SUPERIOR COURT

CANADA
PROVINCE OF QUEBEC
DISTRICT OF MONTREAL

N^{O} : 500-06-001028-196

DATE : November 23, 2020

PRESIDING : THE HONOURABLE THOMAS M. DAVIS, J.S.C.

CHRISTOPHER OUELLET
Petitioner
v.
LASIK M.D. INC.
and
L.M.D. GMA L.P.
and
DR. MOUNIR BASHOUR
and
VALHALLA & CAMELOT ENTERPRISES INC.
Defendants

JUDGMENT ON AN APPLICATION TO AUTHORIZE A CLASS ACTION

OVERVIEW

[1] All can agree that a medical intervention which does not provide the patient with the desired result is an unfortunate occurrence. Even more unfortunate is when the patient is left with debilitating pain, for which there appears to be no cure.

[2] This is the case for the Petitioner, Christopher Ouellet (**Mr. Ouellet**), who alleges that following laser eye surgery, he has been left with a condition that he describes as corneal neuralgia or chronic post-operative pain. He seeks authorization to institute a class action, which would be national in scope, and to represent the following class:

> All persons who have developed corneal neuralgia, also known as chronic postoperative pain, after receiving laser vision correction surgery at Lasik MD.

1. SUMMARY ANALYSIS

[3] The filtering role of the Court called upon to authorize a class action needs little discussion. It is clear and has been well resumed by the Supreme Court of Canada in *L'Oratoire Saint-Joseph du Mont-Royal* v. *J.J.*,

> [109] At the authorization stage, the court's role is to screen applications: *Infineon*, at paras. 59 and 65; *Vivendi*, at para. 37. The court must ensure that the applicant meets both the evidentiary and the legal threshold requirements of the conditions set out in art. 575 *C.C.P.*, but must also bear in mind that the evidentiary threshold that must be met in order to determine whether each of those conditions is satisfied is a low one at this preliminary stage: *Infineon*, at paras. 57 and 59. The court's decision is procedural in nature; the conditions for authorization must be interpreted and applied broadly (*Infineon*, at paras. 59-60 and 66; *Vivendi*, at para. 37). At this stage, the facts alleged in the application for authorization are assumed to be true: *Infineon*, at para. 67. The applicant's burden is one of demonstration and not the burden of proof that would generally apply in private law matters, that is, on a balance of probabilities: *Infineon*, at para. 61. It will suffice for the applicant to show an arguable case in light of the facts and the applicable law: *Infineon*, at paras. 61-67; *Vivendi*, at para. 37. As this Court observed in *Infineon*, various expressions have been used for this burden over the years, as it has, for example, been described as being to establish, in English, "a good colour of right" or "a *prima facie* case" and, in French, "*une apparence sérieuse de droit*": paras. 62-67. In short, the purpose of the court's screening exercise is to filter out frivolous applications and to ensure that parties are not being forced to defend against untenable claims: *Infineon*, at para. 61; *Vivendi*, at para. 37. If the court concludes that the applicant meets the conditions of art. 575 *C.C.P.*, it must then authorize the class action: *Vivendi*, at para. 37.[1]
>
> [The Court's underlining]

[4] There is really no need to say more on the role of the Court at this juncture.

[5] However, for the Court to properly exercise its filtering role in this matter, there are several issues that merit significant discussion.

[6] Leaving prescription aside for the moment, likely the most important is whether or not the Court will be able to find a common question in its analysis of article 575(2) C.C.P. This analysis of the Court will be particularly challenging, given that the foundation of Mr. Ouellet's claim is that prior to his surgery, he was not given proper information or warning about the possibility of corneal neuralgia.

[7] Mr. Ouellet treats this issue in a number of ways in his argument. He posits that the failure of Lasik M.D. Inc. (**Lasik**) to disclose the risk of corneal neuralgia gives rise to

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[1] 2019 SCC 35.

an argument that he was not provided sufficient information on the dangers of the procedure, which he calls the theory of concealment.

[8] He also suggests to the Court that there was no discussion of the consent form[2] with Dr. Bashour.

[9] These elements both lead to Mr. Ouellet's conclusion that he was unable to give informed consent to the surgery that Dr. Bashour performed.

[10] However, this affirmation will raise the following query for the Court. Given that the determination of whether informed consent has been properly obtained by Lasik prior to an intervention requires an analysis of the exchanges between Lasik and each individual patient prior to surgery, consideration of the documentation each patient has been given and consideration of each patient's own circumstances, can there be a common question?

[11] The ability of the Court to find a common question around informed consent is further complicated by the fact that during what might be an appropriate class period, up to 66 ophthalmologists performed laser surgery on behalf of Lasik. Each of them would have been required to have a discussion with the patient prior to the signature of the consent form.

[12] Some of the evidence that Mr. Ouellet would like the Court to consider is subsequent to the surgery. It seems questionable for the Court to found its judgment, in a matter that essentially relates to informed consent, on information that was not considered in his decision to undergo the surgery.

[13] Mr. Ouellet also pointed the Court to article 1469 C.C.Q., which reads as follows:

> **1469.** A thing has a safety defect where, having regard to all the circumstances, it does not afford the safety which a person is normally entitled to expect, particularly by reason of a defect in design or manufacture, poor preservation or presentation, or the lack of sufficient indications as to the risks and dangers it involves or as to the means to avoid them.

[14] This argument was raised for the first time in his written argument plan, albeit to seemingly buttress Mr. Ouellet's argument that he was not given complete information; it seems surprising, in that the amended authorization application makes no reference to the alleged damage being the result of faulty equipment. If in fact that were the case, at first bluff the search for a common question seems difficult as one cannot presume that equipment failure was present in every surgery.

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[2] Exhibit P-5.

[15] If the purpose of the reference is to try to demonstrate a lack of information constitutes concealment by analogy, then the issue remains one of informed consent and the challenge of finding a common question remains whole.

[16] The Court will also have to consider whether Mr. Ouellet's personal action is prescribed. He posits that it is not, given that he only received the diagnosis of corneal neuralgia on November 2, 2016. Is it at that time that he had all the information he required in order to institute proceedings, or rather did he have it at the time he recognized that he was suffering from chronic postoperative pain that was not going away?

[17] Mr. Ouellet believes that prescription is an issue for the merits. On the other hand, there is significant case law to the effect that if the matter is prescribed on its face, the Court should intervene at the authorization stage.[3] This allows for a more appropriate use of judicial resources.

[18] The prescription issue is important both from the perspective of whether or not Mr. Ouellet has a cause of action and from his ability to adequately represent the class. Class counsel has suggested that if the action taken by Mr. Ouellet is indeed prescribed, that the Court accord it a delay to find a new representative. The applicable case law does not support this approach.[4]

[19] The composition of the class will also require discussion, particularly as to whether or not a viable class exists. To put this in another way, are there a sufficient number of Lasik patients suffering from corneal neuralgia to make it difficult or impracticable to apply the rules for mandates for them to take part in judicial proceedings? At best, in respect of the action against Lasik, there appears to be a very small number of people, an element that the Court will have to fully consider.

[20] Whether or not the criteria of article 575(3) C.C.P. are satisfied is even more remote when it comes to the proposed action against Dr. Bashour, as there is little information in the record on the number of patients that he has operated on, and even less on the number who might be suffering from corneal neuralgia.

[21] Finally, whether or not Mr. Ouellet is an adequate representative will not require a great deal of discussion. He was a client of Lasik, was operated on by Dr. Bashour, and clearly has an interest in the case. In normal circumstances, there would be little doubt that he is an adequate representative. That would change if his action is prescribed.

[22] For the reasons that follow, the Court concludes that Mr. Ouellet's class action against Lasik and Dr. Bashour should not be authorized.

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3 *Marineau* c. *Bell Canada*, 2015 QCCA 1519.

4 *Segalovich* c. *CST Consultants inc.*, 2019 QCCA 2144.

2. FIRST ISSUE: PRESCRIPTION

[23] Given that if Defendants' argument that Mr. Ouellet's action is prescribed is well-founded, the analysis of the other issues becomes secondary, the Court will consider prescription first. Mr. Ouellet posits that he only received a diagnosis of corneal neuralgia on November 2, 2016 and, therefore, that prescription runs from that date.

