SUPERIOR COURT
(Class Actions)

CANADA
PROVINCE OF QUEBEC
DISTRICT OF MONTREAL

No: 500-06-000964-185

DATE: July 23, 2019

BY THE HONOURABLE CHANTAL TREMBLAY, J.S.C.

KATHLEEN GAUTHIER
Applicant

v.

JOHNSON & JOHNSON INC.
Defendant

JUDGMENT ON LEAVE TO EXAMINE THE APPLICANT AND TO SUBMIT RELEVANT EVIDENCE

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[1] Kathleen Gauthier filed an *Application for Authorization to Institute a Class Action and to Obtain the Status of Representative* (**Authorization Application**) on behalf of the following class members:

> All of the physical persons residing in Quebec (alternatively in Canada) who bought Tylenol Products[1] manufactured and/or sold and/or marketed by Johnson & Johnson Inc. containing acetaminophen alone or in combination with other medications.

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1 Listed in the Authorization Application.

[2] She alleges that Johnson & Johnson Inc. (**J&J**) has breached its duties under Section 219 and 228 of the *Consumer Protection Act*[2] (**CPA**), Section 52 of the *Competition Act*[3] (**CA**) and Articles 6, 7, 1375 and 1401 of the *Civil Code of Quebec* (**CCQ**) by misleading consumers in omitting to disclose and properly caution against risks and side effects related to the Tylenol Products, including the risk of acute liver failure requiring a liver transplant.

[3] J&J seeks leave to examine the Applicant and to adduce relevant evidence in view of the authorization hearing. Applicant contests these requests.

1. ANALYSIS

1.1 Request to submit relevant evidence

[4] The Court of Appeal in *Asselin* v. *Desjardins Cabinet de services financiers Inc.*[4] framed the Court's analysis of an Application to submit relevant evidence in view of the Authorization hearing as follows:

> [37] Autre exemple de glissement : on laissera les parties produire une preuve volumineuse, qu'on examinera ensuite en profondeur comme s'il s'agissait d'évaluer le fond de l'affaire. **Or, ce n'est pas pour rien que, dans *Allstate du Canada, compagnie d'assurances* c. *Agostino*, réitérant un point de vue déjà exprimé dans *Pharmascience inc.* c. *Option Consommateurs*, la Cour met les juges autorisateurs (ou gestionnaires) en garde contre « la tentation d'user de l'article 1002 C.p.c. [maintenant 574 C.p.c.] de manière à faire du mécanisme de filtrage qu'est le processus d'autorisation du recours collectif une sorte de préenquête sur le fond »**, ce qui risque de contaminer l'analyse propre aux conditions d'autorisation en la faisant déborder du champ restreint qui doit être le sien. C'est en effet une tentation à laquelle il est souvent difficile de résister. Mieux vaut donc s'en prémunir.
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> [38] **Bien sûr, aux termes mêmes de l'art. 574 *C.p.c.* (autrefois 1002 a.*C.p.c.*), « le tribunal peut permettre la présentation d'une preuve appropriée/*the court may allow relevant evidence to be submitted* », accessoirement à la contestation de la demande d'autorisation, le demandeur étant pour sa part autorisé à déposer au soutien de sa procédure, sans permission préalable, certaines pièces qu'il estime de nature à donner du poids à ses allégations. Mais cela doit être fait avec modération et être réservé à l'essentiel et l'indispensable. Or, l'essentiel et l'indispensable, côté demandeur, devraient normalement être assez sobres vu la présomption rattachée aux allégations de fait qu'énonce sa procédure. Il devrait en aller de même du côté du défendeur, dont la preuve, vu la présomption attachée aux faits allégués, devrait être limitée à ce qui permet d'en établir sans conteste l'invraisemblance ou la fausseté.** C'est là le « couloir étroit » dont parle la Cour dans *Agostino*. Car, ainsi que l'écrit

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2 CQLR c P-40.1 and undefined sections of its counterparts in the rest of Canada.
3 RSC 1985, c C-34.
4 2017 QCCA 1673, aux par. 37 à 45 (leave to appeal to SCC granted, 06-27-2019, nº 37898).

> succinctement le juge Chamberland, au stade de l'autorisation, « le fardeau [du requérant] en est un de logique et non de preuve ». Il faut conséquemment éviter de laisser les parties passer de la logique à la preuve (prépondérante) et de faire ainsi un pré-procès, ce qui n'est pas, répétons-le, l'objet de la démarche d'autorisation.
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> [39] Évidemment, on peut comprendre que la partie demanderesse, désireuse de contrer par avance la contestation qu'elle prévoit, puisse être portée à déposer d'emblée une preuve abondante, le plus souvent documentaire, au soutien de ses allégations; elle peut encore chercher à produire des éléments supplémentaires au fur et à mesure qu'elle prend connaissance des moyens qu'entend lui opposer la partie défenderesse. Pour échapper à la perspective d'une action collective, cette dernière, pareillement, souhaitera présenter une preuve destinée à démontrer que l'action envisagée ne tient pas et, pour ce faire, elle pourrait bien forcer la note, sur le thème « abondance de biens ne nuit pas ». **Le juge autorisateur (ou gestionnaire) doit résister à cette propension des parties, tout comme il doit se garder d'examiner sous toutes leurs coutures les éléments produits par l'une et l'autre, au risque de transformer la nature d'un débat qui ne doit ni empiéter sur le fond, ni trancher celui-ci prématurément, ni porter sur les moyens de défense de l'intimé**.
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> (Our emphasis and references omitted)

