

CANADA

PROVINCE OF QUÉBEC
DISTRICT OF MONTRÉAL

SUPERIOR COURT
(Class Actions)

NO: 500-06-001142-211

DOMINIQUE LAVOIE

Representative Plaintiff

v.

WAL-MART CANADA CORP.

Defendant

APPLICATION FOR LEAVE TO EXAMINE ADDITIONAL CLASS MEMBERS
(Art. 221 and 587 CCP)

TO THE HONOURABLE CHRISTIAN IMMER, J.S.C., DEFENDANT WAL-MART CANADA CORP. RESPECTFULLY SUBMITS THE FOLLOWING:

I. INTRODUCTION

1. Wal-Mart Canada Corp. ("**Walmart Canada**") seeks leave to examine three (3) putative members of the class authorized by the Court on March 30, 2022,¹ in addition to the Plaintiff (who was examined on discovery on November 23, 2022).
2. The three (3) additional members that Walmart Canada seeks to examine on discovery are identified in the Confidential Affidavit of Shane Biggin filed under seal herewith, in order to preserve their confidential information until a determination can be made.

II. FACTUAL BACKGROUND

3. Walmart Canada's defence on the merits of the common issues alleges as follows:
 - a) On April 4, 2021, an error caused thousands of different items to be available on the www.walmart.ca site at a price (\$3.49) which was obviously wrong to any visitor to the site;
 - b) On April 4, 2021, very quickly after the occurrence of the pricing error, Internet posts alerting the public to the existence of the error went viral;

¹ *Lavoie c. Wal-Mart Canada Corp.*, [2022 QCCS 1060](#), rectified on May 30, 2022.

- c) Hundreds of posts, which were viewed tens of thousands of times, appeared on internet forums such as RedFlagDeals.com and Reddit.com;
 - d) To limit the effects of the pricing error, all affected items from the Domestic Department were temporarily made unavailable for purchase from Walmart Canada's website. This process began around 8:00 p.m. EDT on Sunday, April 4, 2021, and was completed around midnight between Sunday, April 4, 2021, and Monday, April 5, 2021;
 - e) Over the following few days, Walmart Canada cancelled any orders that had not been fulfilled, including all six (6) of Plaintiff's orders, and refunded any amounts paid, as permitted by its Terms of Sale (D-1);
 - f) The affected items from the Domestic Department were later relisted on the Walmart Canada website at their correct prices.
4. As appears from Plaintiff's Originating Application, between 8:01 p.m. and 10:00 p.m. EDT on April 4, 2021, Plaintiff placed six (6) orders for twenty-two (22) distinct SKUs², often for multiple quantities of the same SKU. These orders were cancelled by Walmart Canada.
5. On April 7, 2021, Plaintiff filed an *Application to Authorize the Bringing of a Class Action and to Appoint the Status of Representative Plaintiff* against Walmart Canada alleging that the order cancellations and other facts relating to the price error violated the *Consumer Protection Act* ("**CPA**").³
6. On March 30, 2022, the Superior Court of Québec authorized a class action⁴ against Walmart Canada on behalf of the following class (the "**Class**"):

All consumers domiciled or residing in Québec who, on April 4th or 5th, 2021, placed an order for an item priced at \$3.49 from the www.walmart.ca website and who, after receiving a purchase confirmation from Wal-Mart at the price initially advertised, subsequently had their purchase cancelled by Wal-Mart.

Tout consommateur, domicilié ou résidant au Québec, qui le 4 ou 5 avril 2021, a placé une commande sur le site internet www.walmart.ca pour un item (...) affiché au prix de 3,49 \$ et qui, après avoir reçu une confirmation de Wal-Mart au prix initialement annoncé, a ensuite vu son achat annulé par Wal-Mart.

² Each SKU, or "Stock-Keeping Unit", identifies a product sold by a retailer (in this case, Walmart Canada).

³ RLRQ, c. P-40.1.

