SUPERIOR COURT

CANADA
PROVINCE OF QUEBEC
DISTRICT OF MONTREAL

N°: **500-06-000643-136**

DATE: May 2, 2018

IN THE PRESENCE OF THE HONOURABLE PAUL MAYER, J.S.C.

CAROLE MELANÇON

PETITIONER

V.

DEPUY ORTHOPAEDICS INC.
JOHNSON & JOHNSON CORP.
JOHNSON & JOHNSON INC.

RESPONDENTS

JUDGEMENT

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1. INTRODUCTION

[1] Ms. Carole Melançon ("**Ms. Melançon**") seeks leave to institute a class action against DePuy Orthopaedics Inc. ("**DePuy**"), Johnson & Johnson Corp ("**JJC**"), and Johnson & Johnson Inc. ("**JJI**") (together the "**Respondents**") for alleged adverse health effects caused by the DePuy Pinnacle metal on metal Acetabular Cup System (the "**Device**").

[2] She requests to be appointed the representative plaintiff for the class action and that the class be authorized.

[3] Having assessed the Parties' submissions, the Court considers that Ms. Melançon has satisfied the criteria for authorization under Article 575 of the *Code of Civil Procedure* ("C.C.P.").

JM2232

[4] For the reasons hereinafter set out, authorization to institute the class action is granted.

2. THE DEVICE

[5] The Device, known as the Pinnacle Metal-on-Metal (MoM) hip replacement, is marketed and sold as part of DePuy's hip replacement system. It is made up of four component parts that together recreate the function of a natural hip: a) the acetabular cup; b) the liner; c) the femoral head; and d) the femoral stem.

[6] The Device is composed of two constituent parts: the acetabular cup and the liner. The cup is affixed to the patient's pelvis, and anchors the hip replacement system. It serves as the socket in which the femoral head rotates. The liner rests between the cup and the femoral head, and creates a smooth surface that reduces friction and wear caused by the femoral head's movement.

[7] While Pinnacle hip system acetabular cups are made of metal, DePuy advertises several possible options with respect to the materials used in manufacturing the liner and the femoral head.[1]

[8] The motion for authorization of a class is limited to those Pinnacle hip systems featuring a liner made of cobalt-chromium metal and a femoral head made of metal.

[9] Given its metallic constituent parts, the Device falls into a category of hip inserts known as "*metal-on-metal*" implants.

[10] The Device is classified as a Class III medical device under the *Medical Devices Regulations*.[2] Its approval for use in Canada is governed by the legal framework under the *Food and Drugs Act*.[3]

[11] It is not contested that the Device is approved for use in Canada and has not been subjected to a product recall by the Minister of Health.

[12] During oral pleadings, it was suggested that other companies also produce "*metal-on-metal*" hip implants, but no evidence to this effect was adduced by either party.

3. THE PARTIES

3.1 The Petitioner

[13] Ms. Melançon is a 57-year-old resident of Trois-Rivières, Quebec. She described herself as an active woman, with hobbies including skiing, roller-skating, and walking.

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1 Exhibit R-8.
2 *Medical Devices Regulations*, SOR/98-282, Schedule 1, Rule 1, s 3.
3 *Food and Drugs Act*, RCS 1985, c F-27.

[14] On March 1, 2011, Ms. Melançon underwent total hip replacement surgery on her right hip, during which she was implanted with the Device. The surgery was conducted by her orthopedic surgeon, Dr. Bruno La Haye ("**Dr. La Haye**"), of Trois-Rivières, Quebec.

[15] Following her surgery, Ms. Melançon alleges she developed persistent pain in her back and her right knee, fatigue, and a decline in her vision. She claims she experienced difficulty walking, standing upright for extended periods of time, and getting up from a seated position. Ms. Melançon also claims that the Device "*squeaked*" when in use.

[16] While Ms. Melançon returned to her employment as a nurse with the Centre Hospitalier Régional de Trois-Rivières in September 2011 following surgery, she claims that pain and discomfort led her to stop working in October 2011. She retired from that position in December 2011, earlier than she had anticipated. Ms. Melançon currently works as a caregiver for a private company.

[17] In June 2013, Ms. Melançon consulted with Dr. La Haye with respect to her pain and discomfort. Blood tests conducted the same month revealed chromium concentrations of 680 nmol/L and cobalt concentrations of 950nmol/L.[4]

[18] Surgery was undertaken on December 5, 2013 to replace the Device with a different prosthesis, to excise a pseudotumor that had formed in her thigh, and to remove metal debris.

3.2 The Respondents

[19] DePuy and JJI are subsidiaries of JJC. Both DePuy and JJC are domiciled in the United States, whereas JJI is domiciled in Canada and is incorporated under the *Canada Business Corporations Act*.[5] Together, these corporate persons are responsible for manufacturing the Device, and for its sale and advertising in Canada.

[20] The nature of the relationship among the Respondents, and their respective involvement in the production, marketing and sale of the Device, was not pleaded before the Court.

4. POSITION OF THE RESPONDENTS

[21] The Respondents insist that none of the four criteria for authorization under Article 575 C.C.P. are satisfied. They argue that authorization to form a class must consequently be rejected.

[22] With respect to the requirement under Article 575(1) C.C.P., the Respondents maintain that the "*infinite variation*" of potential injuries alleged by Ms. Melançon preclude, the existence of common issues in this instance. They allege that authorizing

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4 Exhibit R-13.

5 *Canada Business Corporations Act*, RSC 1985, c C-44.

a class is inconsistent with the purpose of judicial economy that underlies class proceedings, as an individualized assessment of the injury of each class member's injuries would be required.

[23] The Respondents further claim that Ms. Melançon has failed to establish an arguable case within the meaning required by Article 575(2) C.C.P. They reason that Ms. Melançon has proposed a theory of the case that is unfounded on the evidence, and which relies on "*vague, boilerplate, and largely unsupported allegations*". They insist that the weakness of Ms. Melançon's personal case militates against granting authorization.

[24] Likewise, the Respondents assert that Ms. Melançon has not satisfied the requirement under Article 575(3) C.C.P. They argue that Ms. Melançon has defined the class in an overbroad manner and failed to demonstrate that it would be difficult or impractical for putative class members to resort to alternative procedural mechanisms.

