

CANADA

SUPERIOR COURT
(Class Action)

PROVINCE OF QUEBEC
DISTRICT OF MONTREAL

N^o : 500-06-000527-107

PAULA PRICE, [REDACTED]
[REDACTED];

Petitioner

-vs-

MATTEL CANADA INC., [REDACTED]
[REDACTED];

and

MATTEL, INC., [REDACTED]
[REDACTED];

and

FISHER-PRICE INC, [REDACTED]
[REDACTED].

Respondents

**MOTION TO AUTHORIZE THE BRINGING OF A CLASS ACTION AND
TO ASCRIBE THE STATUS OF REPRESENTATIVE**
(Art. 1002 C.C.P. and following)

TO ONE OF THE HONOURABLE JUSTICES OF THE SUPERIOR COURT OF
QUEBEC, SITTING IN AND FOR THE DISTRICT OF MONTREAL, THE PETITIONER
STATES THE FOLLOWING:

GENERAL PRESENTATION

1. Petitioner wishes to institute a class action on behalf of the following Group, of which she is a member, namely:
 - All persons in Québec who purchased and/or otherwise became the owner of any of the toys, subject to recall, that were manufactured, or caused to be manufactured, distributed or ultimately offered for sale and sold to the public, by the Respondents or their retailers, between November 2006 and September 4, 2007 inclusively (hereinafter the “**Toys**”), or any other group to be determined by the Court;

(hereinafter, the Class Members are collectively referred to as “**Petitioner(s)**”, “**Class Member(s)**”, “**Group Member(s)**”, the “**Group**”, the “**Class**”, the “**Member(s)**”, the “**Consumer(s)**”);
2. Respondents design, manufacture and distribute toys in Canada, the United States of America (US) and elsewhere;

FACTS GIVING RISE TO AN INDIVIDUAL ACTION BY THE PETITIONER

Recalls by the Respondents:

3. In or about September 2007, Respondents recalled various models of their toys that were designed for young children. Despite marketing their Toys as safe for young children, who can reasonably be expected to lick, suck, and bite on these Toys, the Respondents negligently allowed these Toys to contain lead, which is poisonous and medically harmful to children if ingested;
4. Lead content in surface area paint is regulated to very specific parameters if the product is intended for the use of children or pregnant women. The Petitioner reasonably believes that the Respondents have breached these regulations;
5. Respondents also recalled models of Toys that exhibit a significant design, or manufacturing defects, that allows *inter alia* for small powerful magnets to be detached from the Toys, which can potentially be ingested by children. These Toys are marketed as being safe for young children, who can reasonably be expected to lick, suck, and bite on these Toys. The Respondents negligently caused these products to be manufactured with an unreasonable and dangerous defect that can be medically harmful to children;

6. The “Mattel” Respondents sold the Toys to distributors including Respondent Fisher-Price Inc. and other mass merchandise stores nationwide who in turn sold the Toys throughout Canada and the United States;
7. In Canada and the United States, there were numerous reported and unreported incidents of personal injury requiring medical attention as a result of the above-mentioned defects of Respondents’ Toys;
8. As a result of the above-mentioned defects and increased risk of poisoning and medical harm in the event lead is ingested, the Toys were dangerously and irreparably defective or unsafe;
9. Consumers are entitled to expect a level of safety that the Toys would not be actually, potentially or in any other way harmful or dangerous to anyone, including their infants;
10. Respondents’ recalls (warnings) are admissions that Respondents manufactured, sold or distributed Toys that are not reasonably fit for their intended purpose or unsafe;
11. To ordinary and prudent Consumers, the above-mentioned defects were latent;
12. Before they sold the Toys, Respondents knew or ought to have known of the existence of these defects;
13. Had the Respondents done appropriate scientific research and testing, they ought to have known that the Toys were defective, unsafe, not fit for their intended purpose, dangerous and materially contribute to the risk of serious injuries, poisoning and medical harm in the event lead is ingested as described hereinabove and should have fully informed the general public, distributors, Consumers, including the Petitioner and putative Class Members, of such risks in a timely manner;
14. Respondents knew or ought to have known of the risk of serious injuries, poisoning and medical harm in the event lead is ingested resulting from the use of the Toys but portray the Toys as safe and offered their products in Québec and throughout Canada deriving revenue as a result of Consumers located in Québec and throughout Canada;