[5] J&J seeks leave to adduce the following evidence:

a) The *Revised Guidance Document – Acetaminophen Labelling Standard* issued by Health Canada on September 15, 2016 (**Revised Guidance**) (Exhibit R-1);

b) The *Acetaminophen Labelling Standard Guidance Document* issued by Health Canada on October 28, 2009 (**Former Guidance**) (Exhibit R-2);

c) The label of Tylenol Extra Strength eZtabs as of December 12, 2017 (Exhibit R-3);

d) An excerpt from the Quebec Register of Enterprises for J&J (Exhibit R-4); and

e) The proposed affidavit of Ms. K. Jill Grande, Senior Manager, Regulatory Affairs at McNeil Consumer Healthcare, a division of J&J (Exhibit R-5).

[6] J&J is of the view that this evidence is useful and necessary to complete the factual background provided in the Authorization Application and to enable the Court to perform its analysis of the criteria set forth in article 575 C.C.P. and more particularly, the cause of action, class definition and common issues.

[7] Except for Exhibits R-3 and R-4, the Applicant is of the view that J&J is trying to add to the evidentiary record without limiting itself to what is essential and indispensable.

[8] With regard to Exhibits R-1, R-2 and R-5, Applicant submits that the Guidance Documents of Heath Canada and the affidavit of Ms. K. Jill Grande confirming that J&J complies with such labelling standards are neither essential nor indispensable to the

authorization stage to verify her legal syllogism. She submits that the question at hand is not whether J&J respected the regulation with regard to labelling standards of acetaminophen but rather if it respected its informational obligations under the CPA, CA and CCQ.

[9] She refers to the decision *Imperial Tobacco Canada ltée* c. *Conseil québécois sur le tabac et la santé*[5] in which the Court of Appeal confirmed such principle in regard of the cigarette labelling rules:

> [488] Bref, à une réserve près, le fait de respecter les normes d'étiquetage ou de publicité fédérales ne libère aucunement les appelantes du devoir de renseignement qui leur incombe en vertu d'une règle de droit, et notamment des lois québécoises, incluant le *C.c.B.C.*, le *C.c.Q.* ou la *L.p.c.*, et ne les libère pas davantage de leur responsabilité en cas de manquement à cette obligation (advenant préjudice et causalité). Cette conclusion s'impose d'autant que les exigences d'étiquetage rendues obligatoires par voie législative et réglementaire à partir de 1989 sont longtemps demeurées peu informatives, comme on le verra. Les appelantes ne pouvaient pas simplement s'en satisfaire et prétendre s'être déchargées ainsi de leur obligation de renseignement.
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> [...]
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> [491] Mais celui qui respecte les normes n'est pas de ce seul fait libéré de son devoir de renseignement ou tenu pour s'en être acquitté, pas plus qu'il n'est libéré de la responsabilité qui peut lui échoir advenant que l'information donnée, même conforme auxdites normes, ne révèle pas de manière exacte, compréhensible et complète le danger inhérent produit. Comme l'écrivent les P^rs^ Jobin et Cumyn :
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> > [...] le fait de se conformer aux prescriptions administratives ou pénales n'assure pas l'immunité contre la responsabilité lorsque le tribunal estime qu'en l'espèce le standard de prudence au civil dépasse celui fixé par la loi administrative; c'est là une saine conception de la responsabilité civile.
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> (Our underlines)

[10] For the following reasons, the Court allows Defendant to adduce Exhibits R-1 to R-5 as evidence in view of the authorization hearing:

a) The Authorization Application states that in September 2016, Health Canada introduced regulatory changes requiring manufacturers of products containing acetaminophen to add stricter warnings and reassess the maximum daily dosages. However, Applicant does not communicate these regulatory changes contained in the Revised Guidance (Exhibit R-1);

b) These standards, as well as the prior standards (Former Guidance, Exhibit R-2), are useful to assess Applicant's legal syllogism regarding the proposed cause of action. Indeed, Applicant refers to these standards as being the basic informational obligations under federal health laws and regulations or administrative directives from Health Canada.

