# SUPERIOR COURT
# (Class Actions)

CANADA
PROVINCE OF QUEBEC
DISTRICT OF MONTREAL

No: 500-06-000794-160

DATE: May 5, 2020

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**BY THE HONOURABLE SUZANNE COURCHESNE, J.S.C.**

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**SYLVAIN GAUDETTE**
Petitioner
v.
**WHIRLPOOL CANADA LP**
and
**WHIRLPOOL CANADA INC**
and
**WHIRLPOOL CORPORATION**
and
**SEARS CANADA INC.**
and
**SEARS CANADA HOLDINGS CORP.**
and
**SEARS ROEBUCK & CO.**
Respondents

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JUDGMENT ON AUTHORIZATION TO INSTITUTE A CLASS ACTION

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JC0BM5

## 1. GENERAL CONTEXT

- **The proposed class action**

[1] Mr. Gaudette seeks authorization to institute a product liability class action against the Respondents (collectively, **Whirlpool**) on behalf of all Quebec residents who have previously or who currently own a Whirlpool, Kenmore and/or Maytag front loading washing machine, without a steam feature, manufactured prior to December 31, 2008, but excluding models built on the Sierra platform starting in 2007 (collectively, the **Washing Machines**).[1]

[2] Whirlpool has either directly or indirectly designed, manufactured, distributed, imported, advertised, warranted, sold and/or serviced the Washing Machines in the province of Quebec.[2]

[3] Mr. Gaudette alleges that the Washing Machines suffer from a serious hidden design defect that causes them to fail to properly self-clean, which in turn causes in the appliances, *inter alia*, moisture, residue, growth and/or bacteria, mould, mildew and foul odours (the **Design Defect**).

[4] He contends that Whirlpool failed to disclose and/or actively concealed, despite longstanding knowledge, the fact that the Washing Machines are defective and the fact that the Design Defect diminishes the value of the Washing Machines.[3]

[5] He wishes to institute, on behalf of the Class members, a class action in damages, injunctive relief and declaratory judgment.

- **The Respondents**

[6] The Respondent entity Whirlpool Canada Inc. no longer exists and was struck from the corporate registry as of May 24, 2005.[4]

[7] Also, as a result of the bankruptcy proceedings filed in Canada and the United States by the Sears entities in 2015, a stay of proceedings has been ordered in favour of Respondents Sears Canada Inc. and Sears Roebuck & Co.[5]

[8] Therefore, the present proceedings may only proceed against Whirlpool Canada LP, Whirlpool Corporation and Sears Canada Holdings Corp.

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1 Class description modified at the hearing on the authorization, on November 19, 2019.
2 Motion to authorize the bringing of a class action and to designate the petitioner as representative, dated June 6, 2016 (the **Motion to authorize**), para. 12.
3 Motion to authorize, para. 4.
4 Excerpt from the REQ – *État des renseignements d'une personne morale* for Whirlpool Canada Inc., dated November 11, 2019.
5 Email from Respondents' counsel dated December 16, 2019 and attached documents.

## 2. PROCEDURAL CONTEXT

[9] Mr. Gaudette's demand is the second application filed in Superior Court of Quebec regarding the Design Defect associated with the Washing Machines.

[10] The first was filed on December 20, 2009 and dismissed on November 19, 2013 by Justice Danielle Mayrand based on her determination that the petitioner's personal cause of action against Whirlpool in that case was prescribed and that he was not an adequate representative plaintiff (the **Lambert case**).[6] In March 2015, the Court of Appeal upheld the Superior Court's decision. On October 29, 2015, the Supreme Court denied leave to appeal.[7]

[11] Mr. Gaudette's demand was also preceded by mirror litigation in the United States[8] and in Ontario (the **Arora case**). A class action instituted against Whirlpool in the United States regarding the alleged Design Defect and heard on the merits was dismissed by a jury in federal court in Cleveland, Ohio in October 2014.[9] On April 18, 2016, a US settlement was entered into by Whirlpool in order to avoid the costs of further litigation and endorsed without admission or prejudice of any kind.[10]

[12] The Arora case filed in Ontario was dismissed by the Ontario Court of Appeal on October 31, 2013, in part because of the absence of contractual privity between the parties.[11] The Arora case had sought to certify a national class excluding Quebec.[12]

[13] On June 6, 2016, the Motion to authorize was instituted by Mr. Gaudette, as the proposed class representative, alleging substantially similar allegations against Whirlpool.

[14] On February 6, 2017, Whirlpool filed an application to dismiss Mr. Gaudette's demand, based on *res judicata* and abuse.

[15] On August 30, 2017, Justice André Roy dismissed Whirlpool's application.[13]

[16] Thereafter, Whirlpool filed an application for leave to appeal, which was granted on October 30, 2017. Whirlpool's appeal was dismissed on July 17, 2018.[14] On August 8, 2019, the Supreme Court of Canada denied Whirlpool's leave to appeal.[15]

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6 *Lambert* v. *Whirlpool*, 2013 QCCS 5688.
7 *Lambert v. Whirlpool Canada, l.p.*, 2015 QCCA 433 and *Sylvain Lambert v. Whirlpool Canada LP, et al.*, 2015 CanLII 69429 (SCC).
8 Exhibit R-13.
9 Exhibit R-14.
10 Exhibit R-14A.
11 *Arora* v. *Whirlpool Canada LP*, 2013 ONCA 657.
12 Exhibit R-15.
13 *Gaudette* c. *Whirlpool Canada*, 2017 QCCS 4193.
14 *Whirlpool Canada* c. *Gaudette*, 2018 QCCA 1206.
15 *Whirlpool Canada LP, et al.* v. *Sylvain Gaudette*, 2019 CanLII 73200 (SCC).

## 3. ANALYSIS

### 3.1 Criteria for Authorization

[17] According to Article 575 of the Code of Civil Procedure (**C.C.P.**), 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;

4° the class member appointed as representative is in a position to properly represent the class members.

[18] At authorization, the Court's limited role is to "screen" or filter out untenable claims and the burden of the petitioner is not very onerous.[16] The criteria set out at Article 575 C.C.P. must be given a flexible, liberal, and generous approach.

[19] At this stage, the Court is ruling on a purely procedural question. The Court must not deal with the merits of the case, as they are to be considered only after the application for authorization has been granted.[17]

[20] The rule of proportionality does not constitute a stand-alone factor and must be assessed with respect to each of the individual criteria set out at Article 575 C.C.P.[18]

[21] If the cumulative criteria for authorization are met, the Court must authorize the class action; there is no residual discretion. The Court should err on the side of caution and authorize the class action where there is doubt as to whether the conditions are met.[19]

[22] Whirlpool submits that Mr. Gaudette's application fails to meet the requirements set out at paragraphs (1), (2) and (4) of Article 575 C.C.P.