[25] Finally, the Respondents submit that Ms. Melançon's lack of involvement in preparatory work related to the application for authorization, combined with the absence of an arguable personal right of action against the Respondents, suggests that she has not satisfied the requirement under Article 575(4) C.C.P. that she be an adequate representative for the class.

5. ISSUE

[26] The Court proposes to examine whether the criteria under Article 575 C.C.P. are satisfied.

6. THE LAW

[27] Leave for authorization to institute a class action is governed by Articles 574 and 575 C.C.P., reproduced below:

> ***574***. *Prior authorization of the court is required for a person to institute a class action.*
> *The application for authorization must state the facts on which it is based and the nature of the class action, and describe the class on whose behalf the person intends to act. It must be served on the person against whom the person intends to institute the class action, with at least 30 days' notice of the presentation date.*
> *An application for authorization may only be contested orally, and the court may allow relevant evidence to be submitted.*
>
> ***575***. *The court authorizes the class action and appoints the class member it designates as representative plaintiff if it is of the opinion that*
>
> *(1) the claims of the members of the class raise identical, similar or related issues of law or fact;*
> *(2) the facts alleged appear to justify the conclusions sought;*

> *(3) the composition of the class makes it difficult or impracticable to apply the rules for mandates to take part in judicial proceedings on behalf of others or for consolidation of proceedings; and*
> *(4) the class member appointed as representative plaintiff is in a position to properly represent the class members.*

[28] Where the court is satisfied that the four criteria of Article 575 C.C.P. are met by the applicant, it is bound to authorize the class action.[6]

[29] The court's inquiry at the authorization stage is not intended to assess the case on its merits. Rather the court is meant to "*filter out frivolous motions and grant those that meet the evidentiary and legal threshold requirements of Article 575*".[7] The Quebec Court of Appeal provided a persuasive summary of the state of the law as concerns the depth of inquiry at the authorization stage in *Sibiga v. Fido Solutions*:

> *[S]ince its decision in Infineon, the Supreme Court has repeatedly emphasized that the judge's function at the authorization stage is only one of filtering out untenable claims. The Court stressed that the law does not impose an onerous burden on the person seeking authorization. "He or she need only establish a 'prima facie case' or an 'arguable case'", wrote LeBel and Wagner JJ. in Vivendi, specifying that a motion judge "must not deal with the merits of the case, as they are to be considered only after the motion for authorization is granted.*[8]

[30] Unlike other Canadian jurisdictions, the requirement of proportionality in Quebec as relates to class action authorization must be assessed with respect to each of the individual criteria of Article 575.[9] It does not constitute a stand-alone factor.

7. ANALYSIS

7.1 The Claims Raise Identical, Similar or Related Issues – 575(1) C.P.C.

7.1.1 Applicable Principles

[31] The requirement of Article 575(1) C.P.C. were canvased by the Supreme Court of Canada in *Vivendi*. There, the Court advocated for a broad and flexible approach when interpreting the provision, emphasizing that:

> *All that is needed in order to meet the requirement of art. 1003(a) C.C.P. is* [...] *that there be an identical, related or similar question of law or fact, unless that question would play only an insignificant role in the outcome of the class action.*[10]

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6 *Bouchard* v. *Agropur*, 2006 QCCA 1342, par. 41 (*Agropur*).
7 *Infineon Technologies AG v. Option Consommateurs*, 2013 SCC 59, par. 61 (*Infineon*).
8 *Sibiga v. Fido Solutions*, 2016 QCCA 1299, par. 34 (*Sibiga*). *Infineon, Id.*; *Vivendi Canada Inc. v. Dell'Anielo*, 2014 SCC 1 (*Vivendi*).
9 *Vivendi*, *Id.*, par. 66.
10 *Vivendi*, *supra* note 8, par. 58.

[32] Two further facets of the provision were highlighted in *Vivendi*.

[33] First, the common issue criterion is satisfied by common questions; common answers are not required.[11]

[34] Second, the Court clarified that the common questions with divergent circumstances among the group members do not form a bar to authorization where "*an aspect of the case lends itself to a collective decision and that once a decision has been reached on that aspect, the parties will have resolved a not insignificant portion of the dispute.*"[12]

[35] The analysis related to Article 575(1) also considers the scope of the group that has been proposed by the applicant. Four criteria for the composition of the group were canvassed in *George v. Québec (Procureur Général):*[13]

> *a) the definition must be founded on objective criteria*
> *b) the criteria must have a rational foundation;*
> *c) the definition of the class must not be circular or imprecise;*
> *d) the definition cannot be based on criteria that are dependent on the outcome of the action on the merits*

[36] It is accepted jurisprudence that the Court has the authority to redefine the class "*so that its dimensions are better aligned with the claim as framed by the applicant.*"[14] Doing so has been identified as preferable to denying authorization, given the legislator's underlying concern with facilitating access to justice through class actions.[15] Nevertheless, the Court is also advised to exercise caution in unduly restricting the scope of the class, especially at the authorization stage.[16]

7.1.2 Common Issues

[37] Ms. Melançon has submitted eight common issues to be addressed by the trial on the merits.

> *a) Do Pinnacle Hip Implants cause an increase in negative health effects, and to what extent?*
> *b) Were the Pinnacle Hip Implants unsafe, or unfit for the purpose for which they were intended as designed, developed, manufactured, sold, distributed, marketed or otherwise placed into the stream of commerce by the Respondents?*

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11 *Vivendi*, *supra* note 8, par. 51.
12 *Vivendi*, *supra* note 8, par. 58.
13 *George* v. *Québec (Procureur général)*, 2006 QCCA 1204 at para 41 (*George*); affirmed in *Sibiga, supra* note 8, par. 138.
14 *Sibiga*, *supra* note 8, par. 136
15 *Sibiga*, *supra* note 8, par. 136.
16 *Sibiga*, *supra* note 8, par. 140.

