SUPERIOR COURT
(CLASS ACTION)

CANADA
PROVINCE OF QUEBEC
DISTRICT OF MONTREAL

No.: 500-06-000916-185

DATE: January 11, 2021

BY THE HONOURABLE SYLVAIN LUSSIER., J.S.C.

AMANDA HAKIM
Plaintiff
v.
PFIZER INC.
and
PFIZER CANADA INC.
and
PFIZER CANADA ULC
Defendants

JUDGMENT

OVERVIEW

[1] The Court is seized with an Application for a temporary stay by Plaintiff Amanda Hakim of what she calls « the Quebec Proceeding », being the Application for authorization to institute a class action in the present Superior Court file.

[2] On March 20, 2018, Plaintiff, represented by Merchant Law Group (MLG), filed the Application for authorization to institute a class action and to appoint a representative applicant on behalf of "all persons in Canada (including their estates, executors, or personal representatives) who purchased, used, or acquired Alesse®, birth control pills,

and their dependants and family members, or any other Class or Sub-Class to be determined by the Court", seeking damages resulting from the use of the defective pills Alesse 21 and Alesse 28®, allegedly designed, manufactured, tested, packed, labelled, marketed, and sold by Defendants.

[3] This Application is premised on the alleged fact that on December 1, 2017, Health Canada issued a safety recall based on the fact that certain packages of birth control pills Alesse 21 and Alesse 28 might contain smaller than normal or broken pills which may reduce effectiveness in preventing pregnancy[1].

[4] On January 22, 2019, Justice Chantal Lamarche granted the Defendants' Application for Leave to Examine the Plaintiff, for Communication of Documents, and to Adduce Relevant Evidence.

[5] The case management of this file was assigned to the undersigned by the Chief Justice of the Superior Court on June 26, 2019.

[6] Ms. Hakim was examined on September 10, 2019. In the course of that examination Ms. Hakim made a number of undertakings, which were duly completed on September 8, 2020, as per the parties' agreement on same.

[7] Defendants sought leave to file certain of the undertakings as exhibits.

[8] On September 30, 2020, the undersigned confirmed that unless there was an objection, no leave was necessary to file evidence obtained through an examination already authorized by the Court, in the following terms :

> La présente fait suite à votre lettre du début septembre.
>
> À moins d'objections de la part des avocats en demande, je considère que le dépôt de pièces ou extraits d'interrogatoires permis par jugement n'a pas à être autorisé. Par conséquent, à moins de débats quant à ce dépôt, il y aurait lieu de fixer d'ores et déjà une date pour l'audition de la demande d'autorisation.
>
> J'ai plusieurs dates en octobre, de même que les 17 et 18 décembre.
>
> J'attends par conséquent de vos nouvelles.

[9] As appears from the quotation, the undersigned did not rule that "the filing to Court of evidence R6-R-9 was not authorized", contrary to the assertion of the Plaintiff's plan of argument[2].

[10] Defendants' counsel informed the Court of their availability in December to argue on authorization.

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1 Paragr. 8 of the Application for Authorization.
2 At paragr. 15.

[11] Notwithstanding the Court's preliminary position, Plaintiff's counsel asked on October 1st for time to take position with respect to the filing of the undertakings, in the following terms:

> Bonjour Monsieur Le Juge,
>
> Je pense qu'il y a eu un certain malentendu lorsque je referais dans mon courriel précèdent à ma disponibilité pour le 17 ou le 18 décembre. En effet, je referais plutôt à une audition pour la présentation de la Demande d'autorisation de présenter des preuves appropriées des défenderesses qu'à l'audition de la Demande d'autorisation pour intenter un recours collectif.
>
> Il me semble qu'il faudra que je vous donne en premier mon intention quant à cette demande au cas où nous contesterons celle-ci, avant de fixer une audition pour la présentation de notre Demande en autorisation
>
> Donc, je vous demande de me donner du temps afin de pouvoir analyser cette preuve (R-6 à R-9), ainsi que le dossier (vu que je remplace mon prédécesseur depuis juillet seulement) avant de fixer une date pour l'audition de notre Demande en autorisation du recours collectif.

