

SUPERIOR COURT

(Class Action Chamber)

CANADA
PROVINCE OF QUEBEC
DISTRICT OF MONTREAL

N° : 500-06-000732-152

DATE : July 22, 2020

BY THE HONOURABLE MR. JUSTICE GARY D.D. MORRISON, J.S.C.

DIANE GAGNON
Petitioner

v.

(...)
BAYER INC.
and
BAYER CANADIAN HOLDINGS INC.
and
BAYER CORPORATION
and
BAYER HEALTHCARRE AG
and
BAYER PHARMA AG
and
BAYER AG
and
BAYER HEALTHCARE PHARMACEUTICALS, INC.
Respondents

JUDGMENT
(Authorization of a Class Action)

1. OVERVIEW

[1] Petitioner seeks the Court's authorization to institute a class action and appointment of her as representative plaintiff.¹

[2] The class which she seeks to represent is described as follows :

All persons residing in Quebec who were prescribed and have ingested the drug XARELTO[®] (rivaroxaban) since 2008, and their successors, assigns, family members, and dependants;

[3] The proposed action contains a claim for both compensatory and punitive damages against the present Respondents based, in part, on a failure to warn against an alleged risk of serious and irreversible bleeding associated with the use of the drug XARELTO[®].

[4] The Application for authorization is not contested by Respondents, who reserve their rights however to fully contest the merits of the proposed class action.

[5] The parties agree that the authorization phase is not the appropriate time to conduct an analysis of contradictory expert reports and opinions. That is more appropriately done at the merits stage.

[6] The recent version of the Application is the result of modifications by Petitioner, with the agreement of Respondents, so as to mirror a similar class action which has been certified by judgment of the Queen's Bench for Saskatchewan in the matter of *Tluchak Estate*², which became a final judgment on February 20, 2020, leave to appeal having been denied by the Court of Appeal for Saskatchewan³ and then by the Supreme Court of Canada⁴. That certified action covers persons resident in Quebec.

[7] The parties in the Quebec proceedings confirm the intention of all concerned to coordinate the two class actions on a national level, hence the importance to them of the Quebec action mirroring the one in Saskatchewan. They acknowledge that this involves unusual circumstances but argue it is in the best interest of class members.

¹ *Third Amended Application to Authorize the Bringing of a Class Action & to Appoint the Petitioner as Representative Plaintiff*, version dated May 8, 2020.

² 2018 SKQB 311.

³ 2019 SKCA 64.

⁴ 2020 CanLII 13139 (SCC).

2. CONTEXT

[8] On or about October 10, 2012, Petitioner underwent knee replacement surgery in Montreal. Thereafter, she was prescribed XARELTO[®] by her surgeon so as to prevent deep venous thrombosis and venous thromboembolism. She claims to have taken the medication as directed.

[9] Petitioner states that within days she suffered a massive hemorrhage in the same knee as had been operated on, requiring blood and plasma transfusions for hours until her bleeding abated.

[10] She asserts that at no time had she been made aware of the risks of suffering hemorrhagic complications as a result of taking XARELTO[®], whereas Respondents were allegedly fully aware of such risks, including serious and irreversible bleeding, but failed to disclose same.

[11] In addition to the failure to provide adequate warnings and instructions, she alleges, amongst other things, the fault and negligence of Respondents in the design, development, manufacturing, testing and market placement of XARELTO[®].

[12] According to Petitioner, there have been thousands of reports of severe hemorrhagic events and deaths reported in the United States and Europe.

3. APPLICABLE LAW

[13] In addition to the requirements set forth at Article 574 *Code of Civil Procedure* ("C.C.P."), the Court must be of the opinion that the criteria stipulated at Article 575 C.C.P. have been met, in which case the proposed class action is to be authorized. Those criteria are the following:

575. (...)

