

C A N A D A  
PROVINCE OF QUÉBEC  
DISTRICT OF MONTREAL

SUPERIOR COURT  
(Class Actions)

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N°: 500-06-001003-199

**JESSICA GAGNON**

**ALLA OLENITCH**

Plaintiffs

v.

**INTERVET CANADA CORP.**

**INTERVET GESMBH**

Defendants

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**APPLICATION FOR DECLINATORY EXCEPTION**

By the Defendants

On April 3, 2020

(Art. 167 C.C.P. and 3148 C.C.Q.)

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**TO THE HONOURABLE PIERRE-C. GAGNON, J.S.C., IN HIS CAPACITY AS CASE MANAGEMENT JUDGE HEREIN, THE DEFENDANTS SUBMIT THE FOLLOWING:**

1. By this declinatory exception, the Defendants ask the Court, for the reasons more fully detailed below, (i) to declare that it has no subject-matter jurisdiction over any claim against Intervet GesmbH on behalf of putative class members who administered Bravecto to their animal outside Quebec, and, as a result, (ii) to dismiss the Plaintiffs' Re-modified Application for Authorization to Institute a Class Action respecting all putative class members who administered Bravecto to their animal outside Quebec.

**I. PROCEDURAL BACKGROUND**

2. On May 17, 2019, the Plaintiffs filed an Application for Authorization to Institute a Class Action in this instance in which they sought to represent a class limited to Québec residents, described as follows:

Toutes les personnes physiques résidentes du Québec, ayant administré entre l'année 2014 et le 17 mai 2019, le produit commercialisé par Intervet Canada Corp., faisant affaires sous le nom de « Merck Santé animale », sous le nom de Bravecto, en comprimé orale [sic] de 112,5 mg à 1 400 mg, à un animal leur appartenant et qui n'ont pas reçu de dédommagement monétaire de Merck, suite à l'administration de ce produit à leur animal;

as appears from the Court record.

3. On June 11, 2019, the Plaintiffs filed a Motion to Modify the Application in which they seek to modify the class in two ways. First, they no longer seek to identify class members on the basis of their place of residence but, rather, on the basis of the place where they administered the medication to their animal. Second, they seek to broaden the class by covering all persons who administered the medication to their animal anywhere in Canada rather than only in Quebec; it is only subsidiarily that they propose to restrict the class to persons who administered the medication to their animal in Quebec. The new proposed class in the Modified Application is described follows:

Toutes les personnes (...) ayant administré au Canada (subsidièrement au Québec), entre l'année 2014 et le 17 mai 2019, le produit commercialisé par Intervet Canada Corp., faisant affaires sous le nom de « Merck Santé animale », sous le nom de Bravecto, en comprimé orale [sic] de 112,5 mg à 1 400 mg, à un animal leur appartenant et qui n'ont pas reçu de dédommagement monétaire de Merck, suite à l'administration de ce produit à leur animal.

as appears from the Court record.

4. The undersigned attorneys immediately advised this Court and the Plaintiffs' counsel that the Modified Application raises issues respecting this Court's jurisdiction over Intervet GesmbH, an Austrian entity, as appears from a copy of the email dated June 11, 2019 communicated herewith as **Exhibit R-1**.
5. On June 19, 2019, the Plaintiffs emailed a Re-modified Application to the Court and the undersigned attorneys, including new allegations aimed at establishing

this Court's jurisdiction over Intervet GesmbH, as appears from the said email communicated herewith as **Exhibit R-2**.

6. On June 26, 2019, the undersigned attorneys filed an Answer on behalf of Intervet GesmbH under reserve of all its rights herein, including its right to challenge the jurisdiction of this Court, as appears from the Court record.
7. The same day, the undersigned attorneys, on behalf of the Defendants, advised the Court that the Defendants would not oppose the Plaintiff's Re-modified Application but that they reserved all their rights and submissions in that regard, including their submissions respecting the Court's absence of jurisdiction over Intervet GesmbH, in whole or in part, as appears from the email communicated herewith as **Exhibit R-3**.
8. On July 2, 2020, this Court rendered judgment allowing the Plaintiffs to file the Re-modified Application, under reserve of the Defendants' right to contest this Court's jurisdiction at the authorization hearing, as appears from the Court record.
9. On September 20, 2019, the Defendants filed an *Application for Leave to Adduce Relevant Evidence, for the Communication of Documents and for Leave to Examine the Plaintiffs* (the "**Application for Leave to Adduce Evidence**"), in which they sought leave to adduce, *inter alia*, the affidavit of Mr. Daniel Beauchamp in support of their jurisdictional argument, as appears from the Court record. Mr. Beauchamp's affidavit is communicated herewith as **Exhibit R-4**.
10. On November 6, 2019, this Court granted in part the Defendants' Application for Leave to Adduce Evidence, allowed the Defendants to adduce paragraphs 1 to 5 and 8 of Mr. Beauchamp's affidavit, but deemed paragraphs 6 and 7 to be redacted, including Exhibit "B" filed in support of paragraph 6 of the affidavit, as appears from the Court record.
11. On December 18, 2019, the Defendants filed an Application for Leave to Appeal this judgment, as appears from the Court record. This Application focused on two pieces of evidence, including the redacted parts of Mr. Beauchamp's affidavit and Exhibit "B" thereto, which the Defendants argued were relevant to their jurisdictional argument.