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16 *Infineon Technologies AG v. Option consommateurs*, 2013 SCC 59, paras. 59 and 65; *Vivendi Canada Inc. v. Dell'Aniello*, 2014 SCC 1, para. 37; *L'Oratoire Saint-Joseph du Mont-Royal v. J.J.*, 2019 SCC 35, paras. 7, 10 and 11.

17 *L'Oratoire Saint-Joseph du Mont-Royal v. J.J.*, 2019 SCC 35, para. 7.

18 *Vivendi Canada Inc. v. Dell'Aniello*, 2014 SCC 1, para. 66.

19 *Sibiga v. Fido Solutions inc*. 2016 QCCA 1299, para. 51.

### 3.1.1 The facts alleged appear to justify the conclusions sought (575 (2) C.C.P.)

- **The applicable principles of law**

[23] The applicant's burden at the stage of authorization is to establish an "arguable case" in light of the facts and the applicable law.[20] The legal threshold requirement of Article 575(2) C.C.P. is a simple burden of demonstration that the proposed legal syllogism is tenable.[21]

[24] The facts alleged, as long as they are sufficiently precise, are taken as true. They must have an evidentiary foundation that is not vague, unsubstantiated or imprecise.[22] Speculations, hypotheses and opinions are not assumed to be true and must be discarded.[23]

[25] The Court must consider not only the alleged facts but any inferences or presumptions of fact or law that may arise from these facts and can serve to establish the existence of an arguable case.[24]

[26] The plaintiff's individual cause of action must be analyzed to determine whether it meets the applicable criteria.[25]

- **The allegations of the Motion to authorize**

[27] The legal syllogism put forth by Mr. Gaudette is as follows:

- The Washing Machines have a hidden Design Defect that causes them to fail to properly self-clean, which in turn causes in the appliances *inter alia* moisture, residue, growth and/or bacteria, mould, mildew and foul odours;
- Despite clear knowledge of the Design Defect, even prior to placing the Washing Machines on the market, Whirlpool sold the Washing Machines to Class Members and continued to do so for a 9-year period;
- In so doing, Whirlpool made false and misleading representations and omissions to the Class in order to serve its commercial interests;
- Class Members suffered damages by reason of Whirlpool's unlawful conduct.

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20 *L'Oratoire Saint-Joseph du Mont-Royal v. J.J.*, 2019 SCC 35, para. 58; *Infineon Technologies AG v. Option consommateurs*, 2013 SCC 59, paras. 65 and 67; *Vivendi Canada Inc. v. Dell'Aniello*, 2014 SCC 1, para. 37.

21 *L'Oratoire Saint-Joseph du Mont-Royal v. J.J.*, 2019 SCC 35, para. 58; *Infineon Technologies AG v. Option consommateurs*, 2013 SCC 59, para. 61.

22 *Infineon Technologies AG v. Option consommateurs*, 2013 SCC 59.

23 *Options Consommateurs v. Bell Mobilité*, 2008 QCCA 2201, para. 38.

24 *L'Oratoire Saint-Joseph du Mont-Royal v. J.J.*, 2019 SCC 35, para. 24.

25 *L'Oratoire Saint-Joseph du Mont-Royal v. J.J.*, 2019 SCC 35, para.7

[28] The Design Defect and Whirlpool's representations are detailed in the allegations of the Motion to authorize[26], supported by several exhibits (some originating from Whirlpool)[27] and expert reports[28], and are summarized as follows:

- the Washing Machines have deep cavities and ribs on surfaces exposed to the water, softener, dirt, and debris, which increase the surface and pooling areas upon which growth of the *scrud* can occur; this situation prevents water, soap, softener, dirt, and debris from being flushed during washing or cleaning cycles and allows and promotes corrosion on key aluminum parts;
- this in turn results in a musty or mouldy smell being released and transferred to clothes washed in the Washing Machines, in the Washing Machines themselves and in the room in which the machines are located;
- Whirlpool recommended to its customers to follow unexpected, costly, and time-consuming steps, such as (a) wiping down the Washing Machines with bleach after each use, (b) leaving the door open between uses (c) cleaning the exterior, interior, door seal, and dispenser drawer, (d) running monthly maintenance cycles and (e) running cycles with Affresh cleaning tablets, a product developed and sold by Whirlpool specifically to address the mould problems in the Washing Machines;[29]
- Whirlpool knew that even strict adherence to its extraordinary maintenance steps would not actually solve the problem created by the Design Defect;
- Whirlpool began manufacturing the Washing Machines in 2001 and for several reasons, including the fact that it began receiving numerous complaints about mould and odour, it made several design changes to the Washing Machines over time;
- these design changes included both structural modifications to the Washing Machines (including removal of tub interior back wall cavities and addition of active venting)[30] and the addition of optional laundry cycles; these changes were not incorporated into all of the engineering platforms at the same time;
- all the models of the Washing Machines have nearly identical designs and any design differences that do exist are immaterial to the claims in this action.

[29] Mr. Gaudette claims that the following factual allegations give him an individual right of action, as a consumer, against Whirlpool:[31]

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26 Motion to authorize, paras. 18-33; 39-45.
27 Exhibits R-6, R-7, R-8, R-9, R-19, R-20, R-21, R-22, R-23, R-24, R-25, R-26, R-27, R-28, R-29, R-30, R-31, R-32, R-33 and R-34.
28 Exhibits R-10, R-12, R-18.
29 Affresh is a washer cleaner in tablet form used to alleviate residue and odour (exhibits R-7, R-8, R-9, R-19, R-33 and R-34).
30 Exhibit R-12.
31 Motion to authorize, paras. 51-65.