[12] After the undersigned granted until October 15th to take position with respect to Defendants' intention to file the undertakings, Plaintiff's counsel informed the Court of her intention to request a stay of proceedings, in the following terms :

> Monsieur le Juge,
>
> Tel que prévu, nous vous écrivons afin de vous soumettre notre position à l'égard de l'Application for leave to adduce relevant evidence des défenderesses, datée du 28 septembre 2020.
>
> Ainsi, nous vous soumettons que nous ne contestons pas la production de ces preuves soumis par les défenderesses (R-6 à R-9) . Cependant, ceci ne constitue pas de notre part une admission quant à leur pertinence à l'étape de l'autorisation du recours collectif. Ce qui sera débattu en temps opportun.
>
> Par ailleurs, nous tenons à vous informer de notre intention de produire dans les jours qui suivent une Application for temporary stay of the Application of Authorization.

[13] This Application was filed on November 10th, 2020. The grounds for requesting the stay will be summarized below.

[14] On September 5, 2018, Justice Chantal Châtelain, coordinating judge for the class action chamber, had specifically asked counsel for the parties whether related files had been opened outside Quebec and whether a stay would be requested. On September 17, 2018, Defendants' counsel replied that an action against his clients had been filed in

Vancouver regarding the consumption of the Alesse products and unwanted pregnancies,[3] but that he did not intend to request a stay.

[15] On September 27th, 2018, Plaintiff's counsel also replied, indicating that, « il n'existe qu'un dossier connexe en Colombie-Britannique qui ne vient pas de notre bureau. Pour notre part, nous ne désirons pas suspendre le dossier et nous voulons aller de l'avant. »

[16] Two years later, then, Plaintiff is now requesting a stay, arguing that the British Columbia certification should proceed prior to the Quebec authorization hearing, which should accordingly be sidelined.

QUESTION AT ISSUE

[17] Should the Court grant the requested stay and, if so, on what terms and conditions?

[18] For the reasons that follow, the Court denies the requested stay.

ANALYSIS

A. General Principles Concerning Suspension of Class Actions

[19] The Court of Appeal has rendered recent judgments establishing the grounds and criteria on which staying orders can be issued[4].

[20] Article 577 C.C.P. gives guidance as to what should inform the Court when a stay is sought in the context of multijurisdictional class actions:

> 577. The court cannot refuse to authorize a class action on the sole ground that the class members are part of a multi-jurisdictional class action already under way outside Québec.
>
> If asked to decline jurisdiction, to stay an application for authorization to institute a class action or to stay a class action, the court is required to have regard for the protection of the rights and interests of Québec residents.
>
> If a multi-jurisdictional class action has been instituted outside Québec, the court, in order to protect the rights and interests of class members resident in Québec, may disallow the discontinuance of an application for authorization, or authorize another

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3 *Taylor Janet MacKinnon and Alysa McIntosh* v. *Pfizer Canada Inc and Wyeth Canada*; Action No S187485.

4 *Equifax inc.* v. *Li*, 2018 QCCA 1560 (Leave to appeal to the Supreme Court of Canada denied on March 21st, 2019; Docket number 38411); *Garage Poirier & Poirier inc.* v. *FCA Canada inc.*, 2019 QCCA 2213; *Micron Technology inc.* v. *Hazan*, 2020 QCCA 1104. See also *Leopardi* vs. *Mercedes Benz Canada Inc.*, 2020 QCCS 3713; *Blackette* vs. *Blackberry Limited*, 2020 QCCS 2447.

> plaintiff or representative plaintiff to institute a class action involving the same subject matter and the same class if it is convinced that the class members' interests would thus be better served.

[21] Article 577 *C.C.P.* must be read in conjunction with articles 3135 and 3137 *C.C.Q.*, as well as article 49 *C.C.P.*

[22] *FCA Canada* establishes that authorization cannot be refused if proceedings were filed first in Quebec[5]. The other paragraphs of article 577 *C.C.P.* are to be considered when a stay is requested and the proceedings were filed in Quebec first.

