C A N A D A

PROVINCE OF QUÉBEC
DISTRICT OF **MONTRÉAL**

N°: **500-**

First instance:
N°: **500-06-000964-185**

COURT OF APPEAL

JOHNSON & JOHNSON INC.

APPELLANT - Defendant

v.

KATHLEEN GAUTHIER

RESPONDENT – Petitioner

APPLICATION FOR LEAVE TO APPEAL
(Articles 30 para. 2, 357 and 578 CCP)

APPELLANT

Dated September 18, 2020

TO ONE OF THE HONOURABLE JUSTICES OF THE COURT OF APPEAL, THE APPELLANT JOHNSON & JOHNSON INC. SUBMITS THE FOLLOWING:

1. The Appellant Johnson & Johnson Inc. seeks leave to appeal from a judgment rendered on February 25, 2020 (the "**Judgment**") by the Honourable Chantal Tremblay of the Superior Court for the District of Montréal (the "**Judge**") in the course of class action proceedings bearing number 500-06-000964-185. The Judgment is attached hereto as **Schedule 1**.

2. This Judgment granted the Respondent's *Re-Amended Motion for Authorization to Institute a Class Action* (the "**Motion for Authorization**"), a copy of which is attached as **Schedule 2**.

3. The Judgment may be appealed with leave of a judge of the Court of Appeal pursuant to Article 578(1) CCP.

4. The delay to appeal from this Judgment will expire on September 22, 2020, the date of the notice of judgment being March 6, 2020 and considering the suspension of civil procedure deadlines between March 15 and August 31, 2020.

5. The hearing on the Motion for Authorization lasted one day, on December 16, 2019.

I. THE PROPOSED CLASS ACTION

6. In her Motion for Authorization, the Respondent sought leave to institute a class action on behalf of the following class:

> All of the consumers residing in Quebec who bought before December 12, 2017, Tylenol Products, listed below, manufactured and/or sold and/or marketed by Johnson & Johnson Inc. containing acetaminophen alone or in combination with other medications.
>
> "Tylenol Products"
>
> [list of 31 Tylenol Products]

7. The Judgment limits the definition of the class by selecting October 23, 2015, as the starting date, being three years before the filling of the initial Motion for Authorization[1].

8. The Respondent alleges that the Appellant mislead consumers in omitting to disclose and properly caution against the risks and side effects related to Tylenol Products, including the risk of death and liver failure. The Respondent suffered none of those side effects[2].

9. Relying on Sections 219 and 228 of the *Consumer Protection Act* ("**CPA**"), Section 52 of the *Competition Act*, and Articles 6, 7, 1375 and 1401 of the *Civil Code of Québec*, the Respondent argues that the Appellant deliberately omitted to disclose important facts to consumers. To reach this conclusion, the Respondent compares

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[1] Judgment, para. 10.

[2] Motion for Authorization, para. 59.

the statement made on the label of the Tylenol Products sold in the United States (Exhibit P-9, attached hereto as **Schedule 3**) with those made on the label used in Canada during the class period (Exhibit P-8A, attached hereto as **Schedule 4**).

10. In doing so, the Respondent identifies three alleged omissions, which are summarized at paragraph 52 of the Motion for Authorization. Firstly, the Appellant would have reduced the maximum daily recommended dosage in the United States to 3,000mg or 3,250mg while keeping a 4,000mg dosage in Canada. Secondly, the Appellant would have expressly warned American consumers that taking three or more alcoholic beverages every day while using a Tylenol Product could cause severe liver damage. Thirdly, the Appellant would have warned American consumers that taking a Tylenol Product with another product containing acetaminophen can cause severe liver damage.

11. As confirmed in the Judgment[3], the relevant label for Tylenol Products sold during the class period contains the following warning:

> [...] Do not take more than 8 caplets per day [i.e. 4000mg]
>
> [Red Warn Sign] **CAUTION**: [...] **Do not use** with other drugs containing **acetaminophen**. Use the smallest effective dose. **Do not** take more than the maximum daily dose. Overdose may result in **severe or possibly fatal liver damage**. [...] Ask a doctor or pharmacist before use if you are pregnant or breastfeeding; have chronic alcoholism; have a serious liver or kidney disease; use any other medications including natural health products, prescription drugs, salicylates or other pain and fever relief medication.