- On April 13, 2008, he purchased a Whirlpool Duet Compact Front-Loading Automatic Washer[32] , from Germain Larivière in Saint-Hyacinthe for a price of $1,101.20;[33]

- On April 24, 2008, the Washing Machine was delivered to his residence where he had it installed (where it still remains today) and himself and his wife used it to wash their belongings;

- Mr. Gaudette and his wife always used the recommended high-efficiency (HE) detergent;

- To date, Mr. Gaudette has purchased three (3) Comerco Protection Plans[34] for his Washing Machine, applicable from April 2009 to June 2018;

- A few months after the installation of the Washing Machine, Mr. Gaudette and his wife noticed that there were dark moisture stains on the plastic joint of the Washing Machine door and these stains were getting increasingly worse;

- In addition, there were repeated accumulations that needed to be regularly removed from the drum; they had to throw some of their belongings out, and there was a foul smell emanating from the Washing Machine;

- As result of these issues, they re-read the instruction manual and visited the Respondents' website and learned that they should regularly run empty bleach cycles, use Affresh tablets once a week, and leave the door open when the appliance was not in use;[35]

- Despite their stringent adherence to these recommended practices, including cleaning the black substance that would accumulate on the plastic joint, nothing seemed to remedy the problems that they were experiencing with any lasting effect and the problems would reoccur;

- Mr. Gaudette had a technician from Comerco Services Inc. come for an unrelated electrical issue and his wife mentioned to him the issues that they were experiencing with the Washing Machine; she was told that this was the way the Washing Machines were and that there was nothing to do about it;

- Mr. Gaudette, by researching his problems online in the summer/autumn of 2015, discovered that the problems with the Washing Machine were the result of the design defects affecting all the Whirlpool Washing Machines;

- On September 28, 2015, Mr. Gaudette came across Consumer Law Group Inc.'s website where he read about the class action and he inputted his name into the

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32 Model # WFW9400SW.
33 Exhibit R-35.
34 Exhibit R-36, *en liasse*.
35 Exhibit R-37.

database to be kept abreast of all happenings as he realized that he was a Class Member;[36]

- When he learned that the class action had been dismissed, he expressed his desire that the class action be refiled and to be the lead Plaintiff in this new action;

- Had he known about the problems associated with the Washing Machines, he would never have purchased his washing machine;

- His damages are a direct and proximate result of Whirlpool's conduct and the defect associated with the Washing Machines.

[30] Mr. Gaudette's recourse is based on the provisions of the Civil Code of Quebec (**C.C.Q.**) pertaining to the warranty of quality[37] and the obligation to inform[38], the *Quebec Consumer Protection Act* (**the CPA**)[39] and the *Competition Act*.[40] He claims compensatory and punitive damages under the C.C.Q. and Article 272 CPA.

[31] Whirlpool contends that Mr. Gaudette failed to demonstrate an arguable case, for the following reasons:

a) He did not allege any individual facts which would give rise to a *prima facie* serious latent defect, loss of use or recall claim; he did not demonstrate that he suffered a loss of any kind;

b) He failed to provide Whirlpool with a written notice of defect pursuant to Article 1739 C.C.Q., depriving Whirlpool of the opportunity of fulfilling its warranty obligations if need be; also, his failure to provide effective written notice before filing his demand deprived Mr. Gaudette of legal standing.

- **The gravity of the latent defect**

[32] The warranty of quality or against latent defects requires that the defect be hidden, serious, anterior to the sale and unknown to the buyer.[41] These conditions apply to the warranty set forth in the C.C.Q. and in the CPA.[42]

[33] Whirlpool submits that Mr. Gaudette continued to use the Washing Machine for over 8 years without repair or complaint. Whirlpool argues that this demonstrates that his washing machine was not only capable of being used, but was used, for its intended purpose. Therefore, Mr. Gaudette's allegations do not meet the threshold of

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36 Exhibit R-38.
37 Articles 1726 and following.
38 Articles 6 and 1375.
39 CQLR c. P-40.1.
40 R.S.C. 1985, c. C-34.
41 *ABB inc. v. Domtar inc.*, 2007 CSC 50, para. 47-55.
42 *Fortin v. Mazda Canada Inc.*, 2016 QCCA 31, para. 60.

seriousness necessary to qualify as a latent defect or a loss of use necessary to establish the existence of a defect.

[34] In determining whether a defect exists and whether it is serious, the Court must verify if the property is unfit for its intended use or if its usefulness is so diminished that the buyer would not have purchased it at the price paid.[43] In *Fortin v. Mazda Canada Inc.,* the Court of Appeal referred to the seriousness of the impairment or loss of use as follows:[44]

> [71] La gravité du déficit d'usage réside dans la diminution importante de l'utilité du bien au point où le consommateur ne l'aurait pas acheté ou n'aurait pas consenti à donner un si haut prix s'il avait connu l'usage réduit qu'il pouvait obtenir de ce bien. La doctrine résume ainsi les indices permettant de cerner cette notion :
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> > [...] Pour décider si un vice est assez grave pour donner ouverture à la garantie, on ne considère pas seulement le coût de sa réparation par rapport à la valeur du bien : on regarde tous les aspects, dont notamment la baisse de la valeur marchande du bien, la diminution de son usage normal (déficit d'usage), les inconvénients, actuels et prévisibles, du vice pour l'acheteur, étant entendu que les attentes légitimes de l'acheteur sont plus grandes pour un bien neuf que pour un bien usagé – parfois une même lacune ne constitue pas un vice pour un bien passablement usagé alors qu'elle l'est pour un bien neuf.[20]
>
> [Références omises.]
>
> [72] Il n'est cependant pas nécessaire que le déficit enlève toute utilité au bien ou rende son usage impossible. Seule la preuve d'une gravité suffisante au point de jouer un rôle déterminant sur la décision du consommateur s'avère nécessaire[21]. Bref, le fabricant doit concevoir le bien en conservant à l'esprit les besoins et les objectifs de sa clientèle. Telle est la norme.
>
> [73] Le consommateur doit également démontrer que le défaut lui était inconnu au moment de l'achat. Cette preuve n'est habituellement pas très exigeante, d'autant qu'en pratique il arrive souvent que ce soit le vendeur lui-même qui se charge de faire la démonstration contraire[22].
>
> [74] Une fois que le consommateur s'est déchargé de son fardeau d'établir ces deux éléments (déficit d'usage et ignorance du défaut), l'article 272 *L.p.c.* crée une présomption absolue de préjudice donnant ouverture aux remèdes énumérés à cette disposition. [...]
>
> (Emphasis added)

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20 Pierre-Gabriel Jobin avec la collaboration de Michelle Cumyn, *La vente*, 3e éd., Cowansville, Éditions Yvon Blais, 2007, nº 157, p. 200-201.

21 *ABB inc. c. Domtar inc.,* supra, note 8, paragr. 52. Voir également N. L'Heureux et M. Lacoursière, *supra*, note 17, no 87, p. 104; P.-G. Jobin avec la collaboration de M. Cumyn, supra, note 20, no 157, p. 200; C. Masse, supra, note 12, p. 259.