[23] Article 3137 *C.C.Q.* does not apply if Quebec proceedings were filed first:

> On the application of a party, a Québec authority may stay its ruling on an action brought before it if another action, between the same parties, based on the same facts and having the same subject is pending before a foreign authority, provided that the latter action can result in a decision which may be recognized in Québec, or if such a decision has already been rendered by a foreign authority.

[24] The present proceedings were filed months before the BC proceedings.

[25] Plaintiff Hakim tried to argue that the stringent criteria of article 3137 *C.C.Q.* should be relaxed in class action proceedings.

[26] The Court of Appeal clearly ruled in *FCA Canada* that article 3137 *C.C.Q.* cannot be invoked in class action proceedings if one of its conditions, here, anteriority, is not met:

> [36] L'analyse d'une demande de sursis à statuer sur une demande d'autorisation, au motif que des recours semblables ont été entrepris dans d'autres juridictions, exige que le juge détermine d'abord si les conditions permettant de surseoir à statuer en raison d'une litispendance internationale sont remplies (3137 C.c.Q.). En effet, si l'une des conditions énoncées n'est pas satisfaite, la demande ne peut être accueillie.[6]

[27] If need be, the Court reaffirmed its ruling in *Hazan*, in a judgment penned by Justice Stephen Hamilton:

> [33] There was some debate in the Superior Court as to how these rules should be applied. Most judgments concluded that Article 3137 C.C.Q. applies to class actions under Hotte c. Servier, and that it was stricter than the "first to file" rule in that the Superior Court had no jurisdiction to stay the Quebec proceedings if they were instituted first and a discretion to do so (based on Article 3137 C.C.Q. and Article 577 C.C.P.) if they were not first.

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5 At paragr. 71, based on the text of paragr. 1 of article 577 C.C.P. (*déjà introduite à l'extérieur du Québec*).

6 *R.S.* v. *P.R.*, 2019 CSC 49.

[28] Both judgments, however, reaffirm the Court's inherent jurisdiction[7] to grant a suspension, without regard to the order of filing of the proceedings:

> [47] In FCA, the Court held that the Superior Court had the inherent jurisdiction to suspend the class proceedings pending in Superior Court "[s]i l'intérêt des membres putatifs et l'administration de la justice militent pour la suspension de l'instance"[8].

[29] Accordingly, the Court will examine Plaintiff Hakim's Application for a stay keeping in mind the criteria identified by the Court of Appeal in the exercise of its discretion:

> [73] Toutefois, ce n'est pas parce que les conditions de l'article 3137 C.c.Q. ne sont pas remplies dans un cas donné, comme c'est le cas ici en raison du dépôt la même journée des demandes d'autorisation au Québec et en Ontario, que la Cour supérieure perd tout pouvoir de suspendre la demande d'autorisation en vertu de sa compétence inhérente (art. 49 C.p.c.) si elle l'estime judiciairement requis. Même si les parties ne sont pas dans une situation de litispendance internationale au sens strict du terme (selon les conditions de l'article 3137 C.c.Q.), elles font tout de même face à des demandes d'autorisation multi-territoriales concomitantes, fondées sur les mêmes faits et ayant le même objet qui sont susceptibles, si autorisées, de couvrir les mêmes parties. En pareilles circonstances, il pourrait être justifié, selon les particularités propres au dossier du Québec et à la lumière des autres demandes étrangères, de suspendre la demande d'autorisation québécoise dans une perspective de saine administration de la justice et dans le respect de l'intérêt des membres putatifs du Québec. Si tel est le cas, la Cour supérieure doit pouvoir avoir recours à ce remède de suspension, sans pour autant surseoir à statuer jusqu'à une décision sur le fond du litige de la part du for étranger[9].

B. Grounds for requesting a Suspension

a) Lis Pendens

[30] Prior to pondering different elements of discretion and judicial management, it has to be established that we have two cases « *fondées sur les mêmes faits et ayant le même objet qui sont susceptibles, si autorisées, de couvrir les mêmes parties* ».

[31] Plaintiff submits that there is an identity of parties, the same facts and the same objects between the Quebec and the BC proceedings.

i. Same Parties

[32] According to Plaintiff, both class proceedings propose a national class whose members ingested the defective pill of Alesse 21/28 that was in the stream of commerce

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7 Spelled out at article 49 *C.C.P.*
8 *Hazan*, cited above.
9 *FCA Canada inc.*, cited above, underlining in the judgment.

in Canada at the time of the public advisory issued by Health Canada on December 1st, 2017 and resulted in unwanted pregnancies.