12. On behalf of the class members, the Respondent is claiming damages comprised of compensatory damages arbitrarily determined at $10 million, and punitive damages in the amount of $100 per class member.

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[3] Judgment, para. 32.

II. THE APPELLANT'S RIGHT TO SEEK LEAVE TO APPEAL

13. The Appellant respectfully submits that the Judgment is flawed with a *prima facie* decisive error respecting the interpretation of the authorization criteria set out in Article 575(2) and (4) CCP. Accordingly, the Appellant should be granted leave to appeal this Judgment pursuant to Article 578 CCP.

14. More specifically, the Judge made an overriding error by accepting that an arguable case had been made with respect to two of the three alleged omissions without analyzing, firstly, if those allegations were manifestly contradicted by the evidence the Judge had allowed the Appellant to present at the authorization hearing and, secondly, if those allegations would constitute misrepresentations as a matter of law. Had the Judge analyzed the question, she would have concluded that the Respondent does not present an arguable case.

15. Subsidiarily, if the Court concludes that there is an arguable case of misrepresentation under the CPA, which is denied, only a subclass of consumers should be authorized. Since the Respondent is not a member of this subclass, the Motion for Authorization must be dismissed.

III. THE DECISIVE ERROR RESPECTING THE INTERPRETATION OF 575(2) CCP

16. As held by this Court in *Asselin v. Desjardins Cabinet de services financiers inc.*, the Respondent was required to establish that her legal syllogism was arguable and that her case was tenable in order to meet the second authorization condition (Article 575(2) CCP)[4]. With respect, the Judge made an overriding error in her interpretation of this condition.

17. On the existence of an arguable case, the Judge summarized the arguments of the Respondent on the violations of Sections 219 and 228 CPA and 52(1) of the *Competition Act* and cited paragraph 52 of the Motion for Authorization to conclude,

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[4] 2017 QCCA 1673, paras. 29 and 34.

in a one-paragraph analysis, that the proposed class action presents a good colour of right[5].

18. The Judge did not analyze whether the facts alleged in the Motion for Authorization, even if they are taken as averred, constitute an arguable case of misrepresentation under the CPA.

19. The Judge also failed to analyze the evidence that the Appellant was permitted to file. Allegations are no longer accepted as averred if they are implausible or if disproved by the evidence in the record[6].

20. At paragraph 35 of the Judgment, the Judge relied on two of the three misrepresentations alleged in the Motion for Authorization to erroneously conclude that the second criterion for authorization was met, namely that:

a) The Appellant contravened the CPA and the *Competition Act* by having reduced the maximum daily recommended dosage of acetaminophen in the United States, without doing so in Canada; and

b) The Appellant failed to warn the Canadian consumers of the risks of taking more than three alcoholic beverages every day while using a Tylenol Product by only asking consumers to consult a doctor or a pharmacist before taking a Tylenol Product if they suffer from chronic alcoholism.

A. Maximum Daily Recommended Dosage of Acetaminophen

21. The Judge erred in authorizing the class action based on the allegations found in the Motion for Authorization. There is no arguable case of misrepresentation by the Appellant regarding the maximum daily recommended dosage of

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[5] Judgment, paras. 28-29 and 35.

[6] *Durand* v. *Subway Franchise Systems of Canada*, 2019 QCCS 477, para. 36.

acetaminophen for the Tylenol Products in Canada because the Appellant complied with the applicable regulatory regime enacting the recommended dosage.

22. The Appellant was authorized by the Judge to adduce evidence in the form of the *Revised Guidance Document - Acetaminophen Labelling Standard* issued by Health Canada on September 15, 2016 (Exhibit D-1, attached hereto as **Schedule 5**), the *Acetaminophen Labelling Standard Guidance Document* issued by Health Canada on October 28, 2009 (Exhibit D-2, attached hereto as **Schedule 6**) and the affidavit of Kristin Jill Grande, Senior Manager, Regulatory Affairs at McNeil Consumer Healthcare, a division of the Appellant, stating, *inter alia*, that the Appellant strictly complied with the requirements set forth by Health Canada for the labelling of acetaminophen products under both of the guidelines (Exhibit D-5, attached hereto as **Schedule 7**).