12. On February 10, 2020, the Defendants' Application for Leave to Appeal was heard by the Honourable Marie-Josée Hogue, J.C.A.
13. At that hearing, the Plaintiffs' counsel formally represented to Madam Justice Hogue that they had no intention on relying on article 3148 C.c.Q. in support of their argument that Quebec courts have jurisdiction over Intervet GesmbH, as noted by Madam Justice Hogue at paragraph 10 her decision dated February 14, 2020 herein, communicated herewith as **Exhibit R-5**.
14. In that context, Madam Justice Hogue held that, while paragraphs 6 and 7 of Mr. Beauchamp's affidavit are relevant to the jurisdictional issue, they were not necessary in the current state of this file ("*en l'état actuel du dossier*") because the Plaintiffs, in their Re-modified Application, do not allege facts that would need to be refuted by the affidavit, and because they indicated that they had no intention on relying on article 3148 C.c.Q. in support of their argument that Quebec courts have jurisdiction over Intervet GesmbH, as appears from the following excerpt of her decision denying leave to appeal (Exhibit R-5):

[9] Il est vrai que les paragraphes 6 et 7 de la déclaration de M. Beauchamp visent à établir des faits qui, en certaines circonstances, pourraient permettre de contrer un argument voulant que les tribunaux québécois aient compétence quant à Intervet GesmbH, ce qui pourrait peut-être justifier l'octroi d'une permission d'appeler. Ils n'ont toutefois pas cette utilité en l'état actuel du dossier.

[10] La requête en autorisation d'exercer une action collective ne contient en effet aucun allégué voulant que Intervet GesmbH ait un domicile ou un établissement au Québec. À l'audience, les intimées indiquent d'ailleurs ne pas avoir l'intention de s'appuyer sur l'article 3148 C.c.Q. pour soutenir leur argument voulant que les tribunaux québécois aient compétence quant à Intervet GesmbH.

[11] Ainsi, à ce stade, le refus du juge de permettre la preuve contenue aux paragraphes 6 et 7 de la déclaration assermentée de M. Beauchamp est sans conséquence.

[12] Si les intimées devaient éventuellement changer leur position, il sera toujours possible pour les

requérantes de demander de nouveau la permission de faire la preuve des faits qu'on retrouve actuellement aux paragraphes 6 et 7 de cette déclaration.

[We underline.]

15. On February 26, 2020, the Plaintiffs emailed a Re-re-modified Application to this Court and to the undersigned attorneys, as appears from this email communicated herewith (without its enclosures) as **Exhibit R-6** and from the Court record.
16. In contradiction with the Plaintiffs' counsel's formal representations to Madam Justice Hogue at the February 10 hearing, this third series of proposed amendments purport to bolster the allegations supporting this Court's jurisdiction over Intervet GesmbH by way of the following bare allegation:

47. Ces deux compagnies, qui commercialisent et fabriquent le produit Bravecto, sont responsables des fautes commises au Québec et au Canada à l'encontre des requérantes et des membres, et du préjudice subi au Québec et au Canada;

[Underlining in original.]

17. The Defendants have notified their opposition to the said proposed modifications, and this Court has not yet ruled on their admissibility. The Defendants hereby confirm that, should the said modifications be allowed, they will exercise their right to request that the facts stated in paragraphs 6 and 7 of Mr. Beauchamp's affidavit and Exhibit "B" thereto be introduced into evidence at the authorization stage, which right was reserved to the Defendants by Madam Justice Hogue at paragraph 12 of her decision, more fully quoted at paragraph 14 above.

## **II. THE COURT'S ABSENCE OF JURISDICTION OVER INTERVET GESMBH**

18. Article 3148 C.C.Q. sets out the instances in which a Quebec Court has jurisdiction over "personal actions of a patrimonial nature", including the claims asserted in the Reamended Motion. Where the jurisdiction of the Court is challenged by the defendant, as is the case here, the plaintiff bears the burden of establishing that at least one of the conditions set out in this provision is met. Article 3148 C.C.Q. provides as follows:

**3148.** In 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.

19. As stated above, the Plaintiffs' counsel formally represented to the Court of Appeal that the Plaintiffs do not purport to rely on Article 3148 C.C.Q. to ground this Court's jurisdiction over Intervet GesmbH, as appears from paragraph 10 of justice Hogue's decision herein (Exhibit R-5), more fully quoted at paragraph 14 above. The Defendants hereby confirm that, should the Plaintiffs seek to reverse their position *ex post facto* in that regard, the Defendants will strongly oppose any such attempt. In addition, in such a case the Defendants will exercise their right to request that the facts stated in paragraphs 6 and 7 of Mr. Beauchamp's affidavit and in Exhibit "B" thereto be introduced into evidence at the authorization stage, which right was reserved to the Defendants by Madam Justice Hogue at paragraph 12 of her decision, more fully quoted at paragraph 14 above.