2.1 Conclusion

[24] Mr. Ouellet did not institute proceedings within the three-year time limit that applies in the present matter; therefore, his action is prescribed

2.2 Facts relevant to the issue

[25] The relevant facts begin with Mr. Ouellet's realization that his surgery had left him with significant corneal pain.

[26] As the Court must take the facts alleged in the amended authorization application as true, it is useful to understand how Mr. Ouellet relates the sequence of events that leads up to November 2, 2016:

> 16. On December 7, 2015, Applicant made an emergency appointment with Lasik MD because he developed severe pain and inflammation in both his eyes (Applicant couldn't look at his computer screen or any monitors). Applicant constantly felt a burning feeling in his eyes;
>
> 17. Following the appointment of December 7, 2015, Applicant was told by Lasik MD that he had blepharitis (an inflammation of the eyelids) and that he should have better hygiene of eyelids (Exhibit P-5). On November 2, 2016, the Applicant would learn that this diagnosis was wrong;
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> 18. On January 21, 2016, the Applicant once again consulted with Lasik MD as he continued to feel excruciating pain in both his eyes (they became very dry and extremely sensitive to light). Applicant had trouble keeping his eyes open. Lasik MD diagnosed him with and gave him a treatment for dry eye. On November 2, 2016, the Applicant would learn that this diagnosis was wrong;
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> 19. On February 5, 2016, the Applicant returned to Lasik MD for help because he continued to experience the same horrible symptoms (including the burning sensation in both of his eyes). Lasik MD prescribed an anti-inflammatory and restasis. Once again, Lasik MD treated him as a dry eye. Martine Beaulieu of Lasik MD also told him that with restasis it takes 6 months to take effect and that he should see an improvement in that time. On November 2, 2016, the Applicant would learn that this diagnosis was wrong;
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> 20. On March 23, 2016, the Applicant returned to Lasik MD as he continued to suffer severe pain in both his eyes. Lasik MD put plugs in his eyes for dry eye and told him to use warm compresses. They prescribed restasis for 6 to 12 months and

an anti-inflammatory. On November 2, 2016, the Applicant would learn that this diagnosis was wrong;

[...]

23. On September 20, 2016, the Applicant returned to Lasik MD to see Dr. Martine Beaulieu ("Dr. Beaulieu") and informed her that he wants to see a surgeon because his life has been a living hell since the eye surgery (Dr. Beaulieu took detailed notes of this appointment in Exhibit P-5);

24. During this appointment the Applicant told Dr. Beaulieu that he had recently consulted with another health professional and that his symptoms are way too much out of proportion to be dry eye and he insisted on seeing a surgeon. Dr. Beaulieu advised the Applicant that he should not see a surgeon because he had just started the treatment she previously recommended and that they have to wait and see if it works. On November 2, 2016, the Applicant would learn that this diagnosis was wrong; [the Court's underlining]

25. Around this time, the Applicant started doing research online. He discovered a Facebook Group called "Lasik Complications Facebook" with approximately 6000 members who experienced laser complications. The Applicant told his story on this page and someone suggested that based on the symptoms he described he may actually have corneal neuralgia and not dry eye;

26. On October 14, 2016, the Applicant consulted with Dr. Beaulieu at Lasik MD and brought articles with him about corneal neuralgia. He explained to her that he believes this could be what he has and informed her that he wants to see the surgeon. During this meeting he reiterated that his life has been completely ruined by the lasik surgery. Despite his pleas, Dr. Beaulieu insists on Applicant continuing the treatment for dry eye only (which was the wrong diagnosis all along). On November 2, 2016, the Applicant would learn that this diagnosis was wrong;

[...]

28. For the first time, on November 2, 2016, Dr. Bashour finally gives Applicant the correct diagnosis of corneal neuralgia (see Exhibit P-5);[5]

[27] Mr. Ouellet relies on the Lasik chart and the date that he believes that he received the correct diagnosis. What does the chart, produced by Mr. Ouellet as part of his evidence actually say, as by relying on his chart he is inviting the Court to consider it in the evaluation of whether he has satisfied his burden of demonstrating a potential cause of action?

[28] While the chart does demonstrate that the surgery did not achieve an optimal result, it also does not fully support the interpretation that Mr. Ouellet gives to it.

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5 Amended Application to Authorize the Bringing of a Class Action and to Appoint the Status of Representative Plaintiff.

[29] The first date to consider, and the most important in relation to the issue of prescription is November 2, 2016. This is the day that Mr. Ouellet met with his surgeon, the Defendant Dr. Bashour.

[30] Contrary to what the amended authorization application implies, the chart on that date does not refer to corneal neuralgia, but rather to regional pain syndrome.

[31] Moreover, what Mr. Ouellet was experiencing on November 2 was nothing new. The chart on October 16 says this:

> Notes:
>
> 14-Oct-2016 5:14 PM CRM Service => Aucune amelioration depuis le dernier RV, il y a 3sem, pt dit ne plus avoir de vie, est persuade d'avoir un syndrome de douleur corneenne neuropatic induite par sa Sx lasik, a apporte plusieurs article sur le sujet dont plusieurs du Dr Perry Rosenthal MD de l'organisme Boston eye pain foundation, depuis notre derniere visite d'il y a 3 sem, il a consulte Dr Choremis a HMR qui lui a propose d'augmenter son restasis a QID et lui a remis une RX pour goutte de serum, pt tellement desespere d'ameliorer son confort qu'il a consulter Dr Gilles Castonguay OD de la clinique Luc Doyle optometriste a verdun pour l'achat lentille scleral, il est en attente de ses dernieres, il a essayer lunette special pour garder l'humidite sur ses yeux et ca a fonctioner pour 3 jours ensuite ses yeux sont redevenu extremenent sec: brulement intense, ne peut plus regarder TV,ordi, lecture, ne peut plus travailler: a perdu son emploi car ses yeux brulaient trop a l'ordinateur et il n'etait pas assez performant, meibomite gr2 avec bord libre irregulier du a atrophie des glandes de meibomius, a lu sur lipiflow et était pret a aller l'essayer. pt presente un niveau de secheresse modere a severe et je lui ai bien explique que ca peut prendre plusieurs mois avant de bien controle son niveau de confort, on avait reussi a bien gere son confort en fevrier 2016 avec PF et Alrex et le pt etait suppose revenir nous consulter si a l'arret des antinflammatoire son inconfort revenait et il n'est pas revenu, consultation avec son MD suggere[6]
>
> [The Court's underlining]

[32] In fact, the chart shows that he had significant pain since at least December 2015.

2.3 Legal principles

[33] Prescription in the present matter is governed by article 2926 C.C.Q.

2926. Lorsque le droit d'action résulte d'un préjudice moral, corporel ou matériel qui se manifeste graduellement ou tardivement, le délai court à	**2926.** Where the right of action arises from moral, bodily or material injury appearing progressively or tardily, the period

6 Exhibit P-5.

compter du jour où il se manifeste pour la première fois.	runs from the day the injury appears for the first time.