> *c) Were Respondents negligent or did they commit faults in the designing, developing, testing, manufacturing, marketing, distributing, labeling or selling of the Pinnacle Hip Implants?*
> *d) Did the Respondents fail to inform the Group Members of the health risks associated with the use of Pinnacle Hip Implants?*
> *e) Are Respondents liable to pay damages to the Group Members as a result of their faults, negligence, or misrepresentations made in manufacturing, marketing, distributing or selling the Pinnacle Hip Implants, or as a result of the use of Pinnacle Hip Implants?*
> *f) Are Respondents liable to pay compensatory damages to the Group Members, and if so in what amount?*
> *g) Are Respondents liable to pay exemplary or punitive damages to the Group Members, and if so in what amount?*[17]

[38] It is the Court's conclusion that Ms. Melançon has raised common issues within the meaning of Article 575(1) C.C.P.

[39] Issues "*a*", "*b*", "*c*", "*e*", and "*g*" in whole and issue "*f*" in part, lend themselves to a common assessment within the confines of class-based proceedings. These are common questions of law within the meaning articulated in *Vivendi*, and their resolution would undoubtedly assist in the settlement of all disputes between prospective class members and the Respondents.

[40] In particular, the resolution of issues related to the commission of fault by the Respondents and to the appropriateness of punitive damages would advance a "*not insignificant*" portion of the dispute. In this manner, the resolution of these questions is consistent with the underlying goal of judicial economy at the heart of class proceedings.

[41] The Respondents have argued that the impossibility of establishing a causal link between the Device and injuries sustained by individual group members in common militates in favour of finding that a common issue does not exist.[18]

[42] With respect, the Court finds this argument unpersuasive. It is well recognized in the jurisprudence that common answers are not required to satisfy the inquiry related to Article 575(1) C.C.P.[19]

[43] Moreover, adopting the Respondents' argument would severely curtail recourse through class-based proceedings in cases involving medical products. Some degree of individualized inquiry will be necessary to establish causation for individual class members where medical products are concerned. This fact alone cannot bar the existence of a common question under Article 575(1) C.C.P.

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17 Re-Amended Motion to Authorize the Bringing of a Class Action and to Ascribe the Status of Representative, par. 67.
18 Respondents' Plan of Argument, pars. 88–93.
19 *Vivendi*, *supra* note 8, par. 59.

[44] The Respondents have also drawn the Court's attention to the decision in *Baratto* v. *Merck Canada inc.*,[20] where it was held that a common issue under Article 575(1) C.P.C. was not established. In that case, Madam Justice Claude Dallaire noted that the wide variation of circumstances among prospective class members rendered class-based proceedings unhelpful. In her estimation, highly individualized assessments would have been required, obviating the usefulness of class-based proceedings.[21]

[45] Noting that the Quebec Court of Appeal's reasons in the appeal of that decision are forthcoming, one would nonetheless distinguish the present case on the facts. In *Baratto*, the Court observed that the alleged injury in that case could have been a symptom of a panoply of underlying causes and diseases.[22] The Court considers that the present instance does not reveal the same difficulties. The evidence adduced by Ms. Melançon suggests on a *prima facie* basis that at least some of adverse effects being alleged can be conclusively tied to the Device. The Respondents have provided no evidence rebutting Ms. Melançon's allegation on this point.

[46] Finally, the Court notes that issue "*d*" should be struck given that Ms. Melançon withdrew her claim during the pleadings that the Respondents failed to satisfy their duty to warn of the health risks related to the Device.

7.1.3 Composition of the Group

[47] The prospective class identified by Ms. Melançon covers:

> *All persons in Canada (including their estates, executors, personal representatives and their dependants and family members), who were implanted with a DePuy Pinnacle metal on metal Acetabular Cup System.*[23]

[48] She seeks approval of a multijurisdictional class action.

[49] During oral arguments, Ms. Melançon indicated she intentionally framed the class broadly to include individuals who have not yet sustained any adverse consequences in order to capture any prospective future harms to those Canadians implanted with the Device.

[50] The Respondents challenged the composition of the group proposed by Ms. Melançon on two grounds. First, they allege that the inclusion of all persons implanted with the device is overly broad. Second, they submit that the Court does not have jurisdiction over putative class members who are not residents of Quebec.

[51] The Court concludes that the composition of the class should be narrowed to current or past residents of Quebec who have been implanted with the Device.

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20 *Baratto* v. *Merck Canada inc.*, 2016 QCCS 6664 (*Baratto*).
21 *Baratto*, *Id.*, pars. 120–123.
22 *Baratto*, *supra* note 20, par. 121.
23 Re-Amended Motion to Authorize the Bringing of a Class Action and to Ascribe the Status of Representative, par. 1.

7.1.3.1 Lack of Jurisdiction

[52] Beginning with the jurisdictional issue, the Court assesses that it does not have jurisdiction over individuals who are not residents of Quebec in the present instance.

[53] The necessary inquiry related to the Court's jurisdiction over individuals residing in other provinces for the purpose of the composition of a class was canvassed in numerous cases. In both *Nova* v. *Apple Inc.*[24] and *Cunning* v. *FitFlop*[25] the application for authorization of a national class was declined on the grounds that the conditions of Article 3148 of the *Civil Code of Quebec* were not satisfied.[26]

[54] In the cases of *Brito* v. *Pfizer Canada Inc.*[27] and *Belley* v. *TD Auto Finance Services Inc.*[28] the authorization to do so was granted.

[55] The mere fact that a place of business in Quebec exists does not automatically create the real and substantial connection needed for the Court to extend its jurisdiction over non-resident putative class members.[29]

[56] In fact, there is no evidence submitted that group members are dispersed across Canada. Further, Ms. Melançon has failed to provide the Court with an explanation of how the conditions of Article 3148 C.C.Q. are satisfied with respect to those putative class members residing outside of Quebec, and has not demonstrated that they have a real and substantial connection to this province.

[57] The Court appraises that the conditions of Article 3148 C.C.Q. are not satisfied for non-Quebec residents. The Respondents are not domiciled in Quebec, the dispute for the non-residents does not relate to the Respondents' activities in Quebec, neither the alleged fault nor their injury occurred in Quebec, and there is no evidence that the parties agreed to submit their disputes to the jurisdiction of Quebec courts.