[33] Plaintiff acknowledges that the description of the BC group is more explicit then the one found in the Quebec Application for Authorization in regard to the period to which the class is limited being January 1st, 2017 to April 30th, 2019, but argues that the allegations of its Application for authorization have the effect of limiting the class to the same period as that of the BC action.

[34] According to Defendants, the parties are different for the following reasons :

> The QC Purported Group is much broader than the BC Purported Group, and in many respects. Specifically, the QC Purported Group:
>
> (i) includes entities as well as physical persons;
>
> (ii) includes persons and entities having purchased or acquired Alesse, even if they were not prescribed the contraception and did not ingest it;
>
> (iii) includes the dependants and family members of individuals having purchased or acquired Alesse; and
>
> (iv) is subject to no temporal limitations.[10]

[35] It may very well be that if the authorization is granted, the group will be redefined to include the same persons as the BC group. But as the Application stands at the present moment, the Court must take notice that the description of the group differs.

[36] While the Court has to show flexibility in these matters, the differences will have to be weighed at the end of the exercise.

ii. Same Facts

[37] According to Plaintiff, the essential facts in support of the Québec Action and the BC Action are related to the use of the defective Alesse 21/28, which were allegedly manufactured, marketed or sold by the Defendants. The causes of action in both proceedings would arise from the harm that these products allegedly caused to those that received them. Both actions also allege that the Defendants failed to adequately warn of such harm.

[38] Plaintiff further submits that the legal duties and grounds of negligence alleged in the Québec Authorization Application are substantially reiterated in the BC proceedings and that "on February 20, 2019, BC amended the notice of civil claim as to the Plaintiffs rely (sic) on competition consumer protection and trade practices legislation in British Columbia and similar legislation elsewhere including Quebec Consumer act" (sic)[11].

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10 Paragr. 20 of the Modified Respondents' Plan of Argument.

11 Paragr. 20 of Plaintiff's Plan of Argument.

[39] Defendants are more precise in their analysis of the facts on which the actions are grounded. While they recognize the similarities between the actions they point to the fundamental difference:

> 15. The QC Proceeding and the BC Proceeding share certain similarities. Both proceedings are, to varying extents, related to the December 1, 2017 Health Canada Public Advisory, which notified consumers and health care professionals that complaints had been received relating to packages of Alesse 21 (Lot A2532) and Alesse 28 (Lot A3183).
>
> a. QC Motion for Authorization at para 9
>
> b. Exhibit E, BC Proceeding Notice of Application at para 5
>
> 16. However, it is undeniable that the QC Proceeding and BC Proceeding have been brought with respect to different proposed groups, and on the basis of different causes of action.
>
> 17. Most significantly, the QC Proceeding is limited to questions of "capped" or broken pills, whereas the BC Proceeding is based on what BC Plaintiffs allege to be an insufficient concentration of the active ingredient in non-broken pills.
>
> a. R-7, QC Proceeding Transcript of Examination of Ms Amanda Hakim, dated 10 September 2019 at 106.1 to 107.13
>
> b. Exhibit E, BC Proceeding Notice of Application at paras 44-51
>
> 18. The causes of action thus respect different alleged faults, and relate to different aspects of the manufacturing process[12].

[40] Capped and broken pills on the one hand and insufficient concentration of active ingredients on the other hand, are significantly different causes of action.

[41] According to the examination of Amanda Hakim, the basis for the Quebec action is the public advisory on capped or broken pills :

> Q. [473] ... I just want to make sure that I
> 2 understand what my clients are being sued for.
> 3 A. It was based off of the...
> 4 Q. [474] The public advisory?
> 5 A. ... the public advisory, yes, 'cause we had
> 6 looked it up and that's what we, the lawsuit
> 7 came from that search that we had looked up.
> 8 Q. [475] Okay, and the public advisory is related
> 9 to capped pills...

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[12] Modified Respondents' Plan of Argument.