15. Had the true facts been disclosed that the Toys are associated with the risk of serious injuries, poisoning and medical harm in the event lead is ingested, Consumers would not have purchased and/or used the Toys;
16. Respondents cannot reasonably expect Consumers to use the Toys that are defective;
17. Further, or in the alternative, Respondents, prior to distribution for retail sale, did inferior research, design and tests on the Toys and as a result were negligent in this regard;
18. Respondents failed to provide to the general public, distributors, Consumers, including the Petitioner and putative Class Members, with a clear, complete, and current warning of the increased risk of injuries, poisoning and medical harm in the event lead is ingested as stated above associated with the purchase and/or use of the Toys, or failed to provide such warning in a timely manner, and Respondents were negligent in that regard;
19. Had the true facts been disclosed that the Toys were associated with increased risk of injuries, poisoning and medical harm in the event lead is ingested as stated above, the purchase and/or use of said Toys on an objective Class wide basis would not have occurred and the Class Members would not have experienced the aforementioned injuries or risks;
20. Finally, many Class Members have not actually been made aware of the recalls and accordingly, their infants were and possibly still may be at risk of increased risk of injuries, poisoning and medical harm in the event lead is ingested;

Petitioner:

21. Between November 2006 and September 4, 2007, Petitioner purchased Toys manufactured by Respondents, subject to recall;
22. In particular, Petitioner purchased various Polly Pocket! toys, the Pollyworld Costume Cart (Lea®) Playset, the Elmo's Guitar, the Dora's Talking House, and the Elmo's Sprinkler. After the recall had been announced by Respondents, the Petitioner disposed of some of the Toys and/or gifted or donated other Toys;
23. The Petitioner is also in possession of numerous other toys manufactured or distributed by the Respondents but she is unable to identify them as being part

of the Recall or not, due to the lack of product number markings on said toys;

24. Petitioner requires a full refund of the purchase price of her Toys, as her Toys are no longer fit for the purpose they were purchased;
25. Petitioner reasonably no longer has confidence in Respondents' Toys. Accordingly, she is justified in requesting a full reimbursement of the purchase price of her Toys and any other damages resulting from the purchase and/or use of the Toys;

FACTS GIVING RISE TO AN INDIVIDUAL ACTION BY EACH OF THE MEMBERS OF THE GROUP

26. The Class is comprised of persons who have purchased or otherwise became the owners of the Toys manufactured by Respondents which are defective or unsafe, as detailed above;
27. The claims of each Group Member are founded on the same general facts as the Petitioner's claims, as pertaining to the acts and omissions of the Respondents regarding the safety of the Toys being recalled, whether these Toys were fit for the purpose for which they were produced and sold, whether the Toys had a latent defect, whether the Toys have a safety defect, and whether the Respondents were negligent in bringing the Toys into the stream of commerce;
28. Class Members relied on the Respondents to ensure that safe Toys were being put into the stream of commerce. The Respondents knew or ought to have known that Class Members were relying on the Respondents to manufacture Toys that were safe and fit for the intended purpose. The Respondents were negligent in not taking the appropriate steps to ensure the safety and fitness of their Toys, *inter alia*, the Respondents were negligent in their testing of their Toys prior to distribution for retail sale. The Respondents were also negligent by delaying the recall of unsafe Toys;
29. The Petitioner and Class Members have suffered damages and inconvenience as a result of Respondents' actions and/or omissions, including but not limited to the cost of purchasing and returning the Toys, current and future cost of medical testing and treatment for their children, counselling costs, loss of income, and various other damages and costs to be determined, and are entitled to claim damages as a result thereto from Respondents;
30. Respondents are liable for reparation of injuries or risks resulting from their

defective or unsafe Toys to Class Members;