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24 *Nova* v. *Apple Inc., 2014 QCCS 6169*, pars. 76–89 (Nova).

25 *Cunning* v. *FitFlop Ltd*, 2014 QCCS 586 (Cunning).

26 ***3148.*** *n personal actions of a patrimonial nature, Québec authorities have jurisdiction in the following cases:*
(1) the defendant has his domicile or his residence in Québec;
(2) the defendant is a legal person, is not domiciled in Québec but has an establishment in Québec, and the dispute relates to its activities in Québec;
(3) a fault was committed in Québec, injury was suffered in Québec, an injurious act or omission occurred in Québec or one of the obligations arising from a contract was to be performed in Québec;
(4) the parties have by agreement submitted to them the present or future disputes between themselves arising out of a specific legal relationship;
(5) the defendant has submitted to their jurisdiction.
However, Québec authorities have no jurisdiction where the parties have chosen by agreement to submit the present or future disputes between themselves relating to a specific legal relationship to a foreign authority or to an arbitrator, unless the defendant submits to the jurisdiction of the Québec authorities.

27 2008 QCCS 2231.

28 2015 QCCS 168.

29 *Nova*, *supra* note 24, par. 87.

[58] Consequently, the Court declines to assert its jurisdiction with respect to prospective class members living outside Quebec, and narrows the composition of the class asserted by Ms. Melançon to include only current residents of Quebec, or those individuals residing in Quebec at the time they were implanted with the Device.

7.1.3.2 Overbreadth

[59] As regards the Respondents' second contention, the Court disagrees that Ms. Melançon has framed the putative class in a manner which is overly broad.

[60] The Respondents object to the definition of the class proposed by Ms. Melançon on the grounds that it would capture individuals implanted with the Device who have sustained no adverse medical reaction and those who have sustained adverse health unrelated to the Device.[30] They allege that by framing the putative ground in such a broad manner, the inquiry on the merits would become unmanageably broad.

[61] Quebec jurisprudence requires that the definition of the group must rest on objective criteria to facilitate the process by which members of the public can identify whether they belong to the class.[31]

[62] Courts have likewise found it unnecessary to limit the composition of the class to those who have sustained an injury that is caused by the object of the class action.[32] Since only those individuals who have sustained such an injury may ultimately recover as part of the class action, imposing this restrictive definition on the composition of the class is superfluous and may instead raise uncertainty for individuals who are unsure whether their harms are causally linked to the object of the class action.

[63] The Court is satisfied that Ms. Melançon has not defined the composition of the group in a manner that is overbroad. By limiting the group to those persons who have been implanted with the Device, this definition of the class rests on objective criteria and allows members of the public to determine whether they belong to the class.

7.2 The Facts Alleged Appears to Justify the Conclusions Sought – 575(2) C.P.C.

[64] Undoubtedly the most complex matter to be assessed is whether Ms. Melançon has established an arguable case as required under Article 575(2) C.C.P.

[65] In the case at hand, the Court concludes that Ms. Melançon has met the threshold required under this criterion.

7.2.1 Applicable Principles

[66] The nature of the analysis required under Article 575(2) was described by the

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30 Respondents' Plan of Argument, par. 102.
31 *George* v. *Quebec (Procureur général)*, 2006 QCCA 1204, par. 40.
32 *Baulne* v. *Bélanger*, 2016 QCCS 538, pars.105–107 (*Baulne*).

Quebec Court of Appeal in *Charles* v. *Boiron Canada Inc.* Mr. Justice Jacques Levesque wrote that the conditions of Article 575(2) C.C.Q. are met where:

> *[L]e demandeur est en mesure de démontrer que les faits allégués dans sa demande justifient, prima facie, les conclusions recherchées et qu'ainsi, il a une cause défendable. Toutefois, des allégations vagues, générales ou imprécises ne suffisent pas pour satisfaire ce fardeau. En d'autres mots, de simples affirmations sans assise factuelle sont insuffisantes pour établir une cause défendable. Il en sera de même pour les allégations hypothétiques et purement spéculatives. Selon l'auteur Shaun Finn, en cas de doute, les tribunaux penchent en faveur du demandeur sauf si, par exemple, les allégations sont manifestement contredites par la preuve versée au dossier.*[33] *(citations removed)*

[67] The standard which the applicant must meet at the authorization stage is not one of proof on a balance of probability, but simply of demonstration.[34]

[68] While the standard is relatively low and allegations are held to be true, the applicant must, nonetheless, provide some evidentiary support for their claims. As the Supreme Court noted in *Infineon*, "*mere assertions are insufficient without some form of factual underpinning (allegations of fact) must be accompanied by some evidence to form an arguable case.*"[35]

[69] Acknowledging the obstacles facing an applicant at this early stage, a fault may be inferred by the Court on the basis of evidence provided by the applicant.[36]

[70] In assessing whether an arguable case is established, the Court must evaluate whether the individual elements making up the cause of action are supported by the facts alleged by the applicant.

7.2.2 Analysis

[71] In her motion, Ms. Melançon submitted two distinct theories of the case. The first of these, related to a failure to warn of the risks related to the Device, was withdrawn by Ms. Melançon during the Hearing. It is no longer at issue.

[72] In Ms. Melançon's alternate theory, she alleges that liability arises from the fact that the Device carried a defect that caused the injury. While Ms. Melançon has failed to expressly identify the juridical source of liability related to her allegation, the Court interprets her submissions as indicating that she invokes extracontractual liability under Article 1457 C.C.Q.[37] The Court's conclusion on this matter arises from repeated

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33 *Charles* v. *Boiron Canada Inc.*, 2016 QCCA 1716, par. 43 (*Boiron*).

34 *Pharmascience Inc. v Option Consommateurs*, 2005 QCCA 437, par. 25.

35 *Infineon*, *supra* note 7, par. 134.

36 *Infineon*, *supra* note 7, par. 89.