[34] The courts have interpreted this article to require that all the elements necessary to the institution of the action must be present before prescription begins to run. The classic summary is found in *Sicé* c. *Langlois*, where the Court of Appeal stated:

> [38] Ensuite, le point de départ du délai de prescription est plutôt le moment où le préjudice s'est manifesté de manière appréciable. Parlant pour la Cour, Mme la juge Deschamps (elle était alors à notre Cour) écrit dans *Monopro Ltd. c. Montreal Trust*, 2000 CanLII 7400 (QC CA), J.E. 2000-777 (C.A.) (requête en autorisation de pourvoi à la Cour suprême rejetée, [2001] 1 R.C.S. xv), un recours en responsabilité civile extracontractuelle :
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> > [5] L'appelante a vu son action en dommages rejetée. Après avoir retenu la faute de l'intimée, la Cour supérieure a conclu à la rupture du lien de causalité et à la tardiveté de l'action. Comme la question de la prescription suffit pour disposer du pourvoi, il n'est pas nécessaire de discuter du lien de causalité.
> >
> > [...]
> >
> > [17] Sur la question de la prescription, l'appelante soutient avec raison que la prescription ne commence à courir que lorsque tous les éléments de responsabilité sont présents, soit la faute, le dommage et le lien de causalité.
> >
> > [...]
> >
> > [21] Si tous les auteurs ne décrivent pas la règle de façon strictement identique (Maurice TANCELIN, *Les Obligations, les techniques d'exécution et d'extinction*, Montréal, Wilson & Lafleur, 1994, par. 1129 et 1130; Jean-Louis BAUDOUIN, *La responsabilité civile délictuelle*, 3e éd., Cowansville, Éditions Yvon Blais, 1989, par. 1121 et 1122; Fernand POUPART, *La prescription extinctive en matière de responsabilité civile*, (1980-81) 15 *R.J.T.* 245, 271 et 277; André NADEAU et Richard NADEAU, *Traité pratique de la responsabilité civile délictuelle*, Montréal, Wilson & Lafleur, 1971, par. 673; John W. DURNFORD, *Some aspects of the suspension and of the starting point of prescription*, 1963 *R.J.T.* 245, p. 259 à 261), la formulation la plus généralement acceptée est celle reliant le point de départ de la prescription au moment où le dommage se manifeste de façon appréciable. Ainsi, Pierre MARTINEAU, *Traité élémentaire de droit civil*, Les Presses de l'Université de Montréal, 1977, p. 305 à 309) décrit ainsi ce moment:
> >
> > > Avant d'aborder les diverses hypothèses susceptibles de se produire, il importe de rappeler que la prescription extinctive a pour fondement l'inaction du titulaire d'un droit, sa négligence à exercer son droit. En conséquence, le point de départ de la prescription

> est le premier moment où il aurait pu agir, le premier instant où il aurait pu prendre action pour faire valoir son droit....
>
> (...)
>
> Il est des cas où le dommage ne se produit pas à un moment précis mais, au contraire, se réalise graduellement de façon progressive durant une période de temps plus ou moins longue.
>
> (...)
>
> Dans de semblables situations, la victime ne peut pas agir en justice dès le moment où la plus simple manifestation de dommage s'est produite. D'un autre côté, elle ne saurait être admise à attendre que les dommages aient atteint leur phase ultime, comme l'écroulement de l'édifice.
>
> On tient que le droit d'action prend naissance dès que le dommage se manifeste de façon appréciable. Le point de départ de la prescription est donc le moment où la victime subit un préjudice réel et certain alors que tous les éléments du dommage sont réunis. Du moment que les dommages ont pu être constatés et évalués, la victime est en mesure d'intenter action même si elle ne connaît pas toute l'étendue de ces dommages, lesquels sont susceptibles de s'aggraver.
>
> [22] La référence au moment où le dommage se manifeste de façon appréciable est aussi retenue de façon pratiquement constante par les tribunaux (*Lalonde c Desrosiers* 1988 CanLII 528 (QC CA), [1988] R.D.J. 154 C.A. ; *Ciment Québec v. Mottard* [1963] B.R. 68 ; *Montreal Tramways Co. c. Eversfield* [1948] B.R. 545). À titre indicatif, il est intéressant de constater que l'article 2926 C.c.Q. prévoit que la prescription commence à courir du jour où le préjudice se manifeste pour la première fois, formulation qui se rapproche de celle retenue pour l'interprétation du C.c.B.C. [7]

[Underlining of the Court of Appeal]

[35] One might summarize this by saying that prescription begins to run when the damage is appreciably present.

[36] In medical cases, the start of prescription has been explained by Justice Danielle Mayrand in *Forest* c. *Podtetenev*, in the following way:

> [45] La prescription a lieu contre toute personne et son point de départ court à compter du jour où le droit d'action a pris naissance, à savoir le jour où les trois

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[7] 2007 QCCA 1007; see also *Lacour* c. *Construction D.M. Turcotte TRO inc.*, 2019 QCCA 1023.

> éléments de la responsabilité sont rencontrés, soit la faute, le dommage et leur lien de causalité.
>
> [46] En matière de dommage corporel, lorsqu'il apparaît graduellement ou tardivement, la prescription court à compter du jour où il se manifeste pour la première fois.
>
> [47] La suspension de la prescription est une exception. La partie qui la demande a le fardeau de démontrer qu'elle était dans l'impossibilité, en fait, d'agir.[8]

[37] Applying the principals to the matter before her, she stated:

> [65] Dans tous les cas, le recours est prescrit. Le délai de prescription a commencé à courir non pas depuis la consultation avec Dr Fanous, mais dès que les symptômes se sont manifestés et ont persisté, à savoir dans les semaines qui ont suivi la chirurgie du 12 février 1997 ou au plus tard après la deuxième retouche effectuée le 17 mars 1998. Le changement de condition de santé visuelle de son œil gauche est le point de départ de la prescription. À compter de ce moment, Mme Forest ne s'est pas comportée avec la diligence d'une personne raisonnable lui permettant d'invoquer la suspension du délai de prescription.[9]
>
> [The Court's underlining]

[38] The Court must not look at the matter from the subjective perspective of Mr. Ouellet, but rather must use an objective standard. It must ask when the existence of the fault "could reasonably be perceived by anyone in the same circumstances."[10]

2.4 Discussion

[39] The first element to consider is what corneal neuralgia really is, given the importance that Mr. Ouellet attaches to it. While perhaps stating the obvious, the importance flows from Mr. Ouellet's affirmation that he only received the correct diagnosis on November 2, 2016.

[40] Dr. Wallerstein explains it this way:

> Neuralgia" ("*négralgie*" in French) is a common word that refers to pain, and more precisely nerve pain. "Corneal neuralgia" simply refers to ocular pain arising from corneal nerves. Other terms used include: "ocular neuropathic pain", "corneal neuropathic pain", "ocular pain syndrome", "chronic corneal pain", "chronic ocular pain", "persistent post-surgical pain", "post-surgical pain", "postsurgical neuralgia", "surgically induced neuropathic pain", "chronic postoperative pain" and "keratoneuralgia".[11]

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8 2016 QCCS 2679.
9 *Ibid.*
10 *Canpro Investments Ltd.* c. *Hudon Gendron Harris Thomas*, s.e.n.c., 2008 QCCS 2176, par. 100.
11 Dr. Wallterstein's sworn statement, par. 8.

[41] Corneal is an adverb, relating to matters in relation to the cornea. In the tenth edition of Merriam-Webster's Collegiate® Dictionary, neuralgia is defined as:

> Acute paroxysmal pain radiating along the course of one or more nerves...

[42] Neuralgia is pain.

[43] Corneal neuralgia is simply acute pain in the ocular nerves.

[44] The amended authorization confirms this; in the definition of what was then the sub-class, Mr. Ouellet qualifies it as "chronic postoperative pain". Later, he uses the terms "complex regional pain syndrome" and "chronic regional pain syndrome".

[45] The take away, from Mr. Ouellet's own application, is that the underlying issue is post-surgical chronic pain. Corneal neuralgia is but one name for it.

[46] Sadly, both from the perspective of the timing of his application, and his personal condition, which the Court does not take lightly, Mr. Ouellet first experienced serious pain in December of 2015, or perhaps a bit before. This is when he made his first appointment.[12]

[47] He consulted again on January 21, 2016, as he "continued to feel excruciating pain in both his eyes".[13]

[48] "On February 5, 2016, [Mr. Ouellet] returned to Lasik MD for help because he continued to experience the same horrible symptoms..."[14]

[49] Mr. Ouellet had another appointment on March 21, 2016 as "he continued to suffer severe pain in both his eyes."[15]

[50] There was no remediation for the pain and Mr. Ouellet returned to Lasik on September 20 and October 14, 2016, seeing Dr. Beaulieu on both occasions.

[51] He finally saw Dr. Bashour on November 2 and 16, 2016 where Mr. Ouellet's pain suffering was acknowledged. As the Court has said, the chart does not mention corneal neuralgia.

