right to apply for annulment of the contract; in the case of error occasioned by fraud, of fear or of lesion, he may, in addition to annulment, also claim damages or, where he prefers that the contract be maintained, apply for a reduction of his obligation equivalent to the damages he would be justified in claiming.	**1407.** Celui dont le consentement est vicié a le droit de demander la nullité du contrat; en cas d'erreur provoquée par le dol, de crainte ou de lésion, il peut demander, outre la nullité, des dommages-intérêts ou encore, s'il préfère que le contrat soit maintenu, demander une réduction de son obligation équivalente aux dommages-intérêts qu'il eût été justifié de réclamer.
1457. Every person has a duty to abide by the rules of conduct which lie upon him, according to the circumstances, usage or law, so as not to cause injury to another. Where he is endowed with reason and fails in this duty, he is responsible for any injury he causes to another person by such fault and is liable to reparation for the injury, whether it be bodily, moral or material in nature. He is also liable, in certain cases, to reparation for injury caused to another by the act or fault of another person or by the act of things in his custody.	**1457.** Toute personne a le devoir de respecter les règles de conduite qui, suivant les circonstances, les usages ou la loi, s'imposent à elle, de manière à ne pas causer de préjudice à autrui. Elle est, lorsqu'elle est douée de raison et qu'elle manque à ce devoir, responsable du préjudice qu'elle cause par cette faute à autrui et tenue de réparer ce préjudice, qu'il soit corporel, moral ou matériel. Elle est aussi tenue, en certains cas, de réparer le préjudice causé à autrui par le fait ou la faute d'une autre personne ou par le fait des biens qu'elle a sous sa garde.
1621. Where the awarding of punitive damages is provided for by law, the amount of such damages may not exceed what is sufficient to fulfil their preventive purpose. Punitive damages are assessed in the light of all the appropriate circumstances, in particular the gravity of the debtor's fault, his patrimonial situation, the extent of the reparation for which he is already liable to the creditor and, where such is the case, the fact that the payment of the damages is wholly or partly assumed by a third person.	**1621.** Lorsque la loi prévoit l'attribution de dommages-intérêts punitifs, ceux-ci ne peuvent excéder, en valeur, ce qui est suffisant pour assurer leur fonction préventive. Ils s'apprécient en tenant compte de toutes les circonstances appropriées, notamment de la gravité de la faute du débiteur, de sa situation patrimoniale ou de l'étendue de la réparation à laquelle il est déjà tenu envers le créancier, ainsi que, le cas échéant, du fait que la prise en charge du paiement réparateur est, en tout ou en partie, assumée par un tiers
3148. In personal actions of a patrimonial nature, a Québec authority has jurisdiction where (1) the defendant has his domicile or his residence in Québec; (2) the defendant is a legal person, is not domiciled in Québec but has an	**3148.** Dans les actions personnelles à caractère patrimonial, les autorités québécoises sont compétentes dans les cas suivants: 1° Le défendeur a son domicile ou sa résidence au Québec; 2° Le défendeur est une personne morale

establishment in Québec, and the dispute relates to its activities in Québec; (3) a fault was committed in Québec, damage was suffered in Québec, an injurious act occurred in Québec or one of the obligations arising from a contract was to be performed in Québec; (4) the parties have by agreement submitted to it all existing or future disputes between themselves arising out of a specified legal relationship; (5) the defendant submits to its jurisdiction. However, a Québec authority has no jurisdiction where the parties, by agreement, have chosen to submit all existing or future disputes between themselves relating to a specified legal relationship to a foreign authority or to an arbitrator, unless the defendant submits to the jurisdiction of the Québec authority.	qui n'est pas domiciliée au Québec mais y a un établissement et la contestation est relative à son activité au Québec; 3° Une faute a été commise au Québec, un préjudice y a été subi, un fait dommageable s'y est produit ou l'une des obligations découlant d'un contrat devait y être exécutée; 4° Les parties, par convention, leur ont soumis les litiges nés ou à naître entre elles à l'occasion d'un rapport de droit déterminé; 5° Le défendeur a reconnu leur compétence. Cependant, les autorités québécoises ne sont pas compétentes lorsque les parties ont choisi, par convention, de soumettre les litiges nés ou à naître entre elles, à propos d'un rapport juridique déterminé, à une autorité étrangère ou à un arbitre, à moins que le défendeur n'ait reconnu la compétence des autorités québécoises.

ANNEX B


SYMPTOMS OF FLU
Fever, Chills, Body Aches and Pains
oscillococcinum®
BOIRON
6 DOSES
1g each
HOMEOPATHIC MEDICINE
INDICATIONS
For relief of symptoms of flu such as fever, chills, body aches and pains.
DIRECTIONS
At the onset of flu symptoms, take one dose and repeat for 2 more doses at 6 hour intervals (3 doses total).
Established flu symptoms, take one dose morning and evening for 3 days.
One dose consists of the entire contents of one tube to dissolve in the mouth.
Will not cause drowsiness.
BOIRON CANADA INC. Longueuil (Qc) J4G 1T5
DIN 00720488
COMPOSITION
Anas Barbariae Hepatis et Cordis extractum 200C
Recyclable
ETU.2W3
09-03

INDICATION Homeopathic medicine for the relief of flu symptoms: Fever, chills, body aches and headaches. This homeopathic medicine does not cause drowsiness. **DOSAGE AND DIRECTIONS** **Adults and children from 2 years old:** ***At the onset of flu symptoms,*** dissolve in the mouth the entire content of 1 tube-dose of pellets. Repeat 2 more doses at 6 hour intervals. ***Established flu symptoms,*** take one tube-dose of pellets morning and evening for 3 days. **For infants 0-2 years:** Dissolve contents of one tube-dose in water before administering and follow same dosing regimen as mentioned above. **CAUTIONS AND WARNINGS** If symptoms persist or worsen for more than 3 days, consult a health care practitioner. **NOTICE FOR DIABETICS** This product contains 0,85g of sucrose and 0,15g of lactose per tube-dose of pellets. **Medicinal ingredients*:** Anas Barbariae Hepatis et Cordis extractum 200 C. **Non medicinal ingredients:** Sucrose, lactose. Keep under normal storage conditions.
* Source information: www.hc-sc.gc.ca/dhp-mps/prodnatur/index_e.html

DIN-HM 80014156

Symptoms of flu

Fever, chills, body aches and headaches

oscillococcinum®

HOMEOPATHIC MEDICINE

BOIRON Canada Inc.
1300 René Descartes
Saint-Bruno de Montarville (QC)
J3V 0B7 Canada

children 0-11 years

oscillococcinum

6 Doses of globules
1g each

BOIRON

Homeopathic medicine

DIN-HM 80069208

DOSAGE AND DIRECTION

At the onset of flu symptoms

Established flu symptoms

Cautions and warning

Medicinal ingredients

Non medicinal ingredients

5

7 74016 73869 0

Boiron Canada Inc.
6 Blvd Gagnon, Longueuil
Québec J4G 1T5 Canada
www.boiron.ca