23. The Judge recognised that the Tylenol Products' label was "consistent with the requirements of the labelling standards issued by Health Canada to be followed by the manufacturers of acetaminophen products in Canada"[7]. Nevertheless, she found an arguable misrepresentation under the CPA by merely holding the arguments found in the Motion for Authorization to be true without analyzing if they were disproved by the evidence adduced by the Appellant.

24. Had she performed this analysis, the Judge would have found that the maximum daily dosage indicated on the label of the Tylenol Product (4,000mg) was the maximum daily dosage imposed by Health Canada. Complying with the applicable regulatory regime with respect to acetaminophen products does not constitute a misrepresentation.

B. Risks in Taking More Than Three Alcoholic Beverages Every Day

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[7] Judgment, para. 34.

25. The Judge erred in concluding that the second authorization criterion was met without applying, in analyzing the alleged misrepresentations, the test defined by the Supreme Court of Canada in *Richard* v. *Time Inc.*[8] ("***Time***"). Rather than accepting the Respondent's conclusion, she should have analyzed the general impression given by the representation at issue and whether this impression was inaccurate[9].

26. In the present context, the Judge should have considered whether an average consumer reading the label of the Tylenol Products would have concluded that taking these products was safe for a person drinking three or more alcoholic beverages every day.

27. As the Appellant submits, the test is not met in the present case. A credulous and inexperienced consumer, when reading the label, would not conclude that it was safe for a person drinking three or more alcoholic beverages every day to take these products because the label includes a clear warning for people suffering from chronic alcoholism not to use the Tylenol Products without consulting a doctor or a pharmacist.

28. Even if the Court concludes otherwise, the requirements to apply the absolute presumption of prejudice of Section 272 of the CPA are not met pursuant to the jurisprudence in *Time* and in this Court's decision in *Imperial Tobacco Canada ltée* v. *Conseil québécois sur le tabac et la santé*[10]. The representation at issue is not objectively capable of influencing the consumer's decision to purchase the product[11]. A consumer drinking occasionally or moderately, i.e. less than three beverages every day, would not objectively decline to buy the Tylenol Products by reason of a different representation regarding heavy alcohol consumption.

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[8] 2012 SCC 8.

[9] *Ibid.*, para. 78.

[10] *Imperial Tobacco Canada ltée* v. *Conseil québécois sur le tabac et la santé*, 2019 QCCA 358.

[11] *Ibid.*, paras. 923-928; *Time*, para. 124.

29. Subsidiarily, if the Court were to conclude that the test in *Time* was met, which is denied, the class action should be authorized only in respect of the subclass of consumers drinking three or more alcoholic beverages every day. Consumers who do not consume such a large amount of alcohol are not impacted by the alleged misrepresentation and their decision to purchase Tylenol Products is not influenced by the representation at issue.

IV. THE DECISIVE ERROR RESPECTING THE INTERPRETATION OF 575(4) CCP

30. The Judge erred in concluding that the Respondent met the fourth authorization criterion of adequate representation (Article 575(4) CCP)[12].

31. A petitioner who fails to establish a valid personal claim cannot adequately represent the putative class, and thus is not an adequate representative within the meaning of Article 575(4) CCP[13].

32. The Respondent having failed to present an arguable case as to the existence of a misrepresentation, she does not meet the adequate representation threshold, however low it may be. Accordingly, she cannot be considered an adequate representative within the meaning of Article 575(4) CCP.

33. Even if the Court were to conclude that the class action should be authorized only in respect of the subclass of consumers drinking three or more alcoholic beverages every day, the Respondent would not be an adequate representative because she is not a member of that subclass.

34. As the Respondent testified, she only drinks alcohol occasionally, during social events, and she rarely drinks at all when she consumes Tylenol Products[14]. As

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[12] Judgment, paras. 47-52.

[13] *Sofio* v. *Organisme canadien de réglementation du commerce des valeurs mobilières*, 2015 QCCA 1820, paras. 10 and 25-26; *Karras* v. *Société des loteries du Québec*, 2019 QCCA 813, paras. 53-54.