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43 *ABB inc. v. Domtar inc.*, 2007 CSC 50, para. 52.

44 2016 QCCA 31.

[22] Thérèse Rousseau-Houle, *Précis de droit sur la vente et le louage des choses*, Québec, Les Presses de l'Université de Laval, 1986, p. 134.

[35] The manufacturer is bound to provide a property that responds to the purchaser's legitimate expectations, including those of a consumer when he or she is the purchaser, defined as follows:

> [80] Pour sa part, la doctrine circonscrit ainsi la notion d'attente légitime :
>
> [...] Il arrive que le bien ou le service ne soient pas conformes à l'attente légitime du consommateur sans pour cela être altérés ou détériorés. [...] L'attente légitime s'apprécie en fonction de divers facteurs : la nature du produit, sa destination, l'état de la technique, les informations données par le fabricant et le distributeur, et les stipulations du contrat. L'attente légitime est celle du consommateur; il n'appartient pas au commerçant ni au fabricant de la déterminer. En principe, elle s'apprécie *in abstracto* par rapport au consommateur moyen. Cependant, dans le cas où une caractéristique particulière est indiquée au contrat, l'appréciation se fait *in concreto*.[27]
>
> (Emphasis added)

[27] N. L'Heureux et M. Lacoursière, supra, note 17, no 80, p. 98.

[36] In *ABB inc. v. Domtar*, the Supreme Court confirmed that the key factor in the analysis resides in the loss of use, as assessed in light of the buyer's reasonable expectations. [45]

[37] Mr. Gaudette complains of dark moisture stains on the plastic joint of his washing machine door, repeated accumulations in the drum, foul smell emanating from the appliance, the fact that some belongings had to be thrown out, all this in spite of his strict adherence to Whirlpool's recommended practices,[46] which include leaving the door of the Washing Machine open when not in use, running empty bleach cycles and the weekly use of Affresh tablets. He asserts that had he known about the problems associated with the Washing Machines, he would never have purchased his washing machine.

[38] He alleges a list of damages purportedly suffered by himself and by the Members of the proposed Class, including the overpayment for the purchase price of the Washing Machines, the reduced value of the Washing Machines, the costs for suggested remedies to the problem, including the Affresh products, the loss of use and enjoyment, and the suffering of trouble and inconvenience related to the alleged defect.[47]

[45] 2007 CSC 50, para.49.
[46] As detailed in the Whirlpool Front-Loading Automatic Washer Use & Care Guide, exhibit R-37.
[47] Motion to authorize, para. 5.

[39] The Court considers that these allegations, taken as true, establish *prima facie* proof of loss and suffice to support an arguable case of the existence of a serious latent defect at this preliminary stage, in light of the legal requirements. Furthermore, the recourse provided for in article 272 CPA is based on the premise that any failure to fulfil an obligation imposed by the CPA, once established, gives rise to an absolute presumption of prejudice to the consumer.[48]

[40] The evidence on the merits will determine the legitimate expectations of the consumer of the Washing Machines, taking into consideration, *inter alia*, the nature of the property, its intended use, the information provided to the consumers and the effects and inconvenience related to the alleged defect. These are matters for debate at a trial on the merits.

- **The written notice of defect**

[41] Article 1739 C.C.Q. provides that the buyer shall give notice in writing of the defect to the seller within a reasonable time after its discovery:

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|---|---|
| **1739.** L'acheteur qui constate que le bien est atteint d'un vice doit, par écrit, le dénoncer au vendeur dans un délai raisonnable depuis sa découverte. Ce délai commence à courir, lorsque le vice apparaît graduellement, du jour où l'acheteur a pu en soupçonner la gravité et l'étendue.<br><br>Le vendeur ne peut se prévaloir d'une dénonciation tardive de l'acheteur s'il connaissait ou ne pouvait ignorer le vice. | **1739.** A buyer who ascertains that the property is defective may give notice in writing of the defect to the seller only within a reasonable time after discovering it. The time begins to run, where the defect appears gradually, on the day that the buyer could have suspected the seriousness and extent of the defect.<br><br>The seller may not invoke tardy notice from the buyer if he was aware of the defect or could not have been unaware of it. |

[42] Mr. Gaudette did not send to Whirlpool a written notice of defect before he filed the Motion to authorize in June 2016. Thus, Whirlpool argues that it was deprived of the right to inspect Mr. Gaudette's washer when it was still opportune to do so and that this failure is fatal to his recourse.

[43] Whirlpool contends that in the context of the warranty against latent defects, the duty to disclose the defect in writing within a reasonable delay not only permits a vendor to inspect the goods sold and verify the allegation of defect, but, more importantly, to fulfill its legal warranty in this regard.

[44] Whirlpool pleads that the *Claude Joyal* decision[49] established that the notice of defect set forth at Article 1739 C.C.Q. is a pre-condition for the very exercise of the warranty against latent defects. This decision confirmed that the failure to provide such

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[48] *Richard v. Time Inc.*, 2012 SCC 8; *Fortin v. Mazda Canada Inc.*, 2016 QCCA 31, para. 74.
[49] *Claude Joyal inc.* v. *CNH Canada Ltd.*, 2014 QCCA 588.

a written notice of defect was fatal to the recourse, subject to the following exceptions: an urgent need for repair, a denial or negation of the warranty by the vendor or a waiver of the notice.[50]

[45] In the *Claude Joyal* decision, the Court of Appeal also stated that the consequences of the failure to provide a notice of defect must correspond to a real prejudice for the seller:

> [35] Considérant que les dispositions relatives à la garantie légale de qualité et du droit de propriété ont été adoptées principalement afin de protéger l'acheteur – ces dispositions étant inspirées de la *Loi sur la protection du consommateur*, L.R.Q., c. P-40.1, et de la *Convention des Nations Unies sur les contrats de vente internationale de marchandises* (« *Convention de Vienne* ») – je suis d'avis que les conséquences du défaut de dénonciation dans un délai raisonnable doivent correspondre à un préjudice réel pour le vendeur, et non à un simple préjudice de droit, afin de pouvoir justifier l'irrecevabilité du recours intenté par l'acheteur.
>
> [36] L'évaluation des conséquences du défaut de dénonciation, plutôt que le rejet automatique du recours de l'acheteur, est une solution que valide le professeur Jobin :
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> > **169 - Préavis. Sanction -** Le préavis constitue une *condition de fond* de la garantie. Comme dans l'ancienne jurisprudence, lorsqu'il n'a pas été donné et qu'aucune exemption ne s'applique, l'action intentée par l'acheteur contre le vendeur doit donc en principe être rejetée, selon la jurisprudence. Il s'agit certes d'une sanction sévère. Elle est justifiée quand l'acheteur a réparé le bien ou l'a revendu sans laisser au vendeur la chance de vérifier s'il s'agit bel et bien d'un vice couvert par la garantie, notamment. Il n'en reste pas moins que cette « technicalité » permet alors au vendeur d'échapper à toute sanction alors que normalement l'acheteur aurait droit au moins à une réduction du prix, ou souvent à la résolution, ainsi qu'à des dommages-intérêts dans bien des cas. C'est ce qui explique les nombreuses dispenses de préavis, signalées plus haut. Pour cette même raison, on a décidé, avec raison selon nous, que la sanction devrait être radicale (rejet de l'action) uniquement lorsque l'omission du préavis a privé le vendeur de la possibilité de vérifier l'existence et la gravité du vice et de le réparer; qu'une simple diminution des dommages-intérêts ou un ajustement à la baisse de la réduction du prix conviendrait mieux aux cas où le défaut de préavis a simplement privé le vendeur de la possibilité de réparer lui-même le vice à meilleur compte.
> >
> > Une comparaison avec la *Convention de Vienne*, l'une des sources principales de notre article 1739, plaide en faveur d'une certaine souplesse dans la sanction du préavis. En effet, cette convention présente deux facettes sur ce point précis : d'une part, elle fait de l'envoi du préavis une obligation stricte que l'acheteur doit respecter sous peine de déchéance (article 39, paragraphe 1); d'autre part, elle laisse subsister la réduction du prix et les dommages-intérêts quand l'acheteur n'a pas donné le préavis selon les prescriptions mais qu'il présente une excuse

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50 See also *Quincaillerie Côté & Castonguay Inc. v. Castonguay*, 2008 QCCA 2216, para. 7.

> raisonnable (*supra n°* 148) et - exception remarquable - elle exempte l'acheteur de *tout* avis quand le vendeur connaissait ou est présumé avoir connu la non-conformité (article 40).
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> [Soulignement ajouté; références omises]

> [38] En somme, l'appréciation des conséquences d'un défaut de dénonciation ne peut que relever du juge qui entendra la preuve. En revanche, cela pourrait avoir une incidence sur le poids de la preuve qui sera présentée de part et d'autre (*Promutuel*, par. 21).

(Emphasis added; references omitted)

[46] In the *Nadeau* class action case[51], cited by Whirlpool, the defendant Mercedes-Benz inspected and repaired Nadeau's vehicle following the institution of the application for authorization, despite Nadeau's lack of prior written notice.[52] The authorization was denied by Justice Morrison because of the plaintiff's failure to give notice and the Court of Appeal dismissed the appeal, while taking into consideration the repairs made by Mercedes-Benz on Nadeau's vehicle after the institution of the proceedings:

> [11] En l'espèce, le juge de première instance ne commet pas d'erreur lorsqu'il conclut au stade de l'autorisation que l'omission d'un avis de dénonciation de l'appelant cumulée à l'absence de toute mise en demeure préalable de sa part avant l'introduction de sa requête « rendent fort périlleux le recours envisagé ». Il s'inspire à cet égard des propos de notre collègue Pelletier dans *Lallier c. Volkswagen*. Ceci, d'autant que les intimées ont en l'espèce offert à l'appelant dès l'institution des procédures de procéder sans frais à l'inspection et au remplacement de l'arbre de balancement et des pièces connexes de son véhicule en sus de lui offrir un véhicule de courtoisie pendant les réparations.
>
> [12] En omettant de faire parvenir un avis de dénonciation et une mise en demeure préalable aux intimées, l'appelant a privé ces dernières de l'opportunité de corriger le vice avant l'introduction de la requête. Il n'est pas en mesure de démontrer que les intimées étaient en défaut de manière à soutenir l'existence d'un recours valable et l'article 589 n.*C.p.c.* ne lui est d'aucun secours pour prétendre qu'il conserve son statut de représentant alors que sa créance est éteinte par le fait des réparations qui ont été assumées par les intimées à la première occasion.

(Emphasis added; references omitted)

[47] The particular circumstances of Mr. Gaudette's case must be taken into consideration in the analysis of Whirlpool's argument at this stage. There is no allegation of corrective work performed on Mr. Gaudette's Washing Machine, which remains available for inspection. Following the institution of the Motion to authorize in June 2016, Whirlpool never availed itself of its right to inspect Mr. Gaudette's machine and never offered to make any repairs.

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51 *Nadeau v. Mercedez-Benz Canada Inc.*, 2017 QCCA 460.
52 *Nadeau v. Mercedez-Benz Canada Inc.*, 2016 QCCS 7, para. 20-22.

[48] To the extent that Whirlpool's ground of defence is that it had no opportunity to repair under Article 1596 C.C.Q. (notice of default), there is no time requirement to put a person in default except that it must be done before repair is effected:

> La mise en demeure, de son côté, n'est soumise à aucun délai; elle doit cependant être envoyée avant la réalisation de la réparation, faute de quoi l'action peut être rejetée. Seuls les travaux réalisés après l'avis peuvent être réclamés. Il s'agit là d'une question mixte de droit et de fait qu'il appartient au juge du fond de trancher.[53]
>
> (References omitted)

[49] In the present matter, Mr. Gaudette has not made any repairs to his washing machine.

[50] Furthermore, manufacturers and professional vendors are presumed to be aware of any defect affecting their products.[54] In this case, the evidence demonstrates, at the stage of authorization, that Whirlpool was aware of the purported Design Defect and of consumer complaints in that regard and that it denied its liability.[55]

[51] Finally, it has not been established that the notice requirement is applicable in the context of claims made under the CPA. This law does not include any provision containing such a requirement.

[52] All the above questions raise mixed issues of fact and law. The trial judge will determine whether Whirlpool has suffered any real prejudice as a result of Mr. Gaudette's failure to provide a written notice of defect before he filed the Motion to authorize and thus, if Mr. Gaudette's omission is fatal to his personal recourse. At this stage, the Court cannot make this determination on the basis of the file as presented.