[52] Relying on the Supreme Court of Canada decision in *Oznaga* v. *Société d'exploitation des loteries*,[16] Mr. Ouellet takes the position that Lasik and Dr. Bashour hid the diagnosis from him and, hence, that it was impossible for him to act sooner. The Court

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12 Amended Application to Authorize the Bringing of a Class Action and to Appoint the Status of Representative Plaintiff, par. 16
13 *Ibid.*, par 18.
14 *Ibid.*, par 19.
15 *Ibid.*, par 20.
16 1981 CanLII 28 (SCC).

does not agree. At the risk of repetition, he was in pain beginning in December 2015, obviously due to the surgery. If the diagnosis of corneal neuralgia was indeed the culminating factor in his right of action, which it is not, Mr. Ouellet was fully aware of this condition before his appointment on October 16, 2016, having consulted other doctors and medical literature. That said, as he has recognized himself in his application, the cause of the action was the unbearable pain that he was suffering. Giving it a special name does not change the reality that the pain was present long before November 2, 2016.

[53] In *Onzaga*, the Supreme Court also pointed out: "that care must be taken not to relax the computing of deadlines, substantive as well as procedural, to the point that they become almost inoperative."[17] Accepting Mr. Ouellet's position that he was able to wait for the correct diagnosis before prescription began to run would run the risk of creating this situation. Some patients may unfortunately suffer for a long time before getting the correct diagnosis; some patients may never get the correct one!

[54] In short, in most cases the ultimate diagnosis should not be the trigger for a medical responsibility claim; making a final diagnosis the trigger for the start of the prescription period would allow a plaintiff to delay instituting his or her action well beyond the knowledge of the necessary elements of the relevant cause of action.[18] It is the appreciable appearance of the material symptoms that lead to the need to seek out a new diagnosis and potentially remedial measures that is determinative of the start of the prescription period.

[55] Whether the action is framed in a portrait of concealment or simply as the failure to provide the information necessary for informed consent does not help Mr. Ouellet on the issue of prescription. He alleges that he relied on advertising from Lasik that he saw on June 13, 2014, which stated *inter alia* that "Lasik patients "say they feel little or no pain". He also says that in his pre-op discussion with Dr. Bashour, there was no discussion of chronic postoperative pain or chronic regional pain syndrome. As both the amended authorization application and the chart show, the pain was chronic long before November 2, 2016. His knowledge that information on the potential of chronic pain was concealed from him or that he was not provided with all of the information that he needed to give consent was also acquired long before that date.

[56] Finally, what about Mr. Ouellet's demand that, if the Court finds the action is prescribed, it should give Class Counsel time to find a new representative? The Court of Appeal dealt with this issue in *Segalovich* c. *CST Consultants inc.*:

> [16] S'inspirant de ce qu'il décrit comme une pratique courante dans les autres juridictions canadiennes, l'appelant soutient que le juge aurait dû autoriser la

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17 *Ibid.*, p. 126; Also considered in *156259 Canada inc.* c. *Hoda inc.,* 2014 QCCS 6038.

18 *Pressman* c. *Lessard*, 2017 QCCS 5331, par. 27.

> demande et ordonner la substitution de représentant. Aucune demande en ce sens n'a toutefois été soumise au juge de première instance.
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> [17] Au Québec, il appartient à celui qui cherche à faire autoriser une action collective de démontrer que les conditions prévues à l'article 575 *C.p.c.* sont satisfaites incluant celle concernant la capacité du représentant.
>
> [18] Si le représentant ne se qualifie pas, l'appelant n'a pas rempli son fardeau et sa demande d'autorisation doit être rejetée. La sanction peut paraître sévère, mais dans un système qui donne préséance à la première demande d'autorisation déposée, le choix du représentant demeure primordial. Le juge n'avait pas à pallier cette lacune. En l'espèce, les membres du groupe ont eu raison d'identifier un nouveau représentant dont la réclamation n'est pas prescrite et déposer une nouvelle demande en autorisation. Le rejet d'une demande d'autorisation pourrait également permettre à une autre demande, suspendue dans l'attente de l'issue de la première, de suivre son cours.[19]
>
> [Reference omitted; the Court's underlining]

[57] If the action is prescribed, the proper course would be to produce a new authorization application with a representative whose cause of action falls within applicable time limits. One ponders why this has not already been done if the pool of people suffering from cornel neuralgia is as large as Mr. Ouellet affirms.

3. SECOND ISSUE: IS THERE A COMMON QUESTION?

[58] The Court will now consider whether there is a common question that might properly be the subject of a class action.

3.1 The New Questions

[59] Just prior to the authorization hearing, Mr. Ouellet proposed new common questions:

> a) Is Lasik Surgery associated with Corneal Neuropathic Pain ("CNP")?
>
> b) If the answer to question 1 is yes, did LasikMD and surgeons working as contractors with LasikMD, including Dr. Bashour, have a duty to disclose CNP to patients as a risk of Lasik Surgery?
>
> c) Do the written materials, advertising, and processes utilized by LasikMD during the class period (2009 to the date that LMD started disclosing CNP as a complication in 2018) adequately disclose the risk of CNP to patients?

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[19] 2019 QCCA 2144.

d) Was the risk of CNP ever verbally disclosed by Dr. Bashour to his patients during the class period?

e) Did the Defendants conceal their knowledge of the risk of corneal neuralgia, and if so, from when to when?

f) Did LasikMD have a procedure for non-surgical staff to provide verbal disclosure of CNP in pre-operative assessments during the class period?

g) Did LasikMD have a procedure for surgical staff to attend with the patient only to perform the surgery during the class period? If so, was such a procedure adequate to obtain informed consent from the patients relating to the risk of CNP?

h) Is the responsibility of any of the Defendants engaged in view of the Civil Code of Quebec or the Quebec Charter?

i) Did the faults of the Defendants in not adequately disclosing the risk of CNP constitute an intentional interference with the personal security of class members?

j) Did the faults of the Defendants cause damage to class members?

k) Can moral, compensatory, and/or punitive damages be assessed in the aggregate?[20]

3.2 Conclusion

[60] Given the particular nature of the present matter, which revolves around whether there was adequate disclosure of the risks of the surgery and whether Mr. Ouellet was able to give informed consent, the Court concludes that there is no appropriate common question, whether one considers the questions proposed initially or the ones proposed on the eve of the hearing.

[61] The proposed questions must be considered in light of the allegations in the amended authorization application. What this review shows is that the situation is so particular to Mr. Ouellet that a class action is not the appropriate procedural vehicle.

[62] The focus on corneal neuralgic pain in the common questions must also be discounted, because Mr. Ouellet himself acknowledges that it is indeed "chronic postoperative pain".

3.3 Facts relevant to the issue

[63] Mr. Ouellet frames his action this way:

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[20] Annexe A: Proposed common questions, modified September 21, 2020.

8. On June 13, 2014, Applicant consulted Lasik MD because he wanted to get lasik surgery (he did not like wearing glasses). Before his first consultation, Applicant reviewed and relied on advertising from Lasik MD which stated that:

- Lasik is the safest elective medical procedure;
- Risks are small, minor, and easily treatable;
- Complications are "extremely rare" and range from 1 in 50,000 to 1 in 100,000;
- Lasik patients "say they feel little or no pain";

[...]

10. During his first consultation on June 13, 2014, Applicant met with a technician at Lasik MD, not with the surgeon who performed his procedure (or any other surgeon). The Lasik MD technician told him that he has big pupils and it is probable that he develops halos and starbursts (especially at night). He was also told that he would have dry eyes for about 3 to 6 months. He [...] was provided with a "Lasik Information Booklet" from Lasik MD similar to the 2016 version communicated herewith as **Exhibit P-6** (Applicant was given the 2015 version and consents in advance to Lasik MD filing same as appropriate evidence);

11. Applicant accepted these risks because he did not consider them to be material, as it from the consent form communicated herewith as **Exhibit P-7**;[21]

3.4 Legal principles

[64] It is trite law to state that the Court need only find one common question for a class action to be appropriate. The answers to the questions do not need to be the same for each member of the class.