37 ***1457.*** *Every person has a duty to abide by the rules of conduct incumbent on him, according to the circumstances, usage or law, so as not to cause injury to another.*

references to "*negligence*" in Ms. Melançon's written submissions.[38]

[73] The Court, thus, intends to assess whether the constituent elements of extra-contractual liability, fault, causation, and injury, are established on a *prima facie* basis.[39]

7.2.2.1 Fault

[74] Ms. Melançon has provided the Court with an array of allegations regarding the fault she attributes to the Respondents.

[75] On the one hand, in her discussion of the criterion at Article 575(2) C.C.P., Ms. Melançon framed the alleged negligence in terms of a failure to properly test the Device and a failure to recall the Device once its adverse health impacts became apparent.[40]

[76] Conversely, both in her motion to authorize and in discussing the common issues for trial under Article 575(1) C.C.P., Ms. Melançon raised the prospect of negligence or fault in the design, development, manufacturing, marketing, distribution, labeling or sale of the Device.[41]

[77] Taking her submissions in their entirety, the Court interprets Ms. Melançon's claim as alleging that the Respondents were negligent in designing, developing, testing or manufacturing the Device.[42]

[78] Ms. Melançon submitted several documents in support of her claim.

- Public communications from regulatory agencies in Canada, the United States, and the United Kingdom warning about possible adverse health impacts from all metal-on-metal hip implants, and recommending that physicians monitor patients with such implants.[43]

- A medical study published in 2016 that found "*unacceptably high*" revision rates. Survival rates of 83.6% at nine years were found for the Device,

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Where he is endowed with reason and fails in this duty, he is liable for any injury he causes to another by such fault and is bound to make reparation for the injury, whether it be bodily, moral or material in nature.
He is also bound, in certain cases, to make reparation for injury caused to another by the act, omission or fault of another person or by the act of things in his custody.

38 Re-Amended Motion to Authorize the Bringing of a Class Action and to Ascribe the Status of Representative, pars. 59–63.

39 *Infineon*, *supra* note 7, pars. 76–79.

40 Petitioner's Plan of Argument, par. 47. The fourth discrete fault alleged pertains to the failure to warn. It was withdrawn by the Petitioner during oral proceedings.

41 Re-Amended Motion to Authorize the Bringing of a Class Action and to Ascribe the Status of Representative at para 62; Petitioner's Plan of Argument, par. 36.

42 As noted above at paragraph 70, the Petitioner has withdrawn any allegations related to a failure to warn of the possible health effects of the Device.

43 See Exhibits R-2, R-3, R-5, R6.

with 71 of 489 implants in the study group being extracted from patients.[44]

- An undated PowerPoint presentation by a doctor from Phoenix, Arizona, alleging that metal-on-metal hip implants pose adverse health risks for patients that outweigh the benefits.[45]

- A January 4, 2017 blog article reviewing the status of parallel litigation related to the Device in the Northern District of Texas, United States.[46] The article discusses the quantum of damages awarded against the Respondents in a case by a Texan jury.

[79] The blog article submitted by Ms. Melançon in Exhibit R-11 backstops what the Court interprets as Ms. Melançon's sole argument regarding the existence of a fault by the Respondents. Ms. Melançon appears to implicitly infer the *prima facie* existence of a fault from the fact that an action related to the Device has succeeded in a foreign jurisdiction.[47]

[80] Unfortunately, Ms. Melançon did not file this decision with the Court as evidence, and failed even to provide the relevant styles of cause.

[81] Equally troubling is the fact that Ms. Melançon provided no authorities for the proposition that foreign litigation on the same subject matter may yield an inference of the existence of an arguable case for the purpose of authorization.

[82] Conversely, the Respondents submitted *Hazan* v. *Microsoft Canada Cie* as an authority against this proposition.[48] That decision pertains to whether evidence related to judicial proceedings in the United States could be filed under Article 574 C.C.P. in relation to a class action authorization in Quebec. Mr. Justice Martin Castonguay wrote that they could not:

> *[48] Dans leur état actuel, tant les allégués de Hazan quant à ces recours étrangers et les pièces afférentes, que les pièces proposées par Microsoft sont fragmentaires et n'ont aucune pertinence quant au mérite de la Requête.*
> *[49] Même si c'était le cas et en prenant pour acquis que les faits peuvent être similaires, il ne revient pas aux tribunaux québécois de faire l'analyse des débats ayant cours ou ayant eu cours dans d'autres juridictions.* [...]
> *[51] Dans leur facture actuelle, tout ce qui touche aux débats américains n'a aucune pertinence dans la présente affaire.*

[83] Without pronouncing on whether foreign decisions can be used to infer the existence of an arguable case, Ms. Melançon in the present instance has not provided

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44 Exhibit R-10.
45 Exhibit R-9.
46 Exhibit R-11.
47 See also Re-Amended Motion to Authorize the Bringing of a Class Action and to Ascribe the Status of Representative, pars. 33–34.
48 *Hazan* v. *Microsoft Canada Cie*, 2010 QCCS 4214.

the Court with enough material to review and evaluate the foreign decision in question. Merely adducing a secondary source that discusses the existence of such litigation is insufficient to satisfy the Court.

[84] The remaining evidence submitted by Ms. Melançon likewise provides no clear and evident factual support for the *prima facie* demonstration of a fault by the Respondents.

[85] While the communications from regulatory agencies suggest that the Device has been linked to adverse health impacts, they do not suggest the existence of a fault by the Respondents. Similarly, while the study presented by Ms. Melançon found "*an unacceptably high revision rate*"[49], Ms. Melançon does not show how this study supports the existence of a fault by the Respondents.

[86] During the Hearing, the Respondents opined that Ms. Melançon simply falls within the group of people who sustain known adverse impacts associated with the Device.

[87] Having reviewed the material adduced by Ms. Melançon, the Court considers that she struggles to show, on a *prima facie* basis, the existence of a fault that is causally related to the injury she sustained.

[88] Ms. Melançon has throughout her submissions repeatedly stated the existence of the alleged negligence, but failed to provide the Court with *prima facie* evidence that provides her claim with any clear factual grounding.

[89] Ms. Melançon has rather attempted to imply the existence of a fault merely because she suffered adverse health effects after being implanted with the Device. It is trite law that the existence of an injury is by itself insufficient to establish the existence of a fault. More must be shown to satisfy Article 575(2) C.C.P.