(1) *the claims of the members of the class raise identical, similar or related issues of law or fact;*

(2) *the facts alleged appear to justify the conclusions sought;*

(3) *the composition of the class makes it difficult or impracticable to apply the rules for mandates to take part in judicial proceedings on behalf of others or for consolidation of proceedings; and*

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

[14] These requirements are cumulative, such that failure to satisfy any one of them constitutes grounds to refuse authorizing the class action.⁵

[15] In performing the analysis of these criteria, the Court is to avoid determining the merits of the proposed action. The authorization phase is only intended to act as a filter, and this for the purposes of preventing cases going forward that are not “defendable” or “arguable”⁶, otherwise said not to constitute a *prima facie* case or not to have a serious appearance or a good colour of right. In other words, the Court is to filter out cases that are not arguable, defensible, justifiable or supportable, or which are frivolous, untenable or clearly unfounded.⁷ All these terms have been recognized by the courts as conveying the same message.

[16] In order to establish that he has an arguable case, an applicant at this stage has a burden of demonstration, such that, as mentioned above, the facts alleged are held to be true.⁸ Accordingly, the authorization stage is generally not the time for a contestation as to alleged facts, which is more appropriate post-authorization. In other words, the Court is not to analyze grounds of defence based on contested alleged facts.

[17] That said, in order to constitute a fact that merits being held to be true, the allegation cannot be vague, general and imprecise, nor can it simply be an inference, a conclusion, an unverified hypothesis, an opinion or a legal argument.⁹

[18] If, however, the allegation of fact is not sufficiently precise *per se*, then essential allegations need generally be supported by proof so as to qualify as being arguable.¹⁰

[19] Moreover, the individual who seeks to act as the representative plaintiff must be in a position to ensure an adequate representation of the members. This is generally not a difficult criteria to satisfy, albeit, for the most part, that person must have an arguable case to the effect that he has a claim that makes him a member of the class.

[20] The Court of Appeal has recently confirmed anew the factors to be considered for the purposes of assessing the status of representative¹¹:

[25] *La jurisprudence enseigne que les facteurs pertinents pour apprécier le critère relatif au statut de représentant, énoncé au paragraphe 575(4°) C.p.c.,*

⁵ *Baratto v. Merck Canada inc.**, 2018 QCCA 1240.

⁶ *Infineon Technologies AG v. Option consommateurs*, [2013] 3 SCR 600, paras. 61-65; *L'Oratoire Saint-Joseph du Mont-Royal v. J.J.*, 2019 SCC 35, at para. 61.

⁷ *Fortier v. Meubles Léon Itée*, 2014 QCCA 195, para. 70.

⁸ *Infineon*, supra, note 6, at para. 67; *J.J.*, supra, note 6, at para. 109.

⁹ *Option Consommateurs v. Bell Mobilité*, 2008 QCCA 2201, at para. 38; *Harmegnies v. Toyota Canada Inc.*, 2008 QCCA 380, at para. 44.

¹⁰ *J.J.*, supra, note 6, at para. 59.

¹¹ *D'Amico v. Procureure générale du Québec*, 2019 QCCA 1922.

sont l'intérêt du représentant à poursuivre, sa compétence et l'absence de conflit d'intérêts. Ces facteurs doivent être interprétés de manière libérale. Comme la Cour suprême l'écrit dans Infineon Technologies AG c. Option consommateurs, « [a]ucun représentant proposé ne devrait être exclu, à moins que ses intérêts ou sa compétence ne soient tels qu'il serait impossible que l'affaire survive équitablement ».

[26] Ici, la juge de première instance constate la « réelle motivation des demandeurs à remplir un tel rôle » et « leur capacité pour ce faire ». La capacité, l'intérêt sincère et légitime des appelants ainsi que l'absence de conflit d'intérêts sont établis. Les exigences additionnelles imposées par la juge — concernant les tentatives faites par les appelants pour contacter d'autres personnes intéressées et la démonstration du nombre de personnes visées par le Groupe - ne sont pas pertinentes pour statuer sur leur statut de représentants.

[21] Satisfying the criteria applicable to the representative plaintiff appears to now be treated as a form of presumption, thereby requiring a respondent to demonstrate the existence of an exception as defined in the above citation. The nature and level of proof that is required in this regard is to be determined on a case by case basis.

