

SUPERIOR COURT
(Class Action)

CANADA
PROVINCE OF QUEBEC
DISTRICT OF MONTREAL

No.: 500-06-001243-233

DAPHNA OHAYON

Applicant

v.

DOLLARAMA S.E.C.

and

DOLLARAMA INC.

and

DOLLARAMA GP INC.

and

SHOPPERS DRUG MART INC.

and

LOBLAW COMPANIES LIMITED

and

AMAZON.COM.CA, INC.

Defendants

APPLICATION BY DEFENDANT SHOPPERS DRUG MART INC.
FOR LEAVE TO ADDUCE EVIDENCE
(Article 574(3) CCP)

TO THE HONOURABLE PIERRE NOLLET, J.C.S., ACTING AS CASE MANAGEMENT JUDGE, THE DEFENDANT, SHOPPERS DRUG MART INC., RESPECTFULLY SUBMITS THE FOLLOWING :

I. Introduction

1. The Defendant, Shoppers Drug Mart Inc. ("**SDM**") seeks leave to file relevant and limited documentary evidence into the Court record, in the form of a sworn declaration and its supporting exhibits.

2. This evidence will serve to correct and contextualize the allegations made by Ms. Daphna Ohayon (the “**Applicant**”), and will assist the Court in determining whether the Applicant’s allegations appear to justify the conclusions sought.

II. Brief Description of the Proposed Class Action

3. On or around May 29, 2023, the Applicant filed an *Application to Authorize the Bringing of a Class Action* against multiple defendants, including SDM.
4. On or around May 30, 2023, the Applicant filed an *Amended Application to Authorize the Bringing of a Class Action*.
5. On or around July 3, 2023, the Applicant filed a *Re-Amended Application to Authorize the Bringing of a Class Action*.
6. On or around November 21, 2023, the Applicant filed a *2nd Re-Amended Application to Authorize the Bringing of a Class Action* (the “**2nd Re-Amended Application**”).
7. As it appears from paragraph 1 of the 2nd Re-Amended Application, the Applicant seeks authorization from this Court to institute a class action on behalf of the following class:

“All natural and legal persons in Canada who purchased a product subject to the Environmental Handling Fee (“**EHF**”) from Dollarama, Pharmaprix or Amazon and who paid a price higher than the price advertised (excluding sales tax) because the EHF was not included in the price prominently advertised.”
8. The Applicant alleges *inter alia* that the prices prominently displayed by the defendants for electronics and batteries in store and online did not include the EHF, in an alleged violation of section 224 c) of the *Consumer Protection Act* and of section 54 of the *Competition Act*.
9. More specifically, with respect to SDM, the Applicant alleges that:
 - (a) It is the licensor of full-service retail drug stores operating under the name Pharmaprix in Québec (par. 53 of the 2nd Re-Amended Application);
 - (b) It dictates the way Pharmaprix stores display prices for electronics and batteries subject to the EHF;
 - (c) On May 21, 2023, an unnamed person purchased a pack of batteries from a Pharmaprix store, which “advertises only a partial price (\$16.99) and never expressly indicates the total real price (in this case \$17.71 plus taxes because of the écofrais of \$0.72) it ultimately charges its customers at the cash for these products” (par. 86 of the 2nd Re-Amended Application);

- (d) The situation was the same on Pharmaprix's website (par. 64 of the 2nd Re-Amended Application);
 - (e) "Pharmaprix is liable as supplier of these items (and because it imposes the manner in which to display them) to its franchise stores and because it allows the stores to use its name in the formation and conclusion of a contract (art. 2163 CCQ)" (par. 85 of the Re-Amended Application);
10. As a result, the Applicant is claiming compensatory damages on behalf of the putative class members pursuant to the *Consumer Protection Act*, the *Competition Act*, and the *Civil Code of Québec*.
11. The Applicant further alleges that the defendants intentionally put more emphasis on a price that did not include the EHF in a way that was lax, careless, passive, ignorant, and in bad faith, therefore justifying the award of a "meaningful amount" of \$40 million in punitive damages.

III. Application for Leave to File Relevant Evidence

12. Without any admission as to the legal syllogism presented against it by the Applicant and its legal obligations with respect to the facts alleged, SDM seeks leave to adduce limited evidence that would serve to explain the context in which the facts alleged in its regard in the 2nd Re-Amended Application took place.
13. The evidence that SDM seeks to adduce would further serve to correct certain inaccurate and unsubstantiated allegations made in the 2nd Re-Amended Application.
14. Indeed, the Sworn Declaration of Grant Wright, Director of Store Solutions for SDM (DP-1) and its supporting exhibits (DP-1 a), b) and c)) are to the effect that:
- (a) The "Pharmaprix" brand is licensed for use only in Québec;
 - (b) Prices prominently displayed for electronics and batteries in Pharmaprix stores have historically included the EHF;
 - (c) The situation at the origin of the Applicant's reproaches against SDM was temporary and the result of a good faith error;
 - (d) As of June 8, 2023, all labels in Pharmaprix stores for electronics and batteries prominently display a price that includes the EHF;
 - (e) At all relevant times, Pharmaprix's website only displayed a total price for electronic and batteries and did not make the EHF visible, contrary to the allegation of the 2nd Re-Amended Application;

- (f) The way prices are displayed on Pharmaprix flyers was not affected, such that, at all relevant times, the EHF was included in the price prominently displayed on flyers for electronics and batteries;
 - (g) The good faith error at the origin of the facts alleged in the 2nd Re-Amended Application was limited in scope to Pharmaprix; at no time were in-store labels in the rest of Canada, outside of the province of Québec, affected by this error;
 - (h) The amounts charged in Pharmaprix stores as EHF are remitted in full to the Québec chapter of the Electronic Products Recycling Association.
15. The evidence that SDM seeks to adduce is limited in scope to what is indispensable and proportionate at the authorization stage.
16. In light of the serious nature of the allegations that are made against it, SDM should be allowed to provide the Court with the full context surrounding the facts alleged in the 2nd Re-Amended Application, and to correct the false allegations made against it.
17. Allowing this limited documentary evidence to be adduced will streamline the hearing on authorization, allow the Court to obtain focus and clarity on the issues of fact and law alleged by the Applicant, and ensure an appropriate assessment of the criteria for authorization, notably whether the facts allege appear to justify the conclusions sought, and whether the proposed class is correctly defined.

FOR THESE REASONS, MAY IT PLEASE THE COURT TO:

GRANT the present Application;

AUTHORIZE Shoppers Drug Mart Inc. to adduce into evidence for the purpose of the authorization hearing the Sworn Declaration of Grant Wright and the exhibits in support thereof as exhibits DP-1 and DP-1 a), b) and c) respectively ;

ALL OF WHICH IS SOUGHT without costs, unless the present Application is contested.

MONTREAL, on January 16, 2024

McCarthy Tétrault LLP

MCCARTHY TÉTRAULT LLP

Lawyers for Defendants Shoppers Drug Mart Inc.

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