[90] A final word may be said with respect to this case's regulatory context. The Respondents suggested that compliance with their statutory obligations under the *Food and Drug Act* and its associated regulations shields them from a civil claim by Ms. Melançon.[50]

[91] The Court disagrees. Without intruding on the evaluation on the merits, the Supreme Court of Canada noted in *Infineon* that compliance with statutory obligations alone does not serve as a shield against civil liability.[51] The Defendant's conformity with regulatory standards cannot be used to radiate the evaluation of whether an arguable case exists at the authorization stage.

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49 Exhibit R-10 at 1.
50 Respondents' Plan of Argument, par. 52.
51 *Infineon*, *supra* note 7, par. 96.

7.2.2.2 Injury and Causation

[92] Whereas Ms. Melançon has provided little documentation to show the *prima facie* existence of a fault, the Court considers that she has succeeded in demonstrating an injury. Without proceeding to an inquiry on the merits of the case, the theory advanced by Ms. Melançon's that the Device caused her injury is adequately supported by the evidence she adduced for the purpose of the authorization hearing.

[93] However, given that a *prima facie* fault was not adequately demonstrated, it is difficult for the Court to pronounce on whether the necessary causal link between the injury and the fault was established for the purpose of the evaluation at Article 575(2) C.C.P.

7.2.2.3 Conclusion

[94] That having been stated, the Court considers that the above analysis is overly severe and strict and even, perhaps, premature at this state of procedures. There may or may not be a fault. Yet, the Court deems that it would be unfair and premature to conclude that there is no fault at this stage of the proceedings.

[95] Madam Justice Marie-France Bich observed in the Court of Appeal case of *Asselin*[52] that the jurisprudence teaches us that a more flexible, liberal and generous approach is required in order to facilitate the execution of class actions as a means of indemnifying victims:

> *[28] L'action collective instaurée par le Code de procédure civile, qui se veut un outil de justice sociale, n'a pas que des adeptes, on le sait, et son cheminement procédural n'est pas sans susciter la critique. Le mécanisme de l'autorisation préalable, en particulier, soulève la controverse et certains, qui le jugent insuffisant, souhaiteraient insuffler plus de sévérité dans le processus d'appréciation des conditions prévues par l'art. 575 C.p.c. (précédemment art. 1003 a.C.p.c.), et notamment celle que prescrit le paragr. 2 de cette disposition. On ne peut aucunement douter que ce soit le souci d'une saine administration de la justice qui anime les tenants de cette proposition, afin d'éviter « une utilisation abusive du service public que forment les institutions de la justice civile » (termes empruntés au juge LeBel dans Marcotte c. Longueuil (Ville)).*
>
> *[29] Cependant, toute méritoire qu'en soit l'intention (et elle l'est), une telle idée, fondée sur une approche exigeante des conditions d'autorisation de l'action collective, ne correspond pas à l'état du droit en la matière, tel que défini par la Cour suprême dans les affaires Infineon Technologies AG c. Option consommateurs, Vivendi Canada Inc. c. Dell'Aniello et Theratechnologies inc. c. 121851 Canada inc. Ces arrêts préconisent au contraire une approche souple, libérale et généreuse des conditions en question, afin de « faciliter l'exercice des recours collectifs comme moyen d'atteindre le double objectif de la dissuasion et*

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52 *Asselin* v. *Desjardins Cabinet de Services Financiers Inc. et al.*, 2017 QCCA 1673.

de l'indemnisation des victimes », conformément au vœu du législateur. Il s'agit dès lors seulement pour le requérant, au stade de l'autorisation, de présenter une cause soutenable, c'est-à-dire ayant une chance de réussite, sans qu'il ait à établir une possibilité raisonnable ou réaliste de succès. Sur ce point, les propos des juges LeBel et Wagner dans Infineon sont sans équivoque:

> *[65] Comme nous pouvons le constater, la terminologie peut varier d'une décision à l'autre. Mais certains principes bien établis d'interprétation et d'application de l'art. 1003 C.p.c. se dégagent de la jurisprudence de notre Cour et de la Cour d'appel. D'abord, comme nous l'avons déjà dit, la procédure d'autorisation ne constitue pas un procès sur le fond, mais plutôt un mécanisme de filtrage. Le requérant n'est pas tenu de démontrer que sa demande sera probablement accueillie. De plus, son obligation de démontrer une « apparence sérieuse de droit », « a good colour of right » ou « a prima facie case » signifie que même si la demande peut, en fait, être ultimement rejetée, le recours devrait être autorisé à suivre son cours si le requérant présente une cause défendable eu égard aux faits et au droit applicable.*
>
> *[Je souligne]*

[...]

[33] D'une part, s'il est vrai que l'on ne doit pas se satisfaire du vague, du général et de l'imprécis, l'on ne peut pour autant fermer les yeux devant des allégations qui ne sont peut-être pas parfaites, mais dont le sens véritable ressort néanmoins clairement. Il faut donc savoir lire entre les lignes. Agir autrement serait faire montre d'un rigorisme ou d'un littéralisme injustifié et donner aux propos de la Cour suprême en la matière une acception qu'ils n'ont pas.

[34] D'autre part, on doit comprendre que des allégations génériques ne suffiront pas, les faits soulevés devant, au regard du droit applicable, être suffisamment spécifiques pour qu'on puisse saisir les grandes lignes du narratif proposé et vérifier sur cette base que sont remplies les conditions de l'art 575 C.p.c., c'est-à-dire que le syllogisme juridique est plaidable et que les questions de fait et de droit qui le sous-tendent sont suffisamment communes pour que leur résolution fasse avancer le débat au bénéfice de chacun des membres d'un groupe par ailleurs convenable, dont les intérêts seront assurés par une personne capable d'une représentation adéquate, conditions qui doivent être interprétées et appliquées en vue de « faciliter l'exercice des recours collectifs ». Il ne s'agit donc pas d'exiger de celui qui demande l'autorisation d'intenter une action collective le menu détail de tout ce qu'il allègue ni celui de la preuve qu'il entend présenter au soutien de ces allégations dans le cadre du procès sur le fond, approche que la Cour suprême a rejetée dans l'arrêt Infineon en rappelant que « la norme applicable est celle de la démonstration d'une cause défendable et non celle de la présentation d'une preuve selon la prépondérance des probabilités, plus exigeante ».