[22] As confirmed through prior case law, the objective of class actions generally is to facilitate access to justice for class members so as to avoid each of them having to bring their own separate action. Therefore, the proposed class action must actually constitute an action at law. The questions of law or fact raised in that particular action must essentially be “*identical, similar or related*” to those of all the other putative class members. That said, even one such question has been held to suffice.¹²

[23] Insofar as proportionality is concerned, notwithstanding the overriding importance of the principle in Quebec civil procedure, it has been determined that it does not constitute a fifth (5th) criteria. Accordingly, the authorization judge is to assess, where appropriate, the principle of proportionality within the analysis of each of the four statutory criteria.¹³

[24] Ultimately, in case of doubt as to whether or not to authorize, the courts have generally applied the approach of authorizing the class action and deferring it to a judge in the post-authorization phase to make the necessary decisions, taking into consideration the more detailed proof provided by all parties.

[25] The present case, as mentioned above, is being framed in the context of a certified action in Saskatchewan.

¹² *Vivendi Canada Inc v. Dell'Aniello*, [2014] 1 SCR 3, at para. 60.

¹³ *Ibid*, at para. 66.

[26] In this regard, the Court cannot refuse to authorize a class action solely due to the fact that a multi-jurisdictional class action has been authorized elsewhere. Article 577 C.C.P. reads as follows :

577. The court cannot refuse to authorize a class action on the sole ground that the class members are part of a multi-jurisdictional class action already under way outside Québec.

If asked to decline jurisdiction, to stay an application for authorization to institute a class action or to stay a class action, the court is required to have regard for the protection of the rights and interests of Québec residents.

If a multi-jurisdictional class action has been instituted outside Québec, the court, in order to protect the rights and interests of class members resident in Québec, may disallow the discontinuance of an application for authorization, or authorize another plaintiff or representative plaintiff to institute a class action involving the same subject matter and the same class if it is convinced that the class members' interests would thus be better served.

577. Le tribunal ne peut refuser d'autoriser l'exercice d'une action collective en se fondant sur le seul fait que les membres du groupe décrit font partie d'une action collective multiterritoriale déjà introduite à l'extérieur du Québec.

Il est tenu, s'il lui est demandé de décliner compétence ou de suspendre une demande d'autorisation d'une action collective ou une telle action, de prendre en considération dans sa décision la protection des droits et des intérêts des résidents du Québec.

Il peut aussi, si une action collective multiterritoriale est intentée à l'extérieur du Québec, refuser, pour assurer la protection des droits et des intérêts des membres du Québec, le désistement d'une demande d'autorisation ou encore autoriser l'exercice par un autre demandeur ou représentant d'une action collective ayant le même objet et visant le même groupe s'il est convaincu qu'elle assure mieux l'intérêt des membres.

[27] That said, in the present matter, there is no application for discontinuance.

[28] Nor are the parties currently asking the Court to decline jurisdiction or to suspend the Quebec proceedings until a final judgment in the Saskatchewan action in accordance with Article 3137 C.C.Q.

[29] Hence, the Court need not review those particular issues in the present matter, at least not at this stage.

[30] The Court considers that there exists no impediment in the present matter to the authorization of a parallel class action to the one certified in Saskatchewan so long as the applicable Quebec criteria are met.

[31] We must now determine whether those criteria are indeed met in this matter.

4. ANALYSIS: APPLICABLE CRITERIA

[32] In the Court's view, Petitioner has indeed demonstrated a serious argument to the effect that the facts alleged appear to justify the conclusions sought, as required by Article 575 (2), C.C.P. The merits judge will decide whether the claim is well-founded in fact and law.

[33] As regards the requirement of raising identical, similar or related issues of law or fact as per Article 575 (1) C.P.C., the issues relating to both the fault of Respondents and the causality of damages generally, certainly qualify.

[34] As for the alleged damages actually suffered by Petitioner, the Application envisages separating the issue from the common issues so that it is treated at another phase of the merits trial.