[65] An example of role of the Court is found in *Vivendi Canada Inc.* v. *Dell'Aniello,* where the Court stated:

> [58] There is one common theme in the Quebec decisions, namely that the *C.C.P.*'s requirements for class actions are flexible. As a result, even where circumstances vary from one group member to another, a class action can be authorized if some of the questions are common: *Riendeau* v. *Compagnie de la Baie d'Hudson*, 2000 CanLII 9262 (Que. C.A.), at para. 35; *Comité d'environnement de La Baie*, at p. 659. To meet the commonality requirement of art. 1003(a) *C.C.P.*, the applicant must show that 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: *Harmegnies*,

[21] Amended Application to Authorize the Bringing of a Class Action and to Appoint the Status of Representative Plaintiff.

> at para. 54; see also *Lallier* v. *Volkswagen Canada inc.*, 2007 QCCA 920, [2007] R.J.Q. 1490, at paras. 17-21; *Del Guidice* v. *Honda Canada inc.*, 2007 QCCA 922, [2007] R.J.Q. 1496, at para. 49; *Kelly* v. *Communauté des Sœurs de la Charité de Québec*, [1995] J.Q. no 3377 (QL), at para. 33. All that is needed in order to meet the requirement of art. 1003(a) *C.C.P.* is therefore 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. It is not necessary that the question make a complete resolution of the case possible: *Collectif de défense des droits de la Montérégie (CDDM)*, at paras. 22-23.
>
> [59] In short, it can be concluded that the common questions do not have to lead to common answers. At the authorization stage, the approach taken to the commonality requirement in Quebec civil procedure is a flexible one. As a result, the criterion of art. 1003(*a*) may be met even if the common questions raised by the class action require nuanced answers for the various members of the group.[22]
>
> [The Court's underlining]

[66] In considering the application of these words to the present matter, there is an important aspect that the Court must consider given the particular nature of the present matter. That is the burden of a plaintiff seeking damages from a medical professional in a context where the action is grounded in the failure of the professional to adequately inform the patient of the risks of the proposed surgery. He or she must demonstrate that, having been given complete and correct information, he or she would not have undergone the procedure. Therefore, the demonstration of whether a particular patient has a cause of action will, therefore, be different for each patient.

[67] This was explained by the Court of Appeal in *Marcoux* c. *Bouchard*. Citing Justice Lebel, as he then was, in *Chouinard* c. *Landry*,[23] Justice Brossard underlined that the criteria for informed consent are not necessarily the same under the Civil law as under the Common law:

> ... Dans la phase d'exécution du contrat de soins, le patient peut exiger ce respect d'une obligation de renseignement portant sur la nature et les risques de l'intervention thérapeutique. Une étude du professeur Kouri situe de façon particulièrement heureuse le rôle de l'obligation de soins par rapport à la formation et à l'exécution du contrat médical. Quant à la formation du contrat, il s'exprime d'abord en ces termes:
>
> [...]
>
> La victime doit prouver que l'élément sur lequel porte le vice de consentement était déterminant. Autrement dit, si elle avait connu la vérité, elle n'aurait pas

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22 2014 SCC 1.

23 1987 CanLII 1002 (QC CA).

> consenti...[Robert P. Kouri. "L'influence de la Cour suprême sur l'obligation de renseigner en droit médical québécois", (1984) 44 R. du B. 851, 859-860.][24]
>
> [The Court's underlining]

[68] A more recent statement of this is found in *M.G.* c. *Pinsonneault*, where the Court of Appeal opines:

> [142] Le médecin a quatre grandes catégories d'obligations à l'endroit de son patient : (1) obtenir son consentement libre et éclairé, ce qui entraîne de sa part l'obligation de satisfaire à son devoir d'information; (2) poser un diagnostic juste sur la condition du patient; (3) lui prescrire et lui administrer un traitement adéquat; et (4) respecter le secret professionnel. Cette dernière obligation n'est pas en cause dans cet appel.
>
> [143] Le droit à l'autonomie, à l'intégrité et à l'inviolabilité de la personne humaine et son corollaire, le droit de toute personne de ne pas être soumise à des soins sans son consentement, sont notamment consacrés aux articles 10 et 11 *C.c.Q.* De ce droit découle l'obligation qu'a le médecin d'obtenir le consentement éclairé de son patient avant de poser un acte médical sur sa personne, ce qui implique une obligation de renseignement sur l'intervention ou le traitement médical envisagé. Permettre au patient d'accepter ou de refuser une intervention ou un traitement médical en toute connaissance de cause constitue la finalité du devoir de renseignement.
>
> [144] Ce devoir de renseignement est une obligation de moyens dont l'intensité varie en fonction de plusieurs paramètres, telles l'urgence de la situation, la nécessité ou non de procéder à l'intervention ou encore la situation particulière du patient et ses questionnements. Les renseignements attendus du médecin portent, notamment, sur le diagnostic, la nature et l'objectif de l'intervention ou du traitement, les effets escomptés, les risques encourus, les choix thérapeutiques et les conséquences d'un défaut d'intervention ou de traitement. Ce sont les risques statistiquement significatifs, probables, prévisibles et connus qui doivent être divulgués, de même que les risques statistiquement peu élevés, mais dont les conséquences sont très importantes.
>
> [145] Le défaut d'obtenir le consentement éclairé du patient ou de l'informer adéquatement constitue une faute professionnelle. Cependant, la responsabilité du médecin n'est pas nécessairement engagée du seul fait d'une faute au devoir de renseignement. Encore faut-il que le patient démontre l'existence d'un lien de causalité entre le manquement au devoir de renseignement et le préjudice, soit que s'il avait été adéquatement renseigné, il n'aurait pas consenti à l'intervention qui a été pratiquée.
>
> [146] Cette détermination se fait selon le test de la « subjectivité rationnelle », lequel consiste « à déterminer et à apprécier, en fonction de la nature du risque et de la preuve, quelle aurait été la réponse raisonnablement probable du patient en

[24] 1999 CanLII 13278 (QC CA).

> l'instance, et non de l'homme raisonnable dans l'abstrait [...] ». Si le patient démontre qu'il n'aurait probablement pas consenti à l'intervention ou au traitement s'il avait été adéquatement renseigné, alors il importe peu que l'intervention médicale ait été pratiquée dans les règles de l'art, car le médecin répond alors des conséquences de la réalisation des risques non divulgués.[25]
>
> [References omitted; the Court's underlining]

[69] Finally, in a recent decision, *Robitaille* c. *Picard*, Justice LaRosa follows the same approach:

> [54] Pour déterminer si le médecin a, dans les circonstances, informé adéquatement le patient, le Tribunal doit référer au test du médecin raisonnablement prudent et diligent placé dans la même situation avec ce même patient.
>
> [55] Cette nuance est importante puisqu'elle impose au médecin de tenir compte de la situation particulière du patient lorsqu'il lui donne les informations en lien avec l'intervention qu'il projette de faire.[26]
>
> [Reference omitted]

[70] These principles, while they might well ultimately support a determination that M. Ouellet was not properly informed, also have their place in the analysis of whether there is a common question for the purposes of a class action.

[71] Where consent is a determinative issue, the occasions where a class action is appropriate will be more rare. This is explained by Justice Hamilton, then on this Court, in *Louisméus* c. *Compagnie d'assurance-vie Manufacturers (Financière Manuvie)*:

> [91] Le recours fondé sur le défaut d'information ou le vice de consentement est plus problématique comme action collective.
>
> [92] Il est fondé sur la compréhension de Mme Louisméus et de Gauthier lorsqu'elle a souscrit la police en 1993 et l'augmentation du capital en 2000.
>
> [93] Il est difficile d'y voir des questions communes avec les autres membres du groupe. La compréhension de l'assuré ou de son conseiller est une question individuelle et non commune. La suffisance de la communication des informations par Aetna pourrait être une question commune mais dans le présent dossier Gauthier semble admettre que les informations dans les bulletins d'Aetna étaient suffisantes et la question est plutôt de savoir si les représentants les ont reçus. Il faut analyser les informations que chaque conseiller a reçues, ce que chaque

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25 2017 QCCA 607.
26 2019 QCCS 1285.