⁴ *Lavoie v. Wal-Mart Canada Corp.*, [2022 QCCS 1060](#), rectified on May 30, 2022.

7. The Superior Court identified the following questions of fact and law to be treated collectively as part of the class action:
- | | |
|---|---|
| a) By cancelling consumers' orders of April 4 and 5, 2021, did Wal-Mart violate s. 16, 231 and 224c) of Québec's <i>Consumer Protection Act</i> ? | a) En annulant les commandes de consommateurs les 4 et 5 avril 2021, Wal-Mart viole-t-elle les articles 16, 231 et 224c) de la <i>Loi sur la protection du consommateur</i> ? |
| b) If so, are Class members entitled to compensation and in what amount? | b) Si oui, les membres du groupe ont-ils droit à des dommages compensatoires et, le cas échéant, à la hauteur de quel montant? |
| c) Are the Class members entitled to punitive damages and, if so, in what amount? | c) Les membres du groupe ont-ils droit à des dommages (...) punitifs et si oui, à la hauteur de quel montant? |
8. Plaintiff claims that compensatory damages should be quantified using what he refers to as the "Lost Value" theory, which he claims is measured as "*the difference between the actual costs to purchase the items on his April 4, 2021 orders (either from Wal-Mart or from another merchant if Wal-Mart does not have any more stock as it declared on April 6, 2021) and the prices advertised by Wal-Mart at the time of his purchase (Wal-Mart is in possession of these prices)*".⁵
9. On October 28, 2022, Walmart Canada filed its defence to the class action. Among other things, Walmart Canada alleges:
- a) The existence of the pricing error vitiated Walmart Canada's consent to any orders;
 - b) The fact that a pricing error occurred was obvious to every member of the class, or at least many of them, and the orders of these class members were thus affected by *dol* or bad faith;
 - c) Walmart Canada did not violate the CPA;
 - d) Class members are not entitled to either compensatory damages or punitive damages. Moreover, the Plaintiff's "Lost Value" theory is not an appropriate measure of damages;
 - e) If any liability is found at all (which is denied), only individual recovery is possible in this case because:
 - i) Many of those who placed orders are not actually *consumers* within the meaning of that term in the CPA, and therefore must be excluded from the class.
 - ii) Walmart Canada raises a defence against the individual claim of any member who knew or should have known that the price was an error

⁵ Originating Application, para. 32.

at the time their order was placed, and asks to reserve this issue for an individual recovery process in the event that any liability is found at all.

- iii) The quantum of damages suffered (if any) is dependent on the individual circumstances of each member.

III. PRE-TRIAL EXAMINATION OF CLASS MEMBERS IS USEFUL TO THE COURT'S DETERMINATION OF ISSUES OF LAW AND FACT TO BE DEALT WITH COLLECTIVELY

- 10. Walmart Canada is seeking leave to examine three (3) persons who placed large orders who are potential class members, for a maximum duration of ninety (90) minutes each, in order to understand, *inter alia*, the facts which lead each to place their orders, understand their measure of damages (if any), and allow the Court to determine whether collective recovery could be awarded.
- 11. These examinations are useful to the Court's determination of issues of law and fact to be dealt with in the judgement on the common issues.

IV. ADDITIONAL CLASS MEMBERS FOR PRE-TRIAL EXAMINATION

A. WITNESS A

- 12. Using two different email addresses, Witness A placed many distinct orders for over one hundred fifty (150) individual SKUs, often in multiple quantities of each, for a total of more than two hundred (200) items.
- 13. Those items ranged in price from \$39.97 to more than \$1,600.00 according to their correct prices.
- 14. All or nearly all of the items ordered by Witness A were items supplied by a business with which Witness A is apparently related, as appears from the LinkedIn profile of Witness A filed under seal herewith as **Exhibit R-1**.
- 15. His orders would have had a total price of over \$85,000.00 according to the correct price of the items ordered.