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5 2019 QCCA 358.

c) In order to analyze whether the Applicant will be in a position to demonstrate that the Defendant misled consumers, it is indispensable that the Court has a copy of the regulatory standards that the Defendant must comply with in relation to the labelling of the Tylenol Products.

d) According to the Applicant, the Defendant misled consumers by omitting to disclose and properly caution them against risks of toxicity and serious health consequences. In support of these allegations, Applicant communicates, as an example, an incomplete image of a Tylenol Extra Strength product (Exhibit P-8).

e) Exhibit P-8 fails to include one side of the product's box containing a warning that the Applicant alleges should have been made to the proposed class members (Exhibit R-3).

f) The label of the Tylenol Products is relevant and central in assessing the allegations of the Authorization Application.

g) The excerpt from the Quebec Register of Entreprises is relevant to assess whether the class can include out-of-province residents (Exhibit R-4).

h) The affidavit of Ms. K. Jill Grande (Exhibit R-5) is relevant as it attests to the content and accuracy of Exhibit R-3 and the corporate information found in Exhibit R-4. It also confirms that the Defendant complies with the Revised Guidance (Exhibit R-1) and Former Guidance (Exhibit R-2).

1.2 Examination of the Applicant

[11] J&J also seeks leave to examine Applicant on the following aspects:

a) The frequency at which she purchased or used the Tylenol Products;

b) The usage she made of the Tylenol Products;

c) To whom she gave Tylenol Products;

d) The period during which she purchased Tylenol Products;

e) The period during which she stopped purchasing and/or using Tylenol Products;

f) The reason why she stopped purchasing and/or using Tylenol Products;

g) The nature and the quantum of the damages claimed;

h) Her participation in the preparation of the Motion for Authorization and her knowledge/investigation of the allegations made therein; and

i) Her communications with other members of the putative class about the proposed class action.

[12] Defendant argues that the Authorization Application lacks relevant facts with respect to key element of Applicant's individual claim, and therefore does not allow a proper analysis of the criteria set forth in article 575 (2) C.C.P.

[13] Plaintiff rather argues that the allegations of the Authorization Application are sufficient since the recourse provided for in Section 272 CPA is «based on the premise that any failure to fulfill an obligation imposed by the Act gives rise to an absolute presumption of prejudice to the consumer»[6].

[14] The allegations pertaining to Applicant's individual claim read as follows:

> 90. Petitioner is a member of the proposed class having consumed Tylenol Products for decades without any knowledge of the above.
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> 91. Not only did Petionner consume Tylenol Products, but she also occasionally gave some to her two children (born in 1998 and 2000) when they were young, having no knowledge of the potentially dangerous effects of APAP on them.
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> 92. It is only in 2017 that Petionner learned of the above.
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> 93. Had she been properly informed, Petitioner's use of Tylenol Products would certainly have been different and less frequent. She would also have looked for alternatives.
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> 94. Petitioner also certainly would never have given her children any Tylenol Products.
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> 95. She is therefore entitled to compensatory damages from the Defendant in the form of the reimbursement of part of the cost she incurred in purchasing Tylenol products. Such amount is estimated at $400.
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> 96. She is also entitled to claim $100 in punitive damages as a result of the intentional breach by the Defendants (sic) of their (sic) obligations under the *Consumer Protection Act*.

[15] The Court is of the view that Defendant has demonstrated the usefulness and necessity to examine the Applicant on the topics a) to g) described above in order to determine if the applicant has an appearance of right to the conclusions sought. Indeed, to institute proceedings under Section 272 CPA, Applicant must demonstrate that the alleged prohibited practice was one that was capable of influencing her behaviour with respect to the formation, amendment or performance of a contract.

[16] As for the topics h) and i) described above concerning the existence of a putative class and the adequacy of the Applicant to represent said putative class, the Court is of the view that the allegations contained in paragraph 87 of the Authorization Application are sufficient. The requested examination on such topics is not essential and indispensable to assess the criteria set forth in article 575 (3) and (4) C.C.P.

[17] Therefore, the Court authorize Defendant's request to examine the Applicant on topics a) to g) only.

WHEREFORE, THE COURT:

[18] **ALLOWS** the filing of the following evidence in view of the authorization hearing:

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6 Richard vs Time, 2012 CSC 8, par. 112.

a) The Revised Guidance Document – Acetaminophen Labelling Standard issued by Health Canada on September 15, 2016 (Exhibit R-1);

b) The Acetaminophen Labelling Standard Guidance Document issued by Health Canada on October 28, 2009 (Exhibit R-2);

c) The label of Tylenol Extra Strength eZtabs as of December 12, 2017 (Exhibit R-3);

d) An excerpt from the Quebec Register of Enterprises for J&J (Exhibit R-4); and

e) The proposed affidavit of Ms. K. Jill Grande, Senior Manager, Regulatory Affairs at McNeil Consumer Healthcare, a division of J&J (Exhibit R-5).

[19] **ALLOWS** Defendant to examine the Applicant out of court at a date to be confirmed within 30 days of the present judgment and for not more than two hours on the following topics:

a) The frequency at which she purchased or used the Tylenol Products;

b) The usage she made of the Tylenol Products;

c) To whom she gave Tylenol Products;

d) The period during which she purchased Tylenol Products;

e) The period during which she stopped purchasing and/or using Tylenol Products;

f) The reason why she stopped purchasing and/or using Tylenol Products;

g) The nature and the quantum of the damages claimed.

[20] **THE WHOLE,** with costs to follow.

Chantal Tblay JSC

CHANTAL TREMBLAY, J.S.C.

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