> conseiller comprenait, ce qu'il a communiqué à ses clients, ce que le client comprenait et ce qui était important pour le client dans sa prise de décision.[27]

[72] Finally, the judgment of Justice Savard, then on this Court, in *Lebrasseur* c. *Hoffmann-La Roche ltée*, an application to authorize a class action in relation to the drug Accutane warrants discussion:

> [42] Certaines des questions soulevées par le recours collectif sont de nature individuelle, telles la situation de chaque membre du groupe quant à la consommation d'Accutane (la posologie, la durée du traitement), la nature de la maladie inflammatoire de l'intestin dont le membre souffrirait, la présence chez ce membre des facteurs de risque de développer une telle maladie, la nature des informations communiquées par le médecin traitant quant aux risques associés au médicament ou encore la validité du consentement donné par le membre à la prise du médicament. Il en est de même de celles relatives aux dommages moraux et compensatoires.[28]
>
> [Reference omitted; the Court's underlining]

[73] One retains from these passages, that whether the professional has communicated the information required for a patient to give informed consent will generally require an analysis of the situation of each individual.

3.5 Discussion

[74] In his written argument, Mr. Ouellet frames what he calls a "clear common denominator" as follows: "Did the defendants adequately inform the patients of the risks of Lasik surgery?"

[75] For the Court, there is no such common denominator, particularly when one considers the number of surgeons who operate on Lasik patients.

[76] The Court will consider the substantive common questions as Mr. Ouellet proposes they be formed. The first two can be looked at together.

3.5.1 Is Lasik Surgery associated with Corneal Neuropathic Pain ("CNP")?

3.5.2 If the answer to question 1 is yes, did LasikMD and surgeons working as contractors with LasikMD, including Dr. Bashour,

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27 2017 QCCS 3614.
28 2013 QCCS 3024.

have a duty to disclose CNP to patients as a risk of Lasik Surgery?

[77] The answer to these questions does not advance the debate. There is already an admission in the record from Dr. Wallerstein[29] that Lasik is aware of a number of patients, albeit a small number, who have symptoms that may correspond to corneal neuralgia; therefore there is really no debate that the first question would be answered in the affirmative.

[78] It should also be noted that Mr. Ouellet uses the words "chronic postoperative pain" to describe the potential class. As Dr. Bashour states in his affidavit:

> Mr. Ouellet's medical record (P-5) does not refer to "corneal neuralgia", but rather refers to Regional pain syndrome, which is a chronic pain condition, constitutes a risk inherent to any kind of surgery, on any part of the body, including but not limited to LASIK surgery (laser-assisted in situ keratomileusis).[30]

[79] This again demonstrates that the answer to the first question does not advance the debate. The Court knows what the answer is.

[80] The answer to the second question also seems obvious. Lasik and the surgeons performing the surgery would have the obligation to disclose the risk of chronic pain.

3.5.3 Do the written materials, advertising, and processes utilized by LasikMD during the class period (2009 to the date that LMD started disclosing CNP as a complication in 2018) adequately disclose the risk of CNP to patients?

[81] It is with this proposed question that the search for a commonality becomes more challenging. The first hurdle is that the adequacy of the disclosure will be different from patient to patient. The degree of information provided to one patient may well be enough based on the person's particular condition, the information that he or she took cognizance of and the pre-op discussion that the person had with the surgeon. Therefore, the question is not a common question, as different facts will be necessary to answer it for each class member.

[82] Moreover, regardless of the answer to the question, in each case, the aggrieved patient will also have the burden of demonstrating that he or she would not have had the intervention had they been fully informed about the complications of CNP.

[83] There is no common proof that will apply in the same way to each patient.

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29 Dr. Wallerstein's sworn statement of May 28, 2020, par. 7.

30 Dr. Mounir Bashour's sworn declaration, par. 3.

[84] Take Mr. Ouellet's case. We know, at least in part, why he underwent Lasik surgery. However, we do not really know what part of the information that he considered might have tipped the balance in favour of undergoing the procedure. That element of his decision is personal to him, and this will no doubt be the case for most people who undergo Lasik correction.

[85] Even this is an oversimplification of the issue. The adequacy of the communication of information by Lasik cannot be considered in the vacuum of the written materials and advertising. Whether or not a patient has ultimately been given the information to be able to provide informed consent will also depend on the communication with the physician performing the surgery. This will likely be different for every surgeon, and there were 66 during the class period. Moreover, the degree of information that will ultimately be required may well depend on a particular patient's understanding of the written materials and the questions he or she asks the doctor before the procedure.

[86] Finally, it has been shown that the patient's condition will also be a factor in the exchange of information. Dr. Wallerstein has said that there are up to 22 different consent forms that may be used depending on the pre-op condition of the patient.[31] Ms. Prudhomme signed at least two additional ones that have not been communicated by Mr. Ouellet.[32] Mr. Ouellet signed an additional document stating that he was not subject to any additional consent form.

[87] Therefore, it is clear that the adequacy of the information will be different for every patient, regardless of the facts in the written materials or information.

3.5.4 Was the risk of CNP ever verbally disclosed by Dr. Bashour to his patients during the class period?

[88] Quite apart from the fact that this is a question that requires looking at the exchanges with each of Dr. Bashour's patients, even assuming that this risk was never disclosed, a negative answer to the question does not advance the debate in a way that renders a class action an appropriate recourse. Again, this is precisely because the personal analysis required to determine whether consent is informed or not, and the need for each patient to demonstrate that he or she would not have had the surgery with a better knowledge of CNP.

3.5.5 Did the Defendants conceal their knowledge of the risk of corneal neuralgia, and if so, from when to when?

[89] While this might look like a common question at first bluff, given that corneal neuralgia has been correctly described by Mr. Ouellet as "chronic postoperative pain", the

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31 *Ibid.*, par. 4.
32 Exhibit P-19.

evidence that he produced with his application shows that it was not concealed. The consent form clearly raises the possibility of chronic pain.[33]

[90] Once this is acknowledged, the question then becomes one of informed consent, the pitfalls of which in a class action procedure the court has already considered.

3.5.6 Did LasikMD have a procedure for non-surgical staff to provide verbal disclosure of CNP in pre-operative assessments during the class period?

[91] The Court agrees that this may also be a common question.

[92] However, it is also of the view that these questions are on the periphery of what is important for the proposed class action to move forward. Mr. Ouellet places the emphasis in his application on the advertising, written materials and the pre-op discussion, not the interactions with nonsurgical staff. Moreover, whether there was such a procedure or not, because of the individual nature of informed consent, the ultimate responsibility for adequate disclosure rests with the surgeon. In addition, whether the information communicated was sufficient will depend on a combination of factors, as the Court has discussed. The answer to this question will not really advance the debate and it would not be proportional to authorize the class action on the basis of this question alone. While it is not an independent criteria, proportionality is a factor that the Court can, and should consider.

3.5.7 Did LasikMD have a procedure for surgical staff to attend with the patient only to perform the surgery during the class period? If so, was such a procedure adequate to obtain informed consent from the patients relating to the risk of CNP?

[93] This is an issue of informed consent that the Court has already considered.

4. THIRD ISSUE: MR. OUELLET'S PERSONAL CAUSE OF ACTION

4.1 Conclusion

[94] But for prescription, it may be that Mr. Ouellet's claim for damages against both Dr. Bashour and Lasik is not frivolous. He may have a valid argument that, in his particular situation, the information that he was given did not allow him to give informed consent.

4.2 Facts Relevant to the Issue

[95] In his decision making, he relied on advertising that led him to believe that the risks were minimal and that patients suffered little or no pain.

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[33] See *infra* at par. 96.

[96] The information booklet that he was provided with[34] does not raise post-operative pain as a significant issue.

[97] Apparently, the discussion with Dr. Bashour was summary at best.

4.3 Discussion

[98] There is an obvious hurdle to Mr. Ouellet's action. While the information booklet does not mention post-operative pain, the consent form clearly does:

> 7. Je comprends qu'après l'intervention, des effets secondaires tels que douleurs, inconfort, grattements, effet de halo, vision floue ou acuité visuelle instable pourraient se manifester de façon temporaire ou permanente. On m'a informé(e) que certains de ces effets secondaires pourraient être difficiles à tolérer.[35]

[99] There is no allegation that Mr. Ouellet actually took the time to read the form, or whether he asked Dr. Bashour any questions about it, which is exactly what the information booklet invited him to do:

> Please read this booklet carefully. It has been provided to you in addition to, but not as a replacement for, face-to-face conversation with your eye care professional.
>
> [...]
>
> To assist you in making an informed decision, your surgeon will cover the risks and complications that are specific to your needs. Please notify your surgeon if you have unanswered questions.[36]

[100] Nor is there an allegation that Mr. Ouellet might have decided not the have the surgery if he had known about the possibility of post-operative pain.