[96] In light of the above jurisprudence and given that Ms. Melançon's alleged damages and injury have been established, the Court considers that the authorization ought to be granted. The debate with respect to the establishment of the fault is to be heard on the merits.

7.3 The Composition of the Class Makes it Difficult or Impracticable to Apply the Rules for Mandates or for Consolidation of Proceedings – 575(3) C.C.P.

7.3.1 Applicable Principles

[97] The inquiry needed in respect to Article 575(3) C.P.C. turns on whether the character of the composition of the proposed class makes it difficult or impractical to pursue judicial proceedings through other procedural vehicles.

[98] The elements Ms. Melançon must demonstrate were canvassed in *Brière* v. *Rogers Communications*. There, Mr. Justice Pierre Nollet wrote:

> *[72] Les éléments suivants s'appliquent : le nombre probable des membres; la situation géographique des membres; les coûts impliqués; et les contraintes pratiques et juridiques inhérentes à l'utilisation du mandat et de la jonction des parties en comparaison avec le recours collectif.*
>
> *[73] Dans Morin c. Bell Canada, la Juge Savard rappelle que les requérants n'ont pas à démontrer que l'application des Articles 59 et 67* C.p.c. *est impossible; ils doivent plutôt démontrer que l'application de ces Articles est difficile ou peu pratique.*[53]

[99] In effect, the applicant must provide the Court with some minimum information on the size of the group and its essential characteristics to allow the Court to verify whether Article 575(3) C.C.P. is met.[54]

7.3.2 Analysis

[100] Ms. Melançon hinges her argument regarding this authorization criterion on the fact that the large number of class members and their geographic distribution makes proceeding by mandate or consolidation impracticable.[55] Ms. Melançon testified in May 2014 in an examination that sixty people had signed up to the prospective class, although no subsequent documentation was produced in support of this assertion.[56] While Ms. Melançon concedes that she does not know the exact number of potential class members. She estimates that they figure in the thousands.[57]

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53 *Brière* v. *Rogers Communications*, 2012 QCCS 2733, pars. 72–73.
54 *Del Guidice* v. *Honda Canada inc.*, 2007 QCCA 922, par. 33.
55 Re-Amended Motion to Authorize the Bringing of a Class Action and to Ascribe the Status of Representative, par. 66.
56 Exhibit D-1 at 15–17, pars. 24–24.
57 Re-Amended Motion to Authorize the Bringing of a Class Action and to Ascribe the Status of Representative, par. 66.

[101] The bar for applicants at the authorization stage is admittedly low.

[102] In light of this, the Court considers that the criterion in Article 575(3) C.C.P. is satisfied.

7.4 The Representative Plaintiff is Competent – 575(4) C.P.C.

7.4.1 Applicable Principles

[103] The Quebec Court of Appeal, writing in *Lambert* v. *Whirlpool*, affirmed a three-part inquiry related to Article 575(4) C.C.P. The representative should: a) have a personal interest in the case; b) be sufficiently competent to represent the group; and c) divulge any conflict of interest.[58]

[104] The Supreme Court of Canada, in *Infineon*, affirmed the use of these criteria, but cautioned that they should be given a liberal interpretation, such that *"no proposed representative should be excluded unless his or her interest or competence is such that the case could not proceed fairly."*[59]

[105] In assessing competence, Quebec jurisprudence requires that the petitioner engage in some effort or undertaking related to the demonstration of the existence a class.[60] However, the degree to which the petitioner must be involved has been the subject of contradictory decisions by Quebec courts. On the one hand, several decisions indicate that the application must take an active role in investigating the facts underlying the claim and in contacting prospective class members.[61] Conversely, the Quebec Court of Appeal's recent decision in *Sibiga* suggests that a passive applicant may nonetheless be deemed to satisfy Article 575(4) C.C.P.[62]

[106] The Court favours the latter approach as more consistent with the principles of access to justice and with the "*minimalist*" view of Article 575(4) C.C.P. endorsed in *Charles* v. *Boiron Canada Inc.*[63]

7.4.2 Analysis

[107] Having evaluated the facts and the evidence, the Court concludes that Ms. Melançon is an adequate representative within the meaning of Article 575(4) C.C.P.

7.4.2.1 Well-Founded Interest

[108] First, Ms. Melançon plainly has a well-founded interest in the case given that she was implanted with the Device and that she alleges the Device caused her physical

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58 *Lambert* v. *Whirlpool Canada, lp*, 2015 QCCA 433, par. 18.
59 *Infineon*, *supra* note 7, par. 149.
60 *Lévesque* v. *Vidéotron, senc*, 2015 QCCA 205, pars. 25–26.
61 See *Del Guidice* v. *Honda Canada inc.*, 2007 QCCA 922, par. 38; *D'Amour* v. *Bell Mobilité inc.*, 2010 QCCS 206, pars. 89–93.
62 *Sibiga*, *supra* note 8, pars. 101–104.
63 *Boiron*, *supra* note 31, par. 55.

harm. Ms. Melançon's interest in the claim was not contested. The Court is satisfied that the necessary threshold is met.

7.4.2.2 Representative is Competent

[109] On the second factor, related to competence, the Respondents submit that Ms. Melançon has failed to sufficiently engage herself in the judicial proceedings, and consequently has not shown herself competent within the meaning of Article 575(4) C.C.P. The Respondents highlight the fact that Ms. Melançon did not perform any investigations to identify potential class members since she substituted Ms. Hannelore Berger as the Petitioner. Ms. Melançon confirmed in her testimony that she had not identified a single member of the class and had undertaken no efforts to identify or contact prospective class members.[64]

[110] The Court is not convinced by the Respondents' arguments on this matter. The Quebec Court of Appeal, in several decisions following *Infineon*, has confirmed that a limited degree of engagement by the petitioner is sufficient to satisfy the competence threshold required under Article 575(4) C.C.P.[65]

[111] In the present instance, while Ms. Melançon has not actively sought out prospective class members, she has testified in her examination to spending approximately thirty hours on reading and research related to these judicial proceedings.[66] Further, Ms. Melançon has conveyed an expectation that she would become engaged in any future work related to the class action through attending meetings, contacting individuals, and assisting her lawyers in research.[67] In doing so, the Court is satisfied that Ms. Melançon is sufficiently engaged in the class to qualify her as competent.