10 A. Okay.[13]

[42] While Defendants admit that the BC action refers to Health Canada's Public Advisory on the Alesse pills (which defendants argue is not a "recall"), they contend that the reference is only in passing.

[43] In the BC Notice of Application, filed on November 28, 2019, paragraphs 44 to 51 contain the allegations regarding the defects in the Alesse pills. Once the description of the chain of possession of the pills studied by plaintiffs' experts is established, paragraphs 48 and following read :

> 48. None of the Alesse pills tested contained 20 mcg of ethinyl estradiol as advertised by the Defendants on the product monograph. On June 27, 2019, Plaintiffs counsel received from Emery Pharma the results of the testing of the above noted Alesse. For Alesse 21 DIN 02236974 Lot A2532 (a Recalled Lot) the amounts of ethinyl estradiol ranged from 17,9954955 mcg to 18,70213964 mcg. For Alesse 28 DIN 02236975 Lot AA5698 (not a Recalled lot) the amounts of ethinyl estradiol ranged from 18, 00675676 mcg to 19.20326577 mcg.
>
> 49. Dr Michael Freeman is a forensic epidemiologist. Epidemiology is the scientific study of disease and injury in specific populations. In his report dated October 14, 2019, Dr Freeman opines that:
>
> > The lowest amount of ethinyl estradiol found in recalled Alesse 21 samples was
> > 17, 99 µg and in non-recalled Alesse 28 samples was 18 µg which was 10%
> >
> > less than the claimed amount of 20 µg.
> >
> > It is noteworthy that these results were for the pills that were not broken chipped or smaller than normal. <u>It is more likely than not that broken or smaller pills would contain even less amount of ethinyl estradiol</u>.
> >
> > As shown in the preceding drug test results the amount of ethinyl estradiol was up to 10 lower than the expected amount of 20 µg in both recalled and non-recalled Alesse pills. None of the tested samples whether recalled or non-recalled were broken or chipped and yet had 10 lower than the expected amount of ethinyl estradiol which indicates that there was a manufacturing defect in the normal shaped pills resulting in a lower level of ethinyl estradiol. Because the amount of ethinyl estradiol was found to be up to 10 lower than the claimed amount of 20 µg or more, the advertised 99% rate of efficacy claimed by Pfizer Canada Inc. for the recalled Alessee 21 and non-recalled Alesse 28 pills cannot be proven.
> > (The Court underlines)
>
> 50. Dr Sid Katz is a Pharmacologist In his report dated October 30 2019 Dr Katz opines that :

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[13] Transcript of the examination held on September 20th, 2019, p. 107.

> It is more likely than not that based on a literature review lower levels of ethinyl estradiol lower than 20 µg would result in a degree of lower efficacy, the extent of which would have to be determined by a controlled study.

[44] The following paragraph, 51, quotes yet another pharmacist, Dr. Jennifer Mosher, who opines on the effect of small variations in « critical dose drugs ».

[45] It is thus quite clear that the emphasis of the BC proceedings is on dosage rather than on the defective packing of the pills. Tests were not even effected on broken pills.

[46] Extracts of the expert reports filed in BC confirm this view. After having mentioned the Recall, Dr. Michael Freeman writes :

> 2) Reduced amount of ethinyl estradiol in recalled and non-recalled pills
>
> The pivotal question of interest is whether the recalled Alesse^{R} 21 and Alesse^{R} 28 pills contained 20 micrograms of ethinyl estradiol as claimed by Pfizer Canada inc. To determine the levels of levonorgestrel and ethinyl estradiol in the recalled pills, Emery Pharma tested the samples from the recalled lot of Alesse^{R} 21 and non-recalled lot of Alesse^{R} 28 using HPLC-based method^{7} described.
>
> In the USP monograph (as necessary with UV-Vis and/or spectrofluorimetric detection) and compared them with Larissia pills, a US generic brand used as a positive control. Both recalled and unrecalled Alesse^{R} 21 and Alesse^{R} 28 samples contained pills that were unbroken. This fact was corroborated by the test results that showed that the amount of levonorgestrel exceeded the expected amount of 100 pg in all the lots, which indicates that it is unlikely that the tested pills were chipped, broken or otherwise smaller than the normal size. However, the amount of ethinyl estradiol was found to be lower than the expected amount of 20 pg in both recalled and non-recalled samples.