31. Accordingly, the Class Members are entitled to a full reimbursement of the purchase price of their Toys and compensation for any other expenses incurred or other damages suffered stemming from the recalls by Respondents;
32. Some Class Members' infants were injured and the Class Members are entitled to claim damages as a result thereto from Respondents;

CONDITIONS REQUIRED TO INSTITUTE A CLASS ACTION

33. The composition of the Group makes the application of article 59 or 67 C.C.P. impractical or impossible for the reasons detailed below;
34. While the exact number of Group Members is unknown to the Petitioner, there are thousands of potential Group Members who have purchased and/or used the recalled Toys;
35. The potential number of Group Members can be estimated from records kept by the Respondents;
36. The potential Group Members are widely dispersed geographically in the province of Québec;
37. The names and addresses of all persons included in the Group are not known to the Petitioner. However, Respondents are likely to possess data regarding sales and distribution figures;
38. In addition, given the costs and risks inherent in an action before the Courts, many people will hesitate to institute an individual action against Respondents. Even if the Class Members themselves could afford such individual litigation, the Court system could not as it would be overloaded. Furthermore, individual litigation of the factual and legal issues raised by the conduct of Respondents would increase delay and expense to all parties and to the Court system;
39. These facts demonstrate that it would be impractical, if not impossible, to contact each and every Member of the Class to obtain mandates and to join them in one action;
40. In these circumstances, a class action is the only appropriate procedure for all of the Members of the Class to effectively pursue their respective rights and have access to justice;

41. The recourses of the Members raise identical, similar or related questions of fact or law, namely:
- a) Did Respondents' Toys have a latent defect?
 - b) Were Respondents' Toys unsafe?
 - c) Were Respondents negligent or did they commit faults in the designing, developing, testing, manufacturing, marketing, distributing, labelling or selling of the Toys to the Group Members?
 - d) Are Respondents responsible to reimburse the purchase price paid by Class Members for the Toys?
 - e) Are Respondents responsible to pay compensatory damages to Class Members stemming from the bodily injuries of their infants, and if so in what amount?
 - f) Are Respondents responsible to pay any other compensatory, moral, punitive and/or exemplary damages to Class Members, and if so in what amount?
42. The interests of justice favour that this motion be granted in accordance with its conclusions;

NATURE OF THE ACTION AND CONCLUSIONS SOUGHT

43. The action that Petitioner wishes to institute for the benefit of the members of the class is an action in damages for product liability;
44. The conclusions that Petitioner wishes to introduce by way of a motion to institute proceedings are:

GRANT Plaintiff's action against Defendants;

CONDEMN Defendants to reimburse to the Members of the Group the purchase price paid for the Toys, plus interest as well the additional indemnity since the date of purchase;

CONDEMN Defendants to pay an amount of compensatory damages to Group Members, to be determined by the Court, plus interest as well the additional indemnity since the date of purchase;

CONDEMN Defendants to pay an amount of moral damages to Group Members, to be determined by the Court, plus interest as well the additional indemnity since the date of purchase;

CONDEMN Defendants to pay an amount of punitive and/or compensatory damages to Group Members, to be determined by the Court, plus interest as well the additional indemnity since the date of purchase;

GRANT the class action of Petitioner on behalf of all the Members of the Group;

ORDER the treatment of individual claims of each Member of the Group in accordance with articles 1037 to 1040 C.C.P.;

RENDER any other order that this Honourable Court shall determine and that is in the interest of the Members of the Group;

THE WHOLE with interest and additional indemnity provided for in the *Civil Code of Québec* and with full costs and expenses including experts' fees and publication fees to advise members;

45. Petitioner suggests that this class action be exercised before the Superior Court in the District of Montreal for the following reasons:
- a) Respondents' Toys are sold in numerous business establishments in the judicial District of Montreal;
 - b) Many Group Members are domiciled or work in the District of Montreal;
 - c) Petitioner's legal counsel practice law in the District of Montreal;
46. Petitioner, who is requesting to obtain the status of representative, will fairly and adequately protect and represent the interest of the Members of the Group, since Petitioner:
- a) is a Group Member;
 - b) purchased defective or unsafe Toys manufactured by Respondents, as detailed above;
 - c) understands the nature of the action and has the capacity and interest to fairly and adequately protect and represent the interests of the Members of the Group;