20. Under reserve of the above, the Defendants submit that, in any event, none of the conditions enacted at article 3148 C.C.Q. to ground the jurisdiction of Quebec Courts over claims against Intervet GesmbH on behalf of putative class members who administered Bravecto to their animal outside Quebec are met in the present instance, and more particularly but without limiting the generality of the foregoing:
- a) Article 3148(1) C.C.Q.: Intervet GesmbH does not have its domicile or residence in Québec. It is a private limited liability company incorporated in Austria and based in Vienna, as appears from paragraph 4 of Mr. Beauchamp's affidavit (Exhibit R-4). See also paragraph 46 of the Re-modified Application;
  - b) Article 3148(2) C.C.Q.: as decided by Madam Justice Hogue, the Re-modified Application contains no allegation that Intervet GesmbH has any establishment or activities in Quebec, so that the paragraphs in Mr. Beauchamp's affidavit confirming that Intervet GesmbH has no establishment or activities in Québec (in fact anywhere in Canada) are not necessary in the circumstances of this case;
  - c) Article 3148(3) C.C.Q.: at best, this provision allows persons who have suffered injury *in Quebec* to sue a foreign entity who they claim would be liable for the said injury before a Quebec authority, but Quebec authorities have no jurisdiction to entertain a claim on behalf of persons who allegedly would have suffered injury *outside Quebec*. Thus, insofar as the Plaintiffs claim that the situs of a class member's alleged injury is the place where the medication was administered to that person's animal, Quebec courts have no jurisdiction to entertain a class action against Intervet GesmbH presented by the Plaintiffs on behalf of persons who administered Bravecto to their animal outside Quebec;
  - d) Article 3148(4) C.C.Q.: there exists no agreement between the parties whereby disputes between them would be submitted to Quebec authorities;
  - e) Article 3148(5) C.C.Q.: Intervet GesmbH has not submitted to the jurisdiction of Quebec authorities, to the contrary it has contested that Quebec authorities have jurisdiction herein at the first opportunity, and it has repeatedly reiterated its position in that regard ever since, as more fully described above.

21. The Plaintiff's counsel argued before the Court of Appeal that the basis for this Court's jurisdiction over Intervet GesmbH would be found not in Article 3148 C.C.Q., on which the Plaintiffs do not seek to rely as more fully described above, but in Article 3128 C.C.Q. This provision, however, is neither here nor there in that regard as it deals with a *conflict of laws* issue rather than a *conflict of jurisdictions* issue. Thus, this provision is of no help to the Plaintiffs in establishing this Court's jurisdiction over Intervet GesmbH.
22. There is no statutory basis or other rationale for the Court to extend its jurisdiction over Intervet GesmbH in this instance.
23. The Defendants are well founded in fact and in law to demand that this Court declare that it has no subject matter jurisdiction over claims against Intervet GesmbH on behalf of putative class members who administered Bravecto to their animal outside Quebec.
24. As a result, given that Intervet GesmbH is a Defendant herein, the Defendants submit that this Court must dismiss the Plaintiffs' Re-modified Application respecting all putative class members who administered Bravecto to their animal outside Quebec.
25. This declinatory exception is well founded in facts and in law.

FOR THESE REASONS, MAY IT PLEASE THE COURT:

**TO GRANT** the Defendants' Declinatory Exception;

**TO DECLARE** that this Court has no subject matter jurisdiction over claims against Intervet GesmbH on behalf of putative class members who administered Bravecto to their animal outside Quebec;

**TO DISMISS** the Plaintiffs' Re-modified Application for Authorisation to Institute a Class Action in this instance respecting all putative class members who administered Bravecto to their animal outside Quebec;

**THE WHOLE** with costs.



Montreal, April 3, 2020

*Blake, Cassels & Graydon L.L.P.*

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**BLAKE, CASSELS & GRAYDON LLP**

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## NOTICE OF PRESENTATION


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Counsel for Plaintiffs

**TAKE NOTICE** that the present *Application for Declinatory Exception* will be presented for adjudication at the time and place to be determined by the Honourable Pierre C. Gagnon, J.S.C., acting as case management judge herein, sitting in and for the district of Montreal, at the Montreal Courthouse located at 1 Notre-Dame Street East, Montreal, Québec, H2Y 1B6.

**DO GOVERN YOURSELVES ACCORDINGLY.**

Montréal, April 3, 2020



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**SUPERIOR COURT**  
(Civil Division)  
**DISTRICT OF MONTREAL**

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**JESSICA GAGNON**

-and-

**ALLA OLENITCH**

Plaintiffs

v.

**INTERVET CANADA CORP.**

**INTERVET GESMBH**

Defendants

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**APPLICATION FOR  
DECLINATORY EXCEPTION**

By the Defendants

On April 3, 2020

(Art. 167 C.C.P. and 3148 C.C.Q.)

**AND NOTICE OF PRESENTATION**

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**ORIGINAL**

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The logo for the law firm Blakes, featuring the word "Blakes" in a stylized, cursive script.

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