[47] Neither of the BC Applicants' affidavits mention the broken pills.

[48] The Court concludes that there exists a significant difference in the factual basis between the two claims.

iii. Same Object

[49] For the purposes of this exercise, the Court considers that both recourses seek damages based on consumer legislation and health administration statutes of different provinces and have the same object.

[50] The Court concludes from the review conducted above that there exists a significant difference between the factual basis of both recourses and that Plaintiff has not established a situation where there exists *lis pendens* with regards to both actions.

b) Proper Administration of Justice

[51] Notwithstanding the conclusion arrived at above, the Court will examine whether the proper administration of justice is better served by granting a suspension by which the Quebec Courts will await the results of BC certification.

[52] Justice Christiane Alary summarized the criteria that should be looked at when the Court exercises its discretion to suspend proceedings, in *Gravel* c. *Agence du revenu du Québec*[14]:

> [13] La Cour supérieure a juridiction pour suspendre des procédures, en vertu de son pouvoir inhérent, si la saine administration de la justice le requiert. La jurisprudence a déterminé différentes circonstances ou conditions justifiant une suspension de l'instance :
>
> 1. il existe un lien indéniable entre deux instances;
>
> 2. le sort ultime d'un recours dans une instance dépend, dans une large mesure, du sort d'un recours dans une autre instance;
>
> 3. la suspension du recours permet d'assurer la règle de la proportionnalité;
>
> 4. il existe un risque de jugements contradictoires sur certaines questions dont sont saisies les deux instances;
>
> 5. l'absence de suspension aurait pour effet de multiplier inutilement les procédures et les coûts pour les parties.
>
> [14] Pour accorder une suspension de l'instance, il n'est pas nécessaire que la situation remplisse les cinq conditions ci-haut mentionnées. Par ailleurs, plus il y a de conditions réunies, plus le Tribunal sera enclin à accorder la suspension.
>
> [15] La suspension est cependant l'exception et non la règle. Le critère déterminant demeure le meilleur intérêt de la justice. (References omitted, underligning by the Court)

[53] In the context of a class action, the interest of Quebec residents must be factored in, pursuant to article 577 *C.C.P.* In *Li* c. *Equifax inc.*[15], Justice Donald Bisson enumerated a number of criteria to ascertain whether this interest is taken into consideration :

- L'avancement des procédures devant l'autre juridiction;
- La participation active des avocats du groupe au Québec dans les procédures en cours devant l'autre juridiction;

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14 2016 QCCS 3578.

15 2018 QCCS 1892, at paragr. 34; leave to appeal denied, 2018 QCCA 1560.

- Le fait qu'il n'existe aucune règle nationale pour régir les cas de litispendance internationale;
- La différence des lois applicables dans les différentes juridictions;
- Le fait que le représentant du groupe proposé au Québec soit dans une meilleure position pour représenter les membres du Québec que le représentant dans le recours pendant devant une autre juridiction;
- La participation et l'intérêt démontré par les membres quant aux procédures au Québec;
- L'intérêt démontré à l'égard des résidents du Québec et leur participation dans les procédures en cours devant l'autre juridiction.

[54] Plaintiff has known about the BC proceeding for more than 22 months, having been informed of it by BC Class Counsel on February 1, 2019. Her lawyers confirmed to Justice Châtelain that they would not seek a suspension of the Quebec proceeding. Plaintiff has offered no valid reason to depart from the judicial contract that was entered into at the time.

[55] The present proceeding is at least as advanced as the BC proceedings. Had it not been for the filing of the present Application, this Court would have been seized to hear the debate on the authorization of the Quebec proceeding on December 18, 2020. In contrast, the BC proceeding is only scheduled to be heard on April 6-8, 2021.