[14] Examination of Ms. Kathleen Gauthier conducted on November 5, 2019, pp. 25-26, attached hereto as **Schedule 8**.

such, the Respondent is not a consumer who could have objectively been impacted by the representation regarding alcohol consumption and, accordingly, she has no valid personal claim.

35. The Respondent having no legal interest against the Appellant, she does not meet the fourth criterion of Article 575 CCP. On this basis alone, the Motion for Authorization should have been dismissed.

V. CONCLUSION

36. The Motion for Authorization fails to present an arguable case of consumer misrepresentation. Even if a subclass had an arguable case in light of the test in *Time*, the Respondent has no valid personal claim in this regard.

37. When analyzing the Motion for Authorization in conformity with the legal principles underpinning the four conditions of Article 575 CCP and the applicable test under the CPA, the Judge ought to have concluded that the proposed class action fails to meet the second and fourth conditions for authorization. By holding otherwise, the Judge made decisive errors in her interpretation of those conditions.

38. For these reasons, the Appellant respectfully submits that the Judgment appears to contain, on its face, overriding errors in the interpretation of the class action authorization conditions found at Article 575 CCP.

39. If the present leave to appeal is granted, the Appellant will ask the Court of Appeal to:

i) **GRANT** the appeal;

ii) **REVERSE** the judgment rendered on February 25, 2020, by the Honourable Chantal Tremblay of the Superior Court for the District of Montréal in the course of class action proceedings bearing number 500-06-000964-185;

iii) **DISMISS** the Respondent's *Re-Amended Motion for Authorization to Institute a Class Action*;

iv) **ORDER** the Respondent to bear the legal costs of the first instance and the appeal.

FOR THESE REASONS, MAY IT PLEASE THE HONOURABLE JUDGE OF THE COURT OF APPEAL TO:

GRANT the present Application for Leave to Appeal;

AUTHORIZE the Appellant to appeal the judgment rendered on February 25, 2020, by the Honourable Chantal Tremblay of the Superior Court for the District of Montréal in the course of class action proceedings bearing number 500-06-000964-185;

ORDER the stay of proceeding in the file bearing number 500-06-000964-185 until a final judgment is rendered in the present appeal;

THE WHOLE with legal costs to follow.

Montréal, September 18, 2020

Blake, Cassels & Graydon LLP

BLAKE, CASSELS & GRAYDON LLP
Attorneys for Appellant
(Court Code: BB-8098)
1 Place Ville-Marie, Suite 3000
Montréal, Québec H3B 4N8
M^tre^ Robert J. Torralbo / M^tre^ Simon J. Seida
robert.torralbo@blakes.com
simon.seida@blakes.com
Telephone: 514-982-4014 / 514-982-4103
Fax: 514-982-4099
Our reference: 35256-820

C A N A D A

PROVINCE OF QUÉBEC

DISTRICT OF **MONTRÉAL**

No: **500-**

First instance:
No: **500-06-000964-185**

COURT OF APPEAL

JOHNSON & JOHNSON INC.

APPELLANT - Defendant

v.

KATHLEEN GAUTHIER

RESPONDENT – Petitioner

AFFIDAVIT

APPELLANT

Dated September 18, 2020

I, the undersigned, Simon J. Seida, lawyer, having my professional address at 1 Place Ville-Marie, Suite 3000, in the city and district of Montréal, Province of Québec, H3B 4N8, do solemnly declare:

1. I am a duly authorized representative of Johnson & Johnson Inc. in the present case;
2. All the facts alleged in the present application are true.

AND I HAVE SIGNED:

Simon J. Seida

Solemnly affirmed before me,
in Montréal, on September 18, 2020

Commissioner of Oaths for Québec

COMMISSAIRE À L'ASSERMENTATION
HÉLÈNE FUHR
194872
POUR LE QUÉBEC

NOTICE OF PRESENTATION

TO: Mtre Karim Renno
Renno Vathilakis Inc.
145, Saint-Pierre Street, Suite 201
Montréal, Québec H2Y 2L6

TAKE NOTICE that the present Application for Leave to Appeal will be presented for adjudication before one of the honourable judges of the Court of Appeal for the district of Montréal, sitting at the Édifice Ernest-Cormier, located 100 Notre-Dame Street East, Montréal, Québec, H2Y 4B6, on November 3, 2020, at 9:30 a.m. or so soon thereafter as counsel may be heard, in Room RC-18.

DO GOVERN YOURSELF ACCORDINGLY.

Montréal, September 18, 2020

Blake, Cassels & Graydon LLP

BLAKE, CASSELS & GRAYDON LLP
Attorneys for Appellant
(Court Code: BB-8098)
1 Place Ville-Marie, Suite 3000
Montréal, Québec H3B 4N8
M^tre^ Robert J. Torralbo / M^tre^ Simon J. Seida
robert.torralbo@blakes.com
simon.seida@blakes.com
Telephone: 514-982-4014 / 514-982-4103
Fax: 514-982-4099
Our reference: 35256-820

LIST OF SCHEDULES IN SUPPORT OF THE APPLICATION FOR LEAVE TO APPEAL

Appellant

SCHEDULE 1: Judgment rendered by the Honourable Chantal Tremblay of the Superior Court on February 25, 2020;

SCHEDULE 2: *Re-Amended Motion for Authorization to Institute a Class Action*;

SCHEDULE 3: Exhibit P-9;

SCHEDULE 4: Exhibit P-8A;

SCHEDULE 5: Exhibit D-1;

SCHEDULE 6: Exhibit D-2;

SCHEDULE 7: Exhibit D-5;

SCHEDULE 8: Examination of Ms. Kathleen Gauthier conducted on November 5, 2019.

Montréal, September 18, 2020

Blake, Cassels & Graydon LLP

BLAKE, CASSELS & GRAYDON LLP
Attorneys for Appellant
(Court Code: BB-8098)
1 Place Ville-Marie, Suite 3000
Montréal, Québec H3B 4N8
M^tre^ Robert J. Torralbo / M^tre^ Simon J. Seida
robert.torralbo@blakes.com
simon.seida@blakes.com
Telephone: 514-982-4014 / 514-982-4103
Fax: 514-982-4099
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COURT OF APPEAL
DISTRICT OF MONTRÉAL

JOHNSON & JOHNSON INC.

APPELLANT - Defendant

v.

KATHLEEN GAUTHIER

RESPONDENT - Petitioner

APPLICATION FOR LEAVE TO APPEAL, AFFIDAVIT, NOTICE OF PRESENTATION, LIST OF SCHEDULES IN SUPPORT OF THE APPLICATION FOR LEAVE TO APPEAL AND SCHEDULES 1 TO 8

ORIGINAL

M^tre Robert J. Torralbo **BB-8098**
M^tre Simon J. Seida
BLAKE, CASSELS & GRAYDON LLP
Barristers & Solicitors
1 Place Ville Marie, Suite 3000
Montréal, Québec H3B 4N8
Telephone M^tre Torralbo : 514-982-4014
Telephone M^tre Seida : 514-982-4103
Fax: 514-982-4099
Email: robert.torralbo@blakes.com
simon.seida@blakes.com

Our File: 35256-820

NOTICE FOLLOWING THE CIVIL PRACTICE REGULATION (ART. 25)

***Article 358, para. 2 C.C.P.**: The respondent, the intervenors and the impleaded parties **must file, within 10 days after notification, a representation statement** giving the name and contact information of the lawyer representing them or, if they are not represented, a statement indicating as much. **If an application for leave to appeal is attached to the notice of appeal**, the respondent, intervenors and the impleaded parties **are only required to file such a statement within 10 days after the judgment granting leave or after the date the judge takes note of the filing of the notice of appeal**.*

***Article 25, para. 1 Civil Practice Regulation:** The parties **shall notify** their proceedings (including briefs and memoranda) **to the appellant and to the other parties who have filed a representation (or non-representation statement)**.*

***Article 30 Civil Practice Regulation: If a party fails to file a representation by counsel (or a non-representation statement)**, it shall be precluded from filing any other pleading in the file. The appeal shall be conducted in the absence of such party. The Clerk is not obliged to notify any notice to such party. If the statement is filed after the expiry of the time limit, the Clerk may accept the filing subject to conditions that the Clerk may determine.*