[101] This said, there are likely sufficient factual allegations for Mr. Ouellet's action to go forward, but, at the risk of repetition, the preceding discussion also highlights the difficulty of finding a common question as his right of action depends on his personal understanding of the information communicated to him, whether he communicated any questions to Dr. Bashour and whether and how they were responded to.

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34 Exhibits P-7 and P-20 is a later example.
35 *Ibid*.
36 Exhibit P-6.

5. FOURTH ISSUE: ARE THERE A SUFFICIENT NUMBER OF LASIK PATIENTS SUFFERING FROM CORNEAL NEURALGIA TO MAKE IT DIFFICULT OR IMPRACTICABLE TO APPLY THE RULES FOR MANDATES?

5.1 Conclusion

[102] The Court concludes that the rules for mandates can be applied without undue difficulty or impracticability.

5.2 Facts Relevant to the Issue

[103] The first fact that the Court retains is that the amended authorization application's demand that Mr. Ouellet represent a national class is not tenable.

[104] As part of the consent form that he signed, Mr. Ouellet recognized:

> Je comprends que la législation qui régit l'intervention est celle de la province du/de (l') QC (province où l'intervention sera effectuée) et je reconnais que les tribunaux de cette province auront la compétence exclusive advenant toute réclamation que je pourrais avoir relativement à l'intervention.[37]

[105] The proof also shows that in the Canadian jurisdictions where Lasik operates, the consent forms contain a similar clause giving exclusive competence to the courts of the province where the surgery has been performed.

[106] This is important, as it means that the potential class may be much smaller than Mr. Ouellet alleges. The information that he provides on the class in his amended authorization application is as follows:

> 78. Applicant is aware of [...] 1,171 other Class members (who "signed-up" to this class action on class counsel's website www.lpclex.com/lasik) among whom there are at least 19 other subclass members suffering from corneal neuralgia, 10 of whom are domiciled in Quebec, and many more who report symptoms similar to corneal neuralgia but who have not received a formal diagnosis. The filing of the present class action has enabled others suffering from corneal neuralgia and other undisclosed complications of Lasik to come forward;[38]

[107] Of course, the sub-class is now the only group that Mr. Ouellet seeks to represent, so he affirms that he currently knows about a maximum of 10 people in the Quebec class, despite the publicity and the media coverage that Mr. Ouellet alludes to in his application.[39]

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37 Exhibit P-7.

38 Amended Application to Authorize the Bringing of a Class Action and to Appoint the Status of Representative Plaintiff, par. 78.

39 *Ibid.*, par 81.

[108] Notably, there is an absence of information around the number of Dr. Bashour's patients who might be part of the class, the only information being provided that: "Dr. Bashour admitted to the Applicant that he was aware of 5 or 6 other Class members".[40]

5.3 Legal Principles

[109] Given article 3148 C.C.Q., the Court must heed the autonomy of the parties in attributing jurisdiction to courts of a province, as explained by the Supreme Court of Canada judgment in *GreCon Dimter inc.* v. *J. R. Normand inc.*:

> 20 Article 3148 establishes the general framework that delineates the jurisdiction of a Quebec authority in relation to contracts in proceedings based on personal actions of a patrimonial nature, subject to the specific rules that apply to cases in which the action is based on a contract of employment or a consumer contract (art. 3149 *C.C.Q.*), a contract of insurance (art. 3150 *C.C.Q.*), or civil liability for damage suffered as a result of exposure to or the use of raw materials originating in Quebec (art. 3151 *C.C.Q.*). Article 3148 also recognizes the primacy of the autonomy of the parties: although the legislature did confer jurisdiction on the Quebec authority on the basis of the criteria of jurisdictional connection, such as domicile, fault, the damage or the injurious act, it was careful to give the parties the ability to choose to oust the authority's jurisdiction when they wish to entrust current or future disputes between them that arise out of a specific legal relationship to a foreign authority or an arbitrator.[41]

[110] This, as the Court has said, has an impact on the size of the group, as the potential members are limited to Quebec.

[111] At the authorization stage, the applicant has a burden of showing that a potential group exists. That goes beyond alleging hypothesis, as explained by Justice Claudine Roy, then on this Court, in *A* c. *Commission scolaire Marie-Victorin*:

> [58] Est-ce que le groupe est plus nombreux que les six individus auxquels réfère la Requête? Madame A semble le croire. Mais ce n'est pas par la publication d'avis autorisant le recours qu'elle pourra le découvrir. Le paragraphe 1003 c) C.p.c. impose une condition préalable à l'autorisation du recours, et non a posteriori.[42]

[112] This said, the burden of demonstration will be diminished in a situation where : « de toute évidence, il y a un nombre important de consommateurs qui se retrouvent dans une situation identique".[43]

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40 Amended Application to Authorize the Bringing of a Class Action and to Appoint the Status of Representative Plaintiff, par. 78.

41 2005 SCC 46; See also *Dell Computer Corp.* v. *Union des consommateurs*, 2007 SCC 34, par. 144.

42 2006 QCCS 5838.

43 *Martel* c. *Kia Canada inc.*, 2015 QCCA 1033, par 29.

[113] The issue of the number of potential class members whose claim is within applicable time limits is also an element that might affect whether there is a viable group. Save for exceptional situations, a group cannot be open-ended. This is explained by Justice Bisson in *Abicidan* c. *Bell Canada*:

> [104] Quant aux paramètres temporels, le Tribunal décide que la date d'ouverture du groupe sera le 1er mai 2012, soit trois ans avant le dépôt de la Demande d'autorisation le 1er mai 2015. Cela correspond à la prescription de trois ans applicable à tout recours en vertu de la LPC. Le Tribunal ne peut retenir la date du 1er février 2010 que suggère le demandeur, car à l'extérieur de la période de prescription. Le demandeur ne parle pas non plus d'une suspension ou d'une interruption de prescription ou d'une impossibilité d'agir des membres du groupe, et le Tribunal ne peut y suppléer. Le procès au mérite déterminera l'impact sur la prescription du recours des membres de la question de la découverte du caractère faux et trompeur des publicités de Bell Canada. Autrement dit, comme c'est le cas pour le demandeur, la publicité de 2010 à 2012 sera fort probablement pertinente au procès au mérite, même si le groupe débute le 1er mai 2012.
>
> [105] La définition du groupe doit également généralement avoir une date de fermeture, le groupe ne pouvant rester « ouvert indéfiniment » et ne pouvant généralement prendre fin à une date postérieure au jugement qui le définit. Or, dans le présent cas, l'apparence de droit est à l'effet que les pratiques de commercialisation, de distribution et de vente de Bell Canada continuent à ce jour. De plus, une injonction permanente est demandée afin de faire cesser ces pratiques. Cela signifie-t-il que le groupe doit rester ouvert? Le Tribunal ne le croit pas.[44]

5.4 Discussion

[114] Some of the same challenges that were discussed around the difficulties of finding a common question and in relation to prescription are also present in whether there is a viable class.

[115] The first thing to note is that Mr. Ouellet and class counsel have done some work to demonstrate the number of potential class members. As mentioned, they have created a page on their web site. 1,197 people have "signed-up" on the site, of which: "there are at least 19 other subclass members suffering from corneal neuralgia, 10 of whom are domiciled in Quebec, and many more who report symptoms similar to corneal neuralgia but who have not received a formal diagnosis."[45]

[116] From the proof that was produced by Lasik, we understand that they are aware of up to nine symptomatic patients across Canada.[46]

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44 2017 QCCS 1198.

45 Amended Application to Authorize the Bringing of a Class Action and to Appoint the Status of Representative Plaintiff, par. 78.

46 Dr. Wallerstein's sworn statement, par. 7.

[117] The question for the Court is what does this really mean? Firstly, whether taking the position of Lasik, or Mr. Ouellet, the group will be small.