[112] Moreover, Ms. Melançon, as a former nurse, has in the Court's view demonstrated a sufficient level of knowledge and competence which confirm her capacity to act as a representative. Quebec jurisprudence requires only a minimal level of understanding about judicial proceedings to be deemed competent.[68] In her examination pursuant to Article 574 C.P.C., Ms. Melançon conveyed a sufficient grasp of her role as a prospective representative and the structure of the proceedings related to class actions to assuage any concerns that she is not fit to represent the class.[69]

[113] An observation is appropriate with respect to the argument advanced by the Respondents with respect to what has been elsewhere termed "*entrepreneurial lawyering*". They suggest that Ms. Melançon has failed to demonstrate her competence as "*she essentially relies on her lawyers to manage and advance the proposed class*

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64 Exhibit D-1 at 71–73.
65 *Boiron*, *supra* note 31, par. 55; *Sibiga*, *supra* note 8, pars. 101–104.
66 Exhibit D-1 at 71–72.
67 Exhibit D-1 at 75.
68 *Léonard* v. *Quebec (Procureure générale)* 2014 QCCS 4952, par. 93.
69 Exhibit D-1 at 70, 75, 76.

action."[70]

[114] The Court would recall the Quebec Court of Appeal's decision in *Sibiga*, where Mr. Justice Nicholas Kasirer's observed that *"it is best to recognize that lawyer-initiated proceedings are not just inevitable, given the costs involved, but can also represent a social good in consumer class action setting."*[71] The mere fact that Ms. Melançon's attorneys have driven judicial proceedings on her behalf does not undermine her capacity to act as a competent representative in this instance.

[115] Second, the Respondents submit that Ms. Melançon's failure to establish that she has an arguable case militates against finding her to be a competent class representative. They cite *Contat* v. *General Motors du Canada ltée* in support of the proposition that an applicant with an extremely weak or non-existent personal claim cannot serve as a competent representative for the class.[72]

[116] For the reasons outlined in Section 7.2.2 of this decision, the Court disagrees with the argument that Ms. Melançon's personal cause of action against the Respondents is extremely weak.

7.4.2.3 Absence of a Conflict of Interest

[117] Finally, the Respondents did not plead the existence of a conflict of interest, and the Court sees nothing to suggest the existence of such a conflict.

8. CONCLUSIONS

[118] In sum, Ms. Melançon has demonstrated that the four conditions of Article 575 C.C.P. have been met.

[119] Authorization for the class action is consequently granted.

FOR THESE REASONS, THE COURT:

[120] **GRANTS** the Re-Amended Motion to Authorize the Bringing of a Class Action and to Ascribe the Status of Representative, in part;

[121] **ASCRIBES** the Petitioner, Carole Melançon, the status of representative of the persons included in the group members herein described as:

> all persons in the Province of Quebec (including their estates, executors, personal representatives, their dependants and family members), who were implanted with the DePuy Pinnacle metal on metal Acetabular Cup System;

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70 Respondents' Plan of Argument, par. 122.
71 *Sibiga*, *supra* note 8, par. 102.
72 *Contat* v. *General Motors du Canada ltée*, 2009 QCCA 1699, par. 33.

[122] **IDENTIFIES** the principle questions of fact and law to be treated collectively as the following:

a) do the Pinnacle Hip Implants cause an increase in negative health effects, and to what extent?

b) were the Pinnacle Hip Implants unsafe, or unfit for the purpose for which they were intended as designed, developed, manufactured, sold, distributed, marketed or otherwise place into the stream of commerce by the Respondents?

c) were the Respondents negligent or did they commit faults in the designing, developing, testing, manufacturing, marketing, distributing, labelling or selling of the Pinnacle Hip Implants?

d) are the Respondents liable to pay damages to the group members as a result of their faults, negligence or misrepresentations made in manufacturing, marketing, distributing or selling of the Pinnacle Hip Implants, or as a result of the use of the Pinnacle Hip Implants?

e) are the Respondents liable to pay compensatory damages to the group members, and if so in what amount?

f) are the Respondents liable to pay exemplary or punitive damages to the group members, and if so in what amount?

[123] **IDENTIFIES** the conclusions sought by the class action to be instituted as being the following:

a) **GRANT** the Petitioner's, Carole Melançon, action against the Respondents;

b) **CONDEMN** the Respondents to pay an amount in compensatory damages to the group members, amount to be determined by the Court, plus interest as well as the additional indemnity;

c) **CONDEMN** the Respondents to pay an amount in moral damages to the group members, amount to be determined by the Court, plus interest as well as the additional indemnity;

d) **CONDEMN** the Respondents to pay an amount in punitive and/or exemplary damages to the group members, amount to be determined by the Court, plus interest as well as the additional indemnity;

e) **GRANT** the class action of the Petitioner, Carole Melançon, on behalf of all members of the group members;

f) **ORDER** the treatment of individual claims of each member of the group in accordance with Articles 1037 to 1040 of the *Code of Civil Procedure*;

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

[124] **DECLARES** that all group members that have not requested their exclusion from the group in the prescribed delay to be bound by any judgement to be rendered on the class action to be instituted;

[125] **FIXES** the delay of exclusion at thirty (30) days from the date of the publication of the notice to the group members;

[126] **ORDERS** the publication of a notice to the group members in accordance with Article 1006 of the *Code of Civil Procedure* and **CONVENES** the parties to a hearing to be fixed with them to discuss the issues of the notice to group members and the costs related to said notice;

[127] **WITH JUDICIAL COSTS** to follow.

PAUL MAYER, J.S.C.

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Date of hearing: February 20, 2018