[53] The Court concludes, in light of the allegations and the applicable legal principles, that this ground of defence raises matters for debate at the stage of the merits.[56]

- **The failure to inform/misrepresentation claims**

[54] Mr. Gaudette argues that Whirlpool did not respect its duty, as a manufacturer, to provide requisite information to consumers regarding the Washing Machines. He bases his claims on the C.C.Q.[57], the CPA, and on the *Competition Act*.[58]

[55] The CPA prohibits the manufacturer from making, by any means, false or misleading representations to a consumer or to fail to mention an important fact in any

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53 Jeffrey EDWARDS, *La garantie de qualité du vendeur en droit Québécois,* 2ème edition, Montreal, Wilson & Lafleur, 2008, p. 204.
54 *ABB inc. v. Domtar inc.*, 2007 CSC 50, para. 56.
55 Motion to authorize, para. 48 and exhibits in support.
56 *Claude Joyal inc.* v. *CNH Canada Ltd.*, 2014 QCCA 588; *Charette v. Ouellette*, 2013, QCCA 264.
57 Articles 6, 1375, 1401, 1457, 1607, and 1611 C.C.Q.
58 R.S.C. 1985, c. C-34, art. 52(1).

representation made to a consumer.[59] Representation includes an affirmation, a behaviour or an omission.[60]

[56] Where a consumer is the victim of a prohibited practice under these provisions of the CPA, it is presumed that, had the consumer been aware of such practice, he would not have agreed to the contract or would not have paid such a high price.[61]

[57] Section 52 (1) of the *Competition Act* reads as follows:

> 52. (1) No person shall, for the purpose of promoting, directly or indirectly, the supply or use of a product or for the purpose of promoting, directly or indirectly, any business interest, by any means whatever, knowingly or recklessly make a representation to the public that is false or misleading in a material respect.

[58] The Motion for authorization[62], supported by internal documents and emails[63], details Whirlpool's purported long-standing knowledge of the Design Defect and its alleged failure to take timely or adequate preventative or remedial steps. It is alleged that the extra maintenance required by the defect is "buried" in "lengthy Use and Care Guidelines" provided to consumers only after they bought and installed their washers.[64]

[59] More specifically, Mr. Gaudette submits that:[65]

- Whirlpool failed to inform consumers that even when they operate the Washing Machines as instructed and use the recommended high-efficiency ("HE") detergent, mould problems will inevitably occur regardless of washer maintenance, due to the Design Defect;

- Whirlpool made express representations that their Washing Machines were "HE" and "ENERGY STAR"[66] compliant, this indication being that consumers would be saving money and energy; however, due to the various problems associated with the Washing Machines, consumers are forced to run empty cycles of hot water, bleach and/or other products to combat the mould and mildew problems;

- Instead of disclosing the mould problem and the extraordinary maintenance required to partially combat it, Whirlpool told all purchasers — but only after they bought and installed the Washing Machines — to buy another product sold by Whirlpool, Affresh, to "effectively combat" the buildup of "mold and mildew".

[60] Although general and concise, these assertions and exhibits, considered alongside the other material and allegations in the record, provide sufficient basis for an arguable case of failure to inform and concealment of the Design Defect against

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59 CPA, art. 219 and 228.
60 CPA, art. 216.
61 CPA, art. 253.
62 At para. 48.
63 Exhibits R-19 to R-34.
64 Motion to authorize, para. 28 and exhibit R-10.
65 Motion to authorize, para. 21-24 and exhibits R-7, R-9 and R-10.
66 ENERGY STAR® is the mark of high-efficiency products in Canada.

Whirlpool. The trial judge will be in a better position to determine, in light of all the evidence, whether these purported acts and omissions, if proven, constitute a violation of the obligations imposed by the C.C.Q. and the *CPA*.

[61] As for the claim under the *Competition Act*, the Court agrees with Justice Perell's analysis and conclusions in the Arora case that there is no viable cause of action against Whirlpool pursuant to art. 52 (1) of this act, on the basis of the alleged misrepresentations.[67]

[62] For these reasons, the Court is of the view that the evidentiary and the legal threshold requirements under article 575 (2) C.C.P. have been met. Although imperfect, Mr. Gaudette's claims are neither frivolous nor unsubstantiated and the merits of Whirlpool's arguments and grounds of defence raised against them must be evaluated and decided on the merits of the case.

### 3.1.2 The members of the class claims raise identical, similar or related issues of law or fact (575(1) C.C.P.)

[63] At the authorization stage, the threshold requirement for common questions is low. Thus, even a single identical, similar or related question of law would be sufficient to meet the common questions requirement provided that it is significant enough to affect the outcome of the class action.[68]

[64] The fact that the situations of all members of the class are not perfectly identical does not mean that the class does not exist or is not uniform.[69]

- **The common issues of law or fact**

[65] The proposed issues of fact or law are defined in the Motion to authorize as follows:

a) Does the design of the Washing Machines facilitate the growth or accumulation of dirt, debris, scrud, and/or biofilm through their intended use?

b) Are the Washing Machines defective and if so, what are the defects?

c) Are the Washing Machines fit to be used as intended?

d) Did Whirlpool know or should they have known that the Washing Machines are defective?

e) Did Whirlpool fail to adequately disclose to users that the Washing Machines are defective or did Whirlpool do so in a timely manner?

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67 *Arora v. Whirlpool Canada LP*, 2012 ONSC 4642, para. 184-201; confirmed by the Ontario Court of Appeal in *Arora v. Whirlpool Canada LP*, 2013 ONCA 657, para. 43-51.

68 *Infineon Technologies AG v. Option consommateurs*, 2013 SCC 59, para. 72 ; *Vivendi Canada Inc. v. Dell'Aniello*, 2014 SCC 1, para. 58.

69 *Infineon Technologies AG v. Option consommateurs*, 2013 SCC 59, para. 73.

f) Did Whirlpool not disclose the extent of the capability of the Washing Machines to self-clean and to suppress or prevent the growth of biofilm?

g) Was the non-disclosure of the extent of the capability of the Washing Machines to self-clean and to suppress or prevent the growth of biofilm a false or misleading representation?

h) Did Whirlpool knowingly or recklessly not disclose the extent of the capability of the Washing Machines to self-clean and to suppress or prevent the growth of biofilm?

i) Did Whirlpool not disclose the extent of the capability of the Washing Machines to self-clean and to suppress or prevent the growth of biofilm in order to promote its business interest?

j) Did Whirlpool unjustly enrich itself through the sale of its Affresh products?

k) Is Whirlpool responsible for all related costs (including, but not limited to, the purchase price or otherwise the premium on the purchase price paid, the loss or reduction in value, the costs of attempted repairs, the purchase price of purported remedies and products, the loss of use and enjoyment, trouble and inconvenience, the replacement costs of clothes and other items, extra energy costs, overpayment for Whirlpool Washing Machines, future costs of repair, the fair replacement value, personal injury damages) to Class Members as a result of the problems associated with the Washing Machines?

l) Should an injunctive remedy be ordered to force Whirlpool to recall, repair, and/or replace Class Members' Washing Machines free of charge?

m) Is Whirlpool responsible to pay compensatory, moral, punitive and/or exemplary damages to Class Members and in what amount?