[118] Secondly, even considering the number of potential class members put forward by Mr. Ouellet, is there enough information for the Court to read between the lines[47] and conclude that Mr. Ouellet has demonstrated that there is a viable class?

[119] As the class will be limited to Quebec given article 3148 C.C.Q., there may be up to 10 people domiciled here who are suffering from the condition. However, we do not know when they were diagnosed, or, in fact, if they have been diagnosed. That word is absent from the allegation.

[120] Nor do we know the degree of the symptoms, a factor to consider given the nature of the condition as described by Dr. Wallerstein:

> Corneal neuralgia is a spectrum, it is... it is really a... it's a relatively new entity, it's ill-defined in the field of ophthalmology, there are no really agreed-upon generally accepted criteria to diagnose it, and it's really a spectrum, you know, of a clinical entity syndrome. So it could be something very, very mild, but it could be something more significant, where a patient has significant complaints.[48]

[121] Equally as important, we do not know who their physician was; there is no allegation as to the number of patients in this small group who were Dr. Bashour's patients.

[122] This is important not only form the perspective of determining whether there is a viable group for a class action to lie against Dr. Bashour and his corporation, but also given the proposed legal syllogism, grounded in the failure to provide informed consent. At the risk of repetition, at least two factors are required to prove the syllogism and to decide the sufficiency of the disclosure necessary for informed consent: the information provided by Lasik and the informed consent discussion with the surgeon.

[123] This is also recognized by Mr. Ouellet in his application as he states that: "There was no consultation with Dr. Bashour before the surgery".[49]

[124] Yet there is no information provided in respect of the 10 patients as to the nature of the discussion that they had with their surgeon, so the Court has no insight into the number who are actually in the situation that Mr. Ouellet alleges.

[125] To put this differently, one cannot forget that this is not a case where the resulting corneal neuralgia is the foundation of the proposed syllogism, but rather the failure to disclose this risk of this condition. Given the complete lack of information on the disclosure

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47 *Asselin* c. *Desjardins Cabinet de services financiers inc.*, 2017 QCCA 1673, par. 33.

48 Dr. Wallerstein' Pre-Trial Examination of August 26, 2020, p. 15.

49 Amended Application to Authorize the Bringing of a Class Action and to Appoint the Status of Representative Plaintiff, par. 15.

to the other potential class members by their physicians, the Court cannot conclude that there is a viable class.

[126] There is another element that leads to this conclusion. Curiously, M. Ouellet has chosen not to put timeframe on his description of the class. Following the lead of Justice Bisson in *Abicidan*[50], the Court believes that there needs to be one. This is not a matter where a more recent judgment of the same colleague in *Gillich* c. *Mercedes-Benz West Island*[51] assists Mr. Ouellet. Firstly, there was a start date for the class, three years prior to the deposit of the authorization application. Justice Bisson then decided that it would not be proportional for the Court to determine an end date, given the nature of the alleged fault under the *Consumer Protection Act*[52] and the fact that the infraction was continuing.

[127] For the purposes of the present discussion, even accepting that an acceptable class might have no end date, it needs to have a start date, which would be November 15, 2016. This is important, because the authorization application gives no information as to how many among the 10 Quebec residents who are alleged to be symptomatic experienced the chronic pain necessary to a diagnosis of corneal neuralgia after that date.[53]

[128] The Court simply cannot agree that prescription should not run against these people for the same reasons as set out hereinabove.

[129] Moreover, even if there is no end date, the evidence in the file is such that the incidence of corneal neuralgia is very rare. This is borne out by Mr. Ouellet's own exhibits, which support the numbers found by Lasik itself:

> But Dr. Guillermo Rocha, who has been doing laser correction for 25 years and is past president of the Canadian Ophthalmological Society, insists persistent pain after surgery is very rare, affecting one in 10,000 patients.
>
> "It is a very rare complication. It exists, it is real, at this point there is not a clear understanding," he said from his clinic in Brandon, Man.
>
> "There are researchers in the United States who have performed 16,000, 17,000 cases and have only seen two cases of corneal neuralgia. In my practice, and I have been performing laser surgery since 1995, I have never seen a case of corneal neuralgia," said Dr. Rocha.[54]

[130] Contrary to the unsubstantiated affirmations in the application, this is not a matter where there are likely to be thousands of class members.

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50 *Abicidan* c. *Bell Canada*, *supra* note 41.
51 2020 QCCS 1582.
52 RLRQ, c. P-40.1.
53 At least one of the non-Quebec residents referred to in the application had her surgery in 1999; Exhibit P-19.
54 Exhibit P-16.

[131] And, the potential size of the class continues to be a factor for the Court to consider:

> [128] Quant au nombre des personnes visées par la description du groupe, il est certainement pertinent. D'une part – et c'est une évidence –, l'art. 575 *C.p.c.* (tout comme l'art. 571 d'ailleurs) requiert l'existence d'un « groupe », lequel implique, par définition, la réunion de plusieurs personnes. D'autre part, la taille de ce groupe doit rendre « difficile ou peu pratique / difficult or impracticable » (mais non pas impossible, notons-le) le recours au mandat prévu par l'art. 91 *C.p.c.* ou à la jonction d'instance prévue par l'art. 210 *C.p.c.*, ce qui suppose ordinairement plus que deux ou trois personnes. Cela dit, il n'est cependant pas obligatoire que le nombre des membres du groupe envisagé se chiffre par milliers.[55]

[132] In summary, the Court shares the words of Justice Dumais in *Ramacieri* c. *Bayer inc.*:

> [70] L'économie judiciaire recherchée par le mécanisme du recours collectif ne doit pas aboutir à un résultat final qui ne vaut que pour quelques individus. D'où la nécessité de s'assurer, dès le départ, qu'il existe bel et bien un groupe concerné par le litige collectif.
>
> [71] Ce groupe, surtout s'il est peu nombreux, doit rendre difficile ou peu pratique le recours au mandat ou à la jonction des parties, pour des motifs géographiques, économiques ou autres contraintes pratiques ou juridiques. Cette preuve incombe aux requérants.[56]
>
> [The Court's underlining]

[133] Mr. Ouellet has not met the burden here.

6. FIFTH ISSUE: IS MR. OUELLET AN ADEQUATE REPRESENTATIVE?

6.1 Conclusion

[134] Given the prescription of his personal action, Mr. Ouellet is not an adequate representative. That said, he otherwise would have been.

[135] The criteria used to determine whether a person is an appropriate representative must be interpreted liberally as outlined by the Supreme Court of Canada in *Infineon Technologies AG* c. *Option consommateurs*:

> [149] Selon l'alinéa 1003d) C.p.c., « le membre auquel il entend attribuer le statut de représentant [doit être] en mesure d'assurer une représentation adéquate des membres ». Dans Le recours collectif comme voie d'accès à la justice pour les consommateurs (1996), P.-C. Lafond avance que la

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55 *Godin* c. *Aréna des Canadiens inc.*, 2020 QCCA 1291.

56 2015 QCCS 4881.

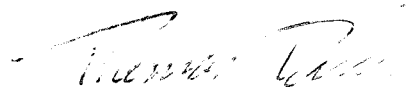
> représentation adéquate impose l'examen de trois facteurs : « . . . l'intérêt à poursuivre [. . .], la compétence [. . .] et l'absence de conflit avec les membres du groupe . . . » (p. 419). Pour déterminer s'il est satisfait à ces critères pour l'application de l'al. 1003d), la cour devrait les interpréter de façon libérale. Aucun représentant proposé ne devrait être exclu, à moins que ses intérêts ou sa compétence ne soient tels qu'il serait impossible que l'affaire survive équitablement.[57]

[136] There is no conflict of interest with other potential members of the group and Mr. Ouellet has demonstrated his competence, interest and commitment in relation to the potential litigation.

FOR THESE REASONS, THE COURT:

[137] **DISMISSES** Applicant's Amended Application to Authorize the Bringing of a Class Action and to Appoint the Status of Representative Plaintiff;

[138] **WITH JUDICIAL COSTS**.



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[57] 2013 CSC 59; see also *Lambert (Gestion Peggy)* c. *Écolait ltée*, 2016 QCCA 659, par 68.