- d) is available to dedicate the time necessary for the present action before the Courts of Québec and to collaborate with Class attorneys in this regard;
- e) is ready and available to manage and direct the present action in the interest of the Class Members that Petitioner wishes to represent, and is determined to lead the present file until a final resolution of the matter, the whole for the benefit of the Class;
- f) does not have interests that are antagonistic to those of other members of the Group;
- g) has given the mandate to the undersigned attorneys to obtain all relevant information to the present action and intend to keep informed of all developments;
- h) is, with the assistance of the undersigned attorneys, ready and available to dedicate the time necessary for this action and to collaborate with other Members of the Group and to keep them informed;

47. The present motion is well founded in fact and in law.

FOR THESE REASONS, MAY IT PLEASE THE COURT:

GRANT the present motion;

AUTHORIZE the bringing of a class action in the form of a motion to institute proceedings in damages;

ASCRIBE the Petitioner the status of representative of the persons included in the Group herein described as:

- All persons in Québec who purchased and/or otherwise became the owner of any of the toys, subject to recall, that were manufactured, or caused to be manufactured, distributed or ultimately offered for sale and sold to the public, by the Respondents or their retailers, between November 2006 and September 4, 2007 inclusively (hereinafter the “**Toys**”), or any other group to be determined by the Court;

IDENTIFY the principle questions of fact and law to be treated collectively as the following:

- a) Did Respondents' Toys have a latent defect?
- b) Were Respondents' Toys unsafe?
- c) Were Respondents negligent or did they commit faults in the designing, developing, testing, manufacturing, marketing, distributing, labelling or selling of the Toys to the Group Members?
- d) Are Respondents responsible to reimburse the purchase price paid by Class Members for the Toys?
- e) Are Respondents responsible to pay compensatory damages to Class Members stemming from the bodily injuries of their infants, and if so in what amount?
- f) Are Respondents responsible to pay any other compensatory, moral, punitive and/or exemplary damages to Class Members, and if so in what amount?

IDENTIFY the conclusions sought by the class action to be instituted as being the following:

GRANT Plaintiff's action against Defendants;

CONDEMN Defendants to reimburse to the Members of the Group the purchase price paid for the Toys, plus interest as well the additional indemnity since the date of purchase;

CONDEMN Defendants to pay an amount of compensatory damages to Group Members, to be determined by the Court, plus interest as well the additional indemnity since the date of purchase;

CONDEMN Defendants to pay an amount of moral damages to Group Members, to be determined by the Court, plus interest as well the additional indemnity since the date of purchase;

CONDEMN Defendants to pay an amount of punitive and/or compensatory damages to Group Members, to be determined by the Court, plus interest as well the additional indemnity since the date of purchase;

GRANT the class action of Petitioner on behalf of all the Members of the Group;

ORDER the treatment of individual claims of each Member of the Group in accordance with articles 1037 to 1040 C.C.P.;

RENDER any other order that this Honourable Court shall determine and that is in the interest of the Members of the Group;

THE WHOLE with interest and additional indemnity provided for in the *Civil Code of Québec* and with full costs and expenses including experts' fees and publication fees to advise members;

DECLARE that all Members of the Group that have not requested their exclusion from the Group in the prescribed delay to be bound by any judgment to be rendered on the class action to be instituted;

FIX the delay of exclusion at thirty (30) days from the date of the publication of the notice to the Members;

ORDER the publication of a notice to the Members of the Group in accordance with Article 1006 C.C.P. and **ORDER** Respondents to pay for said publication costs;

THE WHOLE with costs to follow.

MONTREAL, OCTOBER 8, 2010

MERCHANT LAW GROUP LLP
Attorneys for Petitioner