[66] Whirlpool contends that these proposed issues are redundant and excessive, and that many of them presuppose the outcome of the class action. Although they constitute common issues, the Court agrees, in part, with Whirlpool's assertions.

[67] In light of the allegations of the Motion to authorize and the evidence in support thereof, Mr. Gaudette's cause of action against Whirlpool is based on the alleged failure of the Washing Machines to self-clean and *to prevent* the growth and accumulation of dirt, debris, and moisture etc., defined by Whirlpool as biofilm. Also, some of the proposed questions are repetitive and their wording is biased. Therefore, the Court reformulates the common issues as follows:

a) Does the design of the Washing Machines prevent the growth or accumulation of dirt, debris, scrud, and/or biofilm through their intended use?

b) If not, is the design of the Washing Machines defective and if so, what are the defects?

c) Do those defects constitute latent defects under Article 1726 of the *Civil Code of Quebec* or a violation of the statutory warranties found at Articles 37, 38 and 53 of the *Quebec Consumer Protection Act*?

d) If so, did Whirlpool fail to adequately disclose to Class members that the Washing Machines are defective or did Whirlpool do so in a timely manner?

e) Did Whirlpool breach its duty to inform the members of the class under the *Civil Code of Quebec* and the *Quebec Consumer Protection Act*?

f) Should an injunctive remedy be ordered to force Whirlpool to recall, repair, and/or replace Class Members' Washing Machines free of charge?

g) Are the Class members entitled to compensatory, moral, punitive and/or exemplary damages and if so, in what amount?

- **The Class definition**

[68] The class description must be based on objective criteria, which are rational and not circular or imprecise. The definition cannot be based on criteria that are dependent on the outcome of the action on the merits.[70] It must allow a person to know whether or not he or she is a class member.

[69] The class must not be unnecessarily broad. There must be a rational link between the common questions and the class as identified in the motion. The motion judge may, as an alternative to denying the authorization, redefine the class.[71]

[70] In the proposed Class definition, membership is defined by ownership of the Washing Machines targeted by the class action, which exclude those manufactured after December 31, 2008, the models built on the Sierra platform starting in 2007 and those with the steam feature.[72]

[71] Whirlpool raises prescription issues related to the Class and contends that a majority of proposed class members are patently prescribed, for the following reasons.

[72] The Lambert case was filed on December 20, 2009 and definitively dismissed on October 29, 2015. Whirlpool contends that the Lambert case suspended the prescription of claims under the C.C.Q. which arose on or after December 20, 2006. Therefore, these proceedings never suspended the possible claims of Washing Machines owners of 2001 to 2005 models since they were already prescribed.

[73] Also, Mr. Gaudette filed his Motion to authorize on June 6, 2016, 221 days after the Lambert case was no longer susceptible of appeal. Whirlpool submits that prescription began to run again from October 30, 2015 until June 5, 2016. During that

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70 *George v. Québec (Procureur Général),* 2006 QCCA 1204 at para 40; *Sibiga v. Fido Solutions inc.,* 2016 QCCA 1299, para.138.

71 *Sibiga v. Fido Solutions inc.,* 2016 QCCA 1299, para. 136.

72 For the reasons detailed in exhibit R-40 (opinion and order of Judge Christopher A. Boyko dated September 2, 2014).

period, all Washing Machine claims which arose between December 20, 2006 and July 30, 2007 (i.e. 221 days later), also became time barred. This invariably includes all 2006 models.

[74] Hence, according to Whirlpool, all 2001 to 2006 models should be excluded from the Class.

[75] Furthermore, class counsel in the Arora case admitted that design changes made to machines manufactured in 2007-2008 sufficiently (although not completely) alleviated the problem of biofilm and conceded that these models should be excluded from the class definition.[73]

[76] These grounds raised by the defence, although significant, must be set aside at this early stage. It would be imprudent to dismiss most of Class members' claims on the basis of prescription without the benefit of complete evidence.

[77] Prescription begins to run when the defect first manifests itself in a "material fashion"[74]. The evidence in the record shows that the manifestations or "symptoms" of the alleged Design Defect may appear as quickly as 30 days from initial use and as late as 2 to 3 years thereafter.[75]

[78] The Court cannot determine at this preliminary stage, on the basis of an incomplete evidentiary record, that the prescription of proposed class members' claims starts to run from the date of purchase, the end of the model year or any other specific starting point.

[79] Prescription defences should be resolved, in the present case, at the stage of the merits. The Court may modify the class or divide it into sub-groups if necessary, at any time, should the evidence demonstrate that the situation requires such modifications on the basis, *inter alia*, of design modifications, model features, prescriptive issues or appropriate remedies for certain categories of Class members.[76]

[80] The condition under Article 575 (1) C.C.P. is satisfied.

### 3.1.3 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 (575(3) C.C.P.)

[81] This criterion must be given the same broad and liberal interpretation as the other conditions set forth at Article 575 C.C.P.

[82] Mr. Gaudette alleges that the class includes several thousand consumers, scattered across the province and that it would be impractical, if not impossible, to contact each and every member of the Class to obtain mandates and to join them in

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73 *Arora v. Whirlpool Canada LP*, 2013 ONCA 657, para. 103.
74 *Lambert v. Whirlpool Canada, l.p.*, 2015 QCCA 433, para. 16.
75 Exhibits R-6, R-18, R-21 and R-23.
76 Art. 588 C.C.P.

one action. He argues that a class action is the only appropriate procedure for all of the members of the Class to effectively pursue their respective rights and have access to justice.[77]

[83] Many potential members of the Class have provided their coordinates and comments on the Class counsel website page.[78]

[84] This criterion is not contested by Whirlpool and is satisfied.

### 3.1.4 The class member appointed as representative plaintiff is in a position to properly represent the class members (575(4) C.C.P.)