[35] Although Article 584 C.C.P. prohibits a defendant from requesting a splitting of the proceeding, by stipulating only a prohibition applicable to defendants, it does not prohibit a petitioner from doing so. Essentially, the suspension and separation of issues, particularly those relating to damages, has been implemented in other cases, including the Lac-Mégantic class action¹⁴ and the ABILIFY class action.¹⁵

[36] What is different in the present matter is that the splitting of issues in a proceeding is being recognized at the authorization phase through the description of the common issues, as opposed to being split during the post-authorization phase.

[37] In the Court's view, that is neither a detrimental nor determinant distinction in the present matter. What is indispensable for authorization is that common issues exist and that class actions be able to move forward where appropriate.

[38] In the present matter, separating Petitioner's personal claim in damages from the common issues so that fault or negligence can be determined on a common bases independently from addressing damages, is in the interest of the putative class members.

[39] Moreover, as regards the fact that Quebec residents are already included in the Saskatchewan class action, the Court considers that at this stage it would be premature to intervene and refuse to authorize the proposed action for that reason. Quebec courts do not automatically decline to hear class actions simply because other courts have claimed jurisdiction.

¹⁴ *Ouellet v. Rail World Inc.*, 2015 QCCS 2002.

¹⁵ *Scheer v. Bristol-Myers Squibb Canada Inc.*, 2019 QCCS 5337.

[40] In this regard, the Court has jurisdiction to hear the matter. Furthermore, and as mentioned above, it is not now seized of an application or of a demand to suspend the authorization phase further by reason of the Saskatchewan proceedings. To the contrary, the parties are of the view that, as stated above, a national coordination is appropriate in the interest of the putative class members.

[41] As for the composition of the class, it is such that it would be both difficult and impracticable to apply the rules of mandates to act on behalf of others or for the consolidation of proceedings.

[42] Insofar as Petitioner being appointed as representative plaintiff, the Court considers that no reason has been advanced that would justify not naming her as such.

[43] At the present stage, the Court is therefore of the opinion that Petitioner has demonstrated that the criteria set forth in Articles 575 (1), (3) and (4) have also been satisfied.

[44] Accordingly, the proposed class action should be authorized and Petitioner named representative plaintiff.

FOR THESE REASONS, THE COURT:

[45] **GRANTS** the *Third Amended Application to Authorize the Bringing of a Class Action & to Appoint the Petitioner as Representative Plaintiff,* [45] **ACCUEILLE** la *Third Amended Application to Authorize the Bringing of a Class Action & to Appoint the Petitioner as Representative Plaintiff,*

[46] **AUTHORIZES** the bringing of a class action in the form of an application to institute proceedings in damages and declaratory judgment; [46] **AUTORISE** l'exercice de l'action collective sous la forme *d'une demande introductive d'instance en dommages-intérêts et déclaratoire;*

[47] **APPOINTS** Plaintiff as representative plaintiff for the persons included in the Class herein described as: [47] **ATTRIBUE** à la Demanderesse le statut de représentante des personnes faisant partie du Groupe ci-après décrit :

All persons residing in Quebec who were prescribed and have ingested the drug XARELTO® (rivaroxaban) since 2008, and their successors,

Toutes les personnes résidant au Québec qui se sont fait prescrire et ont consommé le médicament XARELTO® (rivaroxaban) depuis

assigns, family members, and dependants;

2008, ainsi que leurs successeurs, leurs ayants droit, les membres de leur famille et leurs personnes à charge;

[48] **IDENTIFIES** the principal issues to be treated collectively as the following:

- a) Was Bayer negligent in failing to provide a reasonable warning that XARELTO[®] could cause serious and irreversible bleeding?
- b) Does the manner in which Bayer obtained market authorization for XARELTO[®] or the manner in which it marketed XARELTO[®] justify an award of punitive damages?