B. WITNESS B

- 16. Using two different email addresses which appear to indicate the intent to resell merchandise, Witness B placed multiple distinct orders for over one hundred (100) individual SKUs, often in multiple quantities of each, for a total of more than seven hundred (700) items.
- 17. Witness B ordered large quantities of the same items: in a single order up to 30 units of the same item.

18. Her orders would have had a total price of more than \$90,000.00 according to the correct price of the items ordered.

C. WITNESS C

19. Witness C placed many distinct orders for more than fifty (50) individual SKUs, often in multiple quantities of each, for a total of over two hundred (200) items.
20. Witness C also ordered large quantities of the same items: in a single order up to 30 units of the same item.
21. His orders would have had a total price of over \$50,000.00 according to the correct price of the items ordered.
22. During pre-trial examination, Plaintiff stated that it was Witness C who directed him to the Walmart Canada website on April 4, 2021.

V. CONCLUSION

23. Walmart Canada submits that it is in the interest of justice to authorize the requested examinations in light of Walmart Canada's right to a full answer and defence.
24. Given the quantum of each of these potential member's claims, as well as the overall size and complexity of the litigation, the examinations respect the principle of proportionality.
25. The present Application for Leave to Examine Additional Class Members is well founded in fact and in law.

FOR THESE REASONS, MAY IT PLEASE THIS HONORABLE COURT TO:

GRANT the present Application for Leave to Examine Additional Class Members;

AUTHORIZE Wal-Mart Canada Corp. to examine Witnesses A, B and C identified in the Confidential Affidavit of Shane Biggin for a maximum duration of ninety (90) minutes each.

ORDER that the Confidential Affidavit of Shane Biggin and Exhibit R-1 be filed under seal and kept confidential by the Clerk of the Court.

THE WHOLE, without costs, unless the present Application is contested.

MONTRÉAL, July 7, 2023

(s) **Torys Law Firm LLP**

TRUE COPY

Torys Law Firm LLP

Torys Law Firm LLP

TORYS LAW FIRM LLP

Attorneys for the Defendant

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Our reference: 33924-2133

NOTICE OF PRESENTATION

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TAKE NOTICE that the *Application for Leave to Examine Additional Class Members* will be presented before the Honourable Justice Christian Immer of the Superior Court, sitting in and for the District of Montréal, as case management judge, at a date and time to be determined by the Court, at the Montréal Courthouse, located at 1 Notre-Dame Street East, Montréal, Québec H2Y 1B6.

GOVERN YOURSELVES ACCORDINGLY.

MONTRÉAL, July 7, 2023

(s) **Torys Law Firm LLP**

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CANADA

PROVINCE DE QUÉBEC
DISTRICT DE MONTRÉAL

COUR SUPÉRIEURE
(Chambre des actions collectives)

NO : 500-06-001142-211

DOMINIQUE LAVOIE

Représentante/Demanderesse

c.

LA COMPAGNIE WAL-MART DU CANADA

Défenderesse

DÉCLARATION SOUS SERMENT

Je, soussigné, Karl Boulanger, avocat, exerçant ma profession chez Société d'avocats Torys S.E.N.C.R.L., au 1, Place Ville Marie, bureau 2880, Montréal, district de Montréal, province de Québec, H3B 4R4, atteste ce qui suit :

1. Je suis l'un des avocats de la partie défenderesse.
2. Tous les faits allégués dans les paragraphes 1 à 10 et 22 de l' *Application for leave to examine additional class members* en date du 7 juillet 2023 de la défenderesse sont vrais à ma connaissance personnelle ou apparaissent du dossier de la cour.

ET J'AI SIGNÉ À MONTRÉAL, QUÉBEC,
le 7 juillet 2023


Karl Boulanger

Affirmé solennellement devant moi par
vidéoconférence à Montréal, le 7 juillet
2023





Commissaire à l'assermentation pour le
Québec et pour l'extérieur du Québec

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Torys Law Firm LLP

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