[85] Three criteria must be considered in deciding whether an applicant should be granted the status of representative plaintiff. The applicant must show:

(a) An interest in the suit,

(b) competence, and

(c) an absence of conflict with the class members.[79]

[86] These factors are to be interpreted "liberally", which means that "[n]o proposed representative should be excluded unless his or her interest or competence is such that the case could not possibly proceed fairly".[80]

[87] Mr. Gaudette alleges that he understands the nature of the action and actively participates in the preparation of his file, research of information and collaboration with other class members, with the assistance of the attorneys. His interests are not antagonistic to those of other members of the Class.

[88] For the reasons alleged in the Motion to authorize[81], taken as true, the Court considers that Mr. Gaudette satisfies the applicable criteria to be appointed Class representative.

[89] Whirlpool's contestation of Mr. Gaudette's ability to act as Class representative is based on the grounds raised against the other conditions for authorization (his failure to provide written notice of defect, his long-standing use of his Washing Machine, his failure to act promptly following the dismissal of the Lambert case).

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77 Motion to authorize, para. 69-74.

78 Exhibit R-39.

79 *L'Oratoire Saint-Joseph du Mont-Royal v. J.J.*, 2019 SCC 35, para. 32; *Infineon Technologies AG v. Option consommateurs*, 2013 SCC 59, para. 149; *Union des consommateurs v. Air Canada*, 2014 QCCA 523, para. 82; P.-C. Lafond, *Le recours collectif comme voie d'accès à la justice pour les consommateurs* (1996), p. 419.

80 *Infineon Technologies AG v. Option consommateurs*, 2013 SCC 59, para. 149.

81 Paragraphs 81-91.

[90] In view of the Court's conclusions regarding the criteria of Article 575 (1) and (2) C.C.P., these arguments are dismissed at this stage.

**WHEREFORE, THE COURT:**

[91] **GRANTS** Petitioner's *Motion to authorize the bringing of a class action and to designate the petitioner as representative*;

[92] **AUTHORIZES** the bringing of a class action in the form of a judicial demand to institute proceedings in damages, injunctive relief, and declaratory judgment against Whirlpool Canada LP, Whirlpool Corporation and Sears Canada Holdings Corp. (collectively, the Defendants);

[93] **APPOINTS** the Petitioner as representative of the persons included in the Class herein described as:

> All residents in Quebec who currently own or have previously owned a Whirlpool, Kenmore, and/or Maytag Front-Loading Washing Machine without a steam feature, manufactured prior to December 31, 2008, but excluding models built on the Sierra platform starting in 2007, which include the following model numbers:
>
> - Whirlpool GHW9100, GHW9200, GHW9150, GHW9250, GHW9400, GHW9160, GHW9300, GHW9460, WFW8500, WFW9200, WFW8300, WFW9400, WFW8410, WFW8400, WFW9600, WFW9500, WFW8200, WFW9300, WFW9250, WFW9150;
>
> - Kenmore 110.42922, 110.42924, 110.42926, 110.42932, 110.42934, 110.42936,
>
> 110.42822, 110.42824, 110.42826, 110.42832, 110.42836, 110.44832, 110.44836, 110.44834, 110.44932, 110.44934, 110.44936, 110.45091, 110.45081, 110.45087, 110.45088, 110.45089, 110.44826, 110.44921, 110.45862, 110.45981, 110.45986, 110.43902, 110.45991, 110.45992, 110.45994, 110.45996, 110.45972, 110.45976, 110.45872, 110.46472, 110.47561, 110.47566, 110.47567, 110.47511, 110.47512, 110.49972, 110.49962, 110.47081, 110.47086, 110.47087, 110.47088, 110.47089, 110.47531, 110.47532, 110.47571, 110.47577, 110.47091, 110.47852, 110.47542;
>
> - Maytag MFW9600, MFW9700, MFW9800, MHWZ400, MHWZ600;
>
> (collectively, the Washing Machines)

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

> a) Does the design of the Washing Machines prevent the growth or accumulation of dirt, debris, scrud, and/or biofilm through their intended use?
>
> b) If not, is the design of the Washing Machines defective and if so, what are the defects?

c) Do those defects constitute latent defects under Article 1726 of the Civil Code of Quebec or a violation of the statutory warranties found at Articles 37, 38 and 53 of the Quebec Consumer Protection Act?

d) If so, did the Defendants fail to adequately disclose to Class members that the Washing Machines are defective or did they do so in a timely manner?

e) Did the Defendants breach their duty to inform the members of the Class under the *Civil Code of Quebec* and the *Quebec Consumer Protection Act*?

f) Should an injunctive remedy be ordered to force the Defendants to recall, repair, and/or replace Class Members' Washing Machines free of charge?

g) Are the Class members entitled to compensatory, moral, punitive and/or exemplary damages and if so, in what amount?

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

GRANT the class action of the Petitioner and each of the members of the Class;

DECLARE the Defendants have committed unfair, false, misleading, and/or deceptive conduct, particularly so with respect to their designing, manufacturing, marketing, distributing, importing, advertising, warranty, selling, and/or servicing the Washing Machines with a Design Defect;

ORDER the Defendants to cease from continuing their unfair, false, misleading, and/or deceptive conduct;

ORDER the Defendants to recall, repair, and/or replace the Washing Machines free of charge;

DECLARE the Defendants solidarily liable for the damages suffered by the Petitioner and each of the members of the Class;

CONDEMN the Defendants to pay to each member of the Class a sum to be determined in compensation of the damages suffered, and ORDER collective recovery of these sums;

CONDEMN the Defendants to pay to each of the members of the Class, punitive damages, and ORDER collective recovery of these sums;

CONDEMN the Defendants to pay interest and additional indemnity on the above sums according to law from the date of service of the motion to authorize a class action;

ORDER the Defendants to deposit in the office of this court the totality of the sums which forms part of the collective recovery, with interest and costs;

ORDER that the claims of individual Class Members be the object of collective liquidation if the proof permits and alternately, by individual liquidation;

CONDEMN the Defendants to bear the costs of the present action including expert and notice fees;

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

[96] **ORDERS** the publication of a notice to Class members in accordance with Article 579 CCP, pursuant to a further order of the Court and **CONVENES** the parties to a hearing to be scheduled to discuss the issues of notice to Class members and the costs related to said notice;

[97] **SETS** the delay of exclusion at sixty (60) days from the date of the publication of the notice to the members;

[98] **DECLARES** that all members of the Class that have not requested their exclusion in the prescribed delay will be bound by any judgment to be rendered on the class action to be instituted in the manner provided for by the law;

[99] **THE WHOLE** with legal costs.

SUZANNE COURCHESNE, J. S.C.

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Hearing date: November 19, 2019