[49] **IDENTIFIES** the conclusions sought by the class action to be instituted as follows:

GRANT the class action of the Plaintiff;

DECLARE that the Defendants failed to provide adequate warnings with regard to the dangerous side effects of XARELTO[®];

DECLARE the Defendants solidarily liable for the damages

[48] **IDENTIFIE** comme suit les principales questions qui seront tranchées collectivement :

- a) Bayer a-t-il fait preuve de négligence en omettant de donner un avertissement raisonnable que XARELTO[®] pouvait provoquer des hémorragies graves et irréversibles ?
- b) La manière dont Bayer a obtenu l'autorisation de mise sur le marché de XARELTO[®] ou la manière dont elle a commercialisé XARELTO[®] justifie-t-elle l'octroi de dommages-intérêts punitifs ?

[49] **IDENTIFIE** les conclusions recherchées dans le cadre de l'action collective à être instituée comme suit :

ACCUEILLIR l'action collective de la Demanderesse;

DÉCLARER que les Défenderesses n'ont pas fourni les avertissements adéquats en ce qui concerne les effets secondaires dangereux de XARELTO[®];

DÉCLARER les Défenderesses solidairement responsables

suffered by the Plaintiff and the members of the Class;

du préjudice subi par la Demanderesse et les membres du Groupe;

CONDEMN the Defendants to pay to the Plaintiff damages in an amount to be determined following the common issues trial;

CONDAMNER les Défendresses à verser à la Demanderesse des dommages-intérêts d'une somme à être déterminée suite au procès sur les questions communes;

RESERVE the right of each of the members of the Class to claim damages related to the use of XARELTO[®];

RÉSERVER le droit de chacun des membres du Groupe de réclamer des dommages-intérêts liés à l'utilisation de XARELTO[®];

ORDER individual recovery of the claims of the members of the Class in accordance with a process to be determined by this Honourable Court;

ORDONNER le recouvrement individuel des réclamations des membres du Groupe conformément à une procédure qui sera déterminée par cette honorable Cour;

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

CONDAMNER les Défendresses à payer les intérêts et l'indemnité additionnelle prévus à la loi à compter de la date de signification de la demande d'autorisation d'exercer une action collective;

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

CONDAMNER les Défendresses à supporter les frais de la présente action, y compris les frais d'expertise et de publication d'avis;

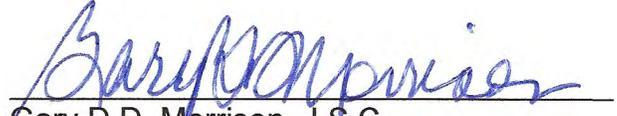
RENDER any other order that this Honourable Court shall determine and that is in the

RENDRE toute autre ordonnance que cette honorable Cour déterminera

interest of the members of the
Class;

et qui est dans l'intérêt des
Membres du Groupe;

- [50] **DECLARES** that all members of the Class that have not requested their exclusion, be bound by any judgment to be rendered on the class action to be instituted in the manner provided for by the law;
- [50] **DÉCLARE** que tous les membres du Groupe qui n'auront pas demandé leur exclusion seront liés par tout jugement à intervenir sur l'action collective qui sera intentée, de la manière prévue par la loi;
- [51] **FIXES** the delay of exclusion at sixty (60) days from the date of the publication of the notice to the Class members, date upon which the members of the Class that have not exercised their means of exclusion will be bound by any judgment to be rendered herein;
- [51] **FIXE** le délai d'exclusion à soixante (60) jours après la date de publication de l'avis aux membres du Groupe, délai à l'expiration duquel les membres qui ne se seront pas prévalus des moyens d'exclusion seront liés par tout jugement à intervenir;
- [52] **ORDERS** the publication of a notice to the members of the Class in accordance with article 579 C.C.P., pursuant to a further order of the Court;
- [52] **ORDONNE** la publication d'un Avis aux membres du Groupe conformément à l'article 579 C.p.c., suivant une ordonnance subséquente à être rendue par le tribunal;
- [53] **DETERMINES** that the class action is to be instituted in the district of Montréal.
- [53] **DETERMINE** que l'action collective doit être introduite dans le district de Montréal.
- [54] **THE WHOLE** with costs relating to the publication of notices to class members to be determined at the time of approval of the notices and their means of publication, with other judicial costs to follow suit.


Gary D.D. Morrison, J.S.C.

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Date of Hearing (by telephone): June 11, 2020