[56] Plaintiff advances that "the *MacKinnon* BC action is particularly well suited to a national certification emanating from one of the common law provinces because the certification system with the examination of expert reports and a greater focus on the probability of success at the common issues trial moves the Group closer to resolution than authorization under the civil law process"[16];

[57] This assertion is particularly surprising when it is recognized that the Quebec regime of class action authorization offers a much quicker and simpler process of authorization. The Supreme Court of Canada recently reiterated in *Desjardins cabinet de services financiers inc.* v. *Asselin*[17] that the Quebec procedure is "more flexible than the one that exists in the rest of the country" and that "the threshold for authorizing a class action in Quebec is a low one".

[58] The Court repeats that "It should be noted that in Quebec, unlike in the rest of the country, an applicant is not required to "show that the claim has a 'sufficient basis in fact'".[18]

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16 Paragr. 65 of Plaintiff's Plan of Argument.
17 2020 SCC 30, at paragr. 22 and 27.
18 Idem, at paragr. 81.

[59] One wonders why, if the other regimes are so much better, Plaintiff's counsel bothered to file an application in Quebec. Others are prevented from filing in the meantime, due to the "first to file rule" applicable in Quebec.[19]

[60] We have seen above that there are significant differences between the Quebec and the BC proceedings. Certification in BC does not necessarily lead to authorization in Quebec nor does refusal to certify necessarily prevent authorization in Quebec.

[61] Plaintiff argues that "additionally, British Columbia is a no costs jurisdiction, meaning that costs are not to be awarded against a party for all or any part of a class proceeding unless there is improper conduct"[20]. The Court is thankful for the explanation but insists on reminding counsel that Quebec is also a no costs jurisdiction, save and except for the "legal costs" provided for at article 339 *C.C.P.*, which are basically disbursements and in no way approach the solicitor client costs that can be imposed in other provinces.

[62] The Court was informed that BC plaintiffs' counsel, Rice Harbut Elliott LLP (RHE), had entered a national consortium with Merchant Law Group LLP to pursue the cases. The Consortium agreement was not part of the record when the Application to stay was filed in November 2020, and was not available at the hearing.

[63] The only exhibit filed was an email form Me Leoni of RHE addressed to Tony Merchant dated September 10, 2020, expressing an agreement in principle to the terms of a correspondence "regarding our firms working together on the Alesse matters."[21]

[64] When the undersigned asked to be provided with a copy of the agreement, such copy was forwarded and received on December 18th. The "Co-counsel Agreement"[22] submitted was signed on that same date of December 18th 2020.

[65] Said Co-counsel agreement provides that all fees earned in both class actions shall be split 50%-50% between the firms. This clause disregards the fact that fees have to be approved and apportioned by the Court : Article 593 *C.C.P.*

[66] Plaintiff advances that "the Consortium is well suited to serve members of the Group. RHE has offices in British Columbia, but Merchant Law Group LLP has offices in Calgary, Edmonton, Kelowna, Langley, Montreal, Moose Jaw, Ottawa, Regina, Saskatoon, Surrey, Toronto, and Winnipeg. The Montreal office of Merchant Law Group will provide services in French to Francophone members of the Group as the case progresses; Anthony Leoni of RHE will be attending that certification with other attorneys

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19 *Hotte* c. *Servier Canada inc.*, 1999 CanLII 13363 (QCCA).
20 Paragr. 66 of Plaintiff's Plan of Argument.
21 Exhibit J.
22 Exhibit K.

at law from RHE and from the Merchant Law Group LLP offices in British Columbia and perhaps elsewhere."[23]

[67] Me Leoni, partner of RHE, has an impressive class action and product liability litigation CV[24]. He is member of the Bar of British Columbia, but not of the Barreau du Québec.

[68] When the undersigned asked if Quebec counsel had been invited to appear in April 2021 before the BC Court, she replied negatively. She has not sought to apply for an Inter-Jurisdictional Practice Permit or for a temporary practice permit, or verified whether she actually needed one, in order appear before the Court and represent the interests of Quebec residents.

[69] A passing reference in the BC proceeding[25] to "similar legislation elsewhere, including the *Quebec Consumer Protection Act*[26]" does not satisfy the Court that the interests of Quebec residents are protected, as required by Article 577 *C.C.P.*

[70] Nor is the Court satisfied with paragraph 30c of Amended Notice of Civil Claim stating that Plaintiffs are claiming "on behalf of the Minister of Health and Social Services of Quