

C A N A D A

PROVINCE OF QUEBEC
DISTRICT OF MONTREAL
NO : 500-06-000790-168

(Class Action)
SUPERIOR COURT

SYLVAIN GAUDETTE,

Plaintiff

v.

NATURE'S TOUCH FROZEN FOODS INC.,
a legal person having a place of business at
5105-M Fisher Street, Saint-Laurent
(Québec), H4T 1J8

and

COSTCO WHOLESALE CANADA LTD.,
legal person having a place of business at
415, West Hunt Club Road, Ottawa (Ontario),
K2E 1C5

and

GESTION COSTCO CANADA INC., a legal
person having a place of business at 1250,
Boul. René-Lévesque West, suite 1400,
Montréal (Québec), H3B 5E9

and

COSTCO WESTERN HOLDINGS LTD., a
legal person having a place of business at
415, West Hunt Club Road, Ottawa (Ontario),
K2E 1C5

Defendants

<p>APPLICATION FOR AUTHORIZATION TO INSTITUTE A CLASS ACTION AND TO APPOINT THE STATUS OF REPRESENTATIVE (Articles 574 - 575 C.C.P. and following)</p>

TO ONE OF THE HONOURABLE JUSTICES OF THE QUEBEC SUPERIOR COURT,
SITTING IN AND FOR THE DISTRICT OF MONTREAL, THE PLAINTIFF RESPECTFULLY
SUBMITS THE FOLLOWING:

I. GENERAL PRESENTATION

A. THE CLASS ACTION

1. The Plaintiff wishes to institute a class action on behalf of the following Class, of which he is a member (the "Class members"):

"All persons residing in Quebec, who purchased and/or consumed Nature's Touch brand Organic Berry Cherry Blend products, which were manufactured, sold and/or distributed by the Defendants with best before dates up to and including March 16, 2018, which have been recalled due to Hepatitis A contamination (hereinafter the "Class").

or such other Class definition as may be approved by the Court;

2. This action follows the Public Health Notice and the Food Recall Warning during the month of April 2016, of Nature's Touch brand Organic Berry Cherry Blend (hereinafter the "Recalled Foods"), as this product may be contaminated with the Hepatitis A virus, the whole as appears from documents issued by the Public Health Agency of Canada (hereinafter "PHAC") and the Canadian Food Inspection Agency (hereinafter "CFIA"), copies of which are produced herewith as **Exhibit P-1 en liasse**;
3. The Plaintiff has consumed the recalled food and has subsequently experienced various ailments and health problems;
4. As a result of the foregoing, the Plaintiff and the members of the Class have suffered damages in that they have purchased and/or consumed Recalled Foods referred to by the action;

B. THE DEFENDANTS

5. The Defendant, Nature's Touch Frozen Foods Inc., is a corporation incorporated under the Canada Business Corporations Act, having its head office located in Ville Saint-Laurent, operating in the wholesale trade of frozen and packaged food, the whole as it appears from the Registre des Entreprises du Québec, produced herein as **Exhibit P-2**;
6. The Defendant, Gestion Costco Canada Inc., is a holding company incorporated under the Canada Business Corporations Act, having its head office located in Montreal, the whole as it appears from the Registre des Entreprises du Québec, produced herein as **Exhibit P-3**;
7. The Defendant, Costco Wholesale Canada Ltd., is incorporated under the Canada Business Corporations Act, having its head office located in Ottawa, the whole as it appears from the Registre des Entreprises du Québec, produced herein as **Exhibit P-4**;

8. The Defendant, Costco Wholesale Canada Ltd., is a membership-only warehouse club that provides a wide selection of grocery and merchandise;
9. The Defendant, Costco Western Holdings Ltd., is the majority shareholder of Costco Wholesale Canada Ltd., the whole as it appears from the Registre des Entreprises du Québec, produced herein as Exhibit P-4;
10. The entities described above, are hereinafter collectively referred to as the “Defendants”;

C. FACTUAL CONTEXT

11. On April 15th, 2016, the CFIA issued a food recall warning concerning Nature’s Touch brand Organic Berry Cherry Blend which was recalled due to possible Hepatitis A contamination, the whole as it appears from Exhibit P-1 *en liasse*;
12. On the same day, the PHAC issued a notice to the effect that a total of 12 cases of hepatitis A had been linked to the Recalled Foods produced, marketed, sold and/or distributed by the Defendants: Ontario (9), Québec (2) et Newfoundland and Labrador (1), the whole as it appears from Exhibit P-1 *en liasse*;
13. On April 22nd 2016, the PHAC issued an update of its previous public health notices already issued respectively on April 15th and 18th, 2016 in order to provide a revised case count update of Hepatitis A cases identified;
14. In this notice, the PHAC explained that the following symptoms could appear after exposure to the hepatitis A virus:
 - Fever;
 - Loss of appetite;
 - Stomach cramps;
 - Jaundice;
 - Dark urine;
 - Fatigue.
15. The Defendant Costco Wholesale Canada Ltd. published, on its website, information regarding dates and places where vaccination services were to be provided;

D. FAULT

16. All and any of the Defendants were negligent in the quality control, monitoring, processing, storage, distribution, sale and timely notification to the public and recall of the Recalled Foods, putting the Plaintiff and members of the Class at risk for contracting the Hepatitis A virus;
17. The Defendants negligently breached their duty of care which constitutes a fault;
18. The Plaintiff states that the damages incurred were caused by the negligence and fault of the Defendants;

E. DAMAGES

19. As a result of the Defendants' negligence and fault, the Plaintiff and members of the Class have suffered physical illness, mental distress, emotional trauma and fear for their health, unnecessary vaccination, economic losses and other damages as a result of the illness suffered and/or as a result of buying and/or consuming the Recalled Foods;
20. The damages sustained by the Plaintiff and Class members would not have occurred but for the negligence and fault of the Defendants;

F. PUNITIVE DAMAGES

21. Defendants' conduct, as particularized above, in the distribution, marketing, sale and promotion and the delayed withdrawal or recall and/or the failure to withdraw or recall Recalled Foods was reckless, entirely without care and deliberate. Such conduct renders the Defendants liable to pay punitive damages to the Plaintiff and the Class members;

II. THE PLAINTIFF'S PERSONAL CLAIM AGAINST THE DEFENDANTS IS BASED ON THE FOLLOWING FACTS

22. The Plaintiff is a retired lawyer and a current lecturer at the Université de Montréal and the Université du Québec à Montréal who resides in Mont Saint-Hilaire, located in the Montérégie region of southern Quebec;
23. On April 8, 2016, the Plaintiff purchased a 1,5 kg bag of Nature's Touch Organic Berry Cherry Blend with a best before date up to including March 15, 2018, with the UPC code 8 73668 00179 1, from the Costco Wholesale store located at 5025, boulevard Cousineau, in Saint-Hubert, Quebec, the whole as it appears from his bill and proof of purchase, produced herein as **Exhibit P-5**;
24. The Plaintiff consumed the product in question on the same day;
25. On April 17, 2016, the Plaintiff started experiencing symptoms of stomach cramps, nausea and fatigue;
26. The Plaintiff endured the symptoms for a few days before slowly getting back to normal;
27. The Plaintiff was feeling fine before eating the Nature's Touch Organic Berry Cherry Blend and only started feeling sick after consuming the product;
28. On April 28, 2016, the Plaintiff was informed of the Hepatitis A contamination of the Nature's Touch Organic Berry Cherry Blend products;
29. On the same day, the Plaintiff contacted the INFO-SANTÉ (811) health service hotline and was informed that a vaccine could not be administered more than two (2) weeks after the initial exposure;
30. Based on the Canadian Food Inspection Agency recall of the Nature's Touch Organic Berry Cherry Blend due to Hepatitis A and the timing of the Plaintiff's consumption of the product and his illness, there is a logical inference between these events;

31. The Plaintiff suffered damages from the illness he endured for a few days along with the stress of potentially having had Hepatitis A;
32. Had the Plaintiff been aware of the risks associated with consuming Nature's Touch Organic Berry Cherry Blend, he would never have purchased the product. But for the Defendants' wrongful conduct, the Plaintiff would not have suffered damages, inconveniences and loss as alleged;

III. FACTS GIVING RISE TO THE PERSONAL CLAIM OF EACH MEMBER OF THE CLASS

33. The claims of each of the Class members are based on the same facts as those upon which the Plaintiff is based;
34. Each Class member has purchased and/or consumed the Recalled Foods;
35. Each Class member has suffered pecuniary and/or non-pecuniary damages arising from the purchase and/or consumption of the Recalled Foods, such as, but not limited to:
 - Personal injury for being infected with Hepatitis A virus;
 - Personal injury for other illnesses;
 - Personal injury for having to undergo an otherwise unnecessary vaccination and/or blood test;
 - Material damages (disposal of the Recalled Foods);
 - Loss of income, medical expenses;
 - Emotional and moral damages.
36. The Class members' damages would not have occurred but for the negligence and fault of the Defendants;
37. Therefore, each Class member is entitled to make a claim for physical, moral and/or material damages suffered as a result of purchasing and/or consuming the Recalled Foods produced, marketed, sold and/or distributed by the Defendants;

IV. CONDITIONS REQUIRED TO INSTITUTE A CLASS ACTION

38. The composition of the class makes it difficult or impracticable to apply the rules for mandates to sue on behalf of others or for consolidation of proceedings, for the following reasons :
 - a. The Plaintiff is unaware of the precise number of people who have purchased and/or consumed the Recalled Foods, which are distributed throughout Canada, including the Province of Quebec;
 - b. The Plaintiff does not know and cannot know the identity of the people who have purchased and/or consumed the Recalled Foods;
 - c. The names and addresses of members included in the Class are not known to the Plaintiff;

- d. It is difficult, if not impossible, to find each and every one of those involved in this action and to contact each member to obtain mandates to sue on behalf of others or for consolidation of proceedings.
39. The claims of the Class members raise identical, similar or related questions of fact or law, namely :
- a. Did the Plaintiff and the members of the Class purchase and/or consume the Recalled Foods produced, marketed, sold and/or distributed by the Defendants?
 - b. Did the Plaintiff and Class members sustain physical, monetary and/or moral damages caused by the purchase and/or the consumption of the Recalled Foods produced, marketed, sold and/or distributed by the Defendants?
 - c. Were the Defendants negligent and/or did the Defendants breach a duty of care and commit a fault in violation of the *Civil Code of Quebec* and/or the *Consumer Protection Act*?
 - d. Are the Members of the Class entitled to claim for physical, moral, monetary and/or punitive damages related to the purchase and/or the consumption of the Recalled Foods?
 - e. Are the Defendants liable to compensate Class members for physical, moral, monetary and/or punitive damages related to the purchase and/or the consumption of the Recalled Foods?
40. The interests of justice weigh in favor of this application being granted in accordance with its conclusions;

V. NATURE OF THE ACTION AND CONCLUSIONS SOUGHT

41. The action that the Plaintiff wish to institute for the benefit of the Class members is an action in damages;
42. The conclusions that the Plaintiff wish to introduce by way of a motion to institute proceedings are:

GRANT the Plaintiff's action against the Defendants;

CONDEMN the Defendants to pay to the Plaintiff and the Class members compensation for all damages suffered in an amount to be determined by the Court;

CONDEMN the Defendants to pay to the Plaintiff and the Class members punitive damages in an amount to be determined by the Court;

GRANT the class action of the Plaintiff on behalf of all the Class members;

ORDER collective recovery of the claims of the Class members for damages if the Court is of the view that the evidence produced enables the establishment with sufficient accuracy of the total amount of the claims of the members; OR

ALTERNATELY, ORDER individual recovery of the claims of the Class members for damages, the whole in accordance with articles 599 to 601 C.C.P.;

THE WHOLE with interests and additional indemnity provided for in the *Civil Code of Quebec* and with full costs and expenses including expert fees, notice fees and fees relating to administering the plan of distribution of the recovery in this action.

43. The Plaintiff suggests that this class action be exercised before the Superior Court in the district of Montreal for the following reasons:
- a) Due to demographics, the largest portion of members of the Class resides in the judicial district of Montreal;
 - b) Two Defendants have their place of business in the judicial district of Montreal;
 - c) The legal counsel of the Plaintiff has an office in the judicial district of Montreal.
44. The Plaintiff, who is requesting to obtain the status of representative, will fairly and adequately protect and represent the interest of the Class members for the following reasons:
- a) The Plaintiff has purchased and/or the consumed of the Recalled Foods produced, marketed, sold and/or distributed by the Defendants;
 - b) The Plaintiff has suffered damages following the purchase and/or the consumption of the Recalled Foods produced, marketed, sold and/or distributed by the Defendants the implantation;
 - c) The Plaintiff has the legal interest to sue;
 - d) The Plaintiff understands the nature of the action;
 - e) The Plaintiff is competent in regards to his knowledge of the action;
 - f) The Plaintiff is available to dedicate the time necessary for an action and to collaborate with Class members; and
 - g) The Plaintiff interest is not antagonistic to those of other Class members.
45. The present motion is well-founded in fact and in law.

FOR THESE REASONS, MAY IT PLEASE THE COURT:

GRANT the present application;

AUTHORIZE the bringing of a class action in the form of a judicial application originating a proceeding in damages;

ASCRIBE the Plaintiff the status of representative of the persons included in the Class herein described as:

“All persons residing in Quebec, who purchased and/or consumed Nature's Touch brand Organic Berry Cherry Blend products, which were manufactured, sold and/or distributed by the Defendants with best before dates up to and including March 16, 2018, which have been recalled due to Hepatitis A contamination (hereinafter the "Class").

or such other Class definition as may be approved by the Court;

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

- a. Did the Plaintiff and the members of the Class purchase and/or consume the Recalled Foods produced, marketed, sold and/or distributed by the Defendants?
- b. Did the Plaintiff and Class members sustain physical, monetary and/or moral damages caused by the purchase and/or the consumption of the Recalled Foods produced, marketed, sold and/or distributed by the Defendants?
- c. Were the Defendants negligent and/or did the Defendants breach a duty of care and commit a fault in violation of the *Civil Code of Quebec* and/or the *Consumer Protection Act*?
- d. Are the Members of the Class entitled to claim for physical, moral, monetary and/or punitive damages related to the purchase and/or the consumption of the Recalled Foods?
- e. Are the Defendants liable to compensate Class members for physical, moral, monetary and/or punitive damages related to the purchase and/or the consumption of the Recalled Foods?

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

GRANT the Plaintiff's action against the Defendants;

CONDEMN the Defendants to pay to the Plaintiff and the Class members compensation for all damages suffered in an amount to be determined by the Court;

CONDEMN the Defendants to pay to the Plaintiff and the Class members punitive damages in an amount to be determined by the Court;

GRANT the class action of the Plaintiff on behalf of all the Class members;

ORDER collective recovery of the claims of the Class members for damages if the Court is of the view that the evidence produced enables the establishment with sufficient accuracy of the total amount of the claims of the members; OR

ALTERNATELY, ORDER individual recovery of the claims of the Class members for damages, the whole in accordance with articles 599 to 601 C.C.P.;

THE WHOLE with interests and additional indemnity provided for in the *Civil Code of Quebec* and with full costs and expenses including expert fees, notice fees and fees relating to administering the plan of distribution of the recovery in this action.

DECLARE that all Class members that have not requested their exclusion from the Class in the prescribed delay to be bound by any judgement to be rendered on the class action to be instituted;

FIX the delay of exclusion at 30 days from the date of the publication of the notice to the Class members;

ORDER the publication of a notice to the Class members in accordance with article 576 C.C.P.;

REFER the record to the Chief Justice so that he may determine the district wherein the class action is to be brought and the judge before whom it will be heard;

THE WHOLE with costs, including the costs of all publications of notices.

Montreal, May 4, 2016

Siskinds, Desmeules, Avocats, SENCRL

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NOTICE OF PRESENTATION
(Articles 146 and 574 al. 2 C.P.C.)

To:

NATURE'S TOUCH FROZEN FOODS INC.,
5105-M Fisher Street,
Saint-Laurent (Québec), H4T 1J8;

AND

COSTCO WHOLESALE CANADA LTD.,
415, West Hunt Club Road,
Ottawa (Ontario), K2E 1C5;

AND

GESTION COSTCO CANADA INC.,
1250, Boul. René-Lévesque West, suite 1400,
Montréal (Québec), H3B 5E9;

AND

COSTCO WESTERN HOLDINGS LTD.,
415, West Hunt Club Road,
Ottawa (Ontario), K2E 1C5;

Defendants

TAKE NOTICE that the present *Application For Authorization To Institute A Class Action And To Appoint The Status of Representative* will be presented before this Honourable Court, at the Palais de justice de Montreal, located at 1, Notre-Dame Street East, in the City and District of Montreal, on the date set by the coordinator of the class actions chamber.

DO GOVERN YOURSELVES ACCORDINGLY

Montreal, May 4, 2016

Siskinds, Desmeules, Avocats, SENCRL.

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CANADA

(CLASS ACTION)
SUPERIOR COURT

PROVINCE OF QUEBEC
DISTRICT OF MONTREAL
NO : 500-06-000790-168

SYLVAIN GAUDETTE

Plaintiff

v.

NATURE'S TOUCH FROZEN FOODS INC.,

and

COSTCO WHOLESALE CANADA LTD.,

and

GESTION COSTCO CANADA INC.

and

COSTCO WESTERN HOLDINGS LTD.,

Defendants

LIST OF EXHIBITS
(Article 247 C.C.P.)

In support of the Application for Authorization to Institute a Class Action and to Appoint the Status of Representative, the Plaintiff intends to use the following exhibits:

- Exhibit P-1:** Public Health Notice and the Food Recall Warning, issued by the Public Health Agency of Canada and the Canadian Food Inspection Agency (*en liasse*);
- Exhibit P-2:** Nature's Touch Frozen Foods Inc.'s extract of the State of information from the *Registraire des entreprises du Québec*;
- Exhibit P-3:** Gestion Costco Canada Inc.'s extract of the State of information from the *Registraire des entreprises du Québec*;
- Exhibit P-4:** Costco Wholesale Canada Ltd.'s extract of the State of information from the *Registraire des entreprises du Québec*;

Exhibit P-5: Plaintiff's bill and proof of purchase, dated April 8, 2016.

Siskinds, Desmeules, Avocats, S.E.N.C.R.L.

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CANADA
PROVINCE OF QUEBEC
DISTRICT OF MONTRÉAL

SUPERIOR COURT – CLASS ACTION
NO : **500-06-000790-168**

SYLVAIN GAUDETTE

Plaintiff

V.

NATURE'S TOUCH FROZEN FOODS INC.

ET ALS.

Defendants

**APPLICATION FOR AUTHORIZATION
TO INSTITUTE A CLASS ACTION
AND TO APPOINT THE STATUS OF
REPRESENTATIVE**

(Articles 575 C.P.C. and following)

BB-6852

Me Sammy Elnemr

O/F : 67-186

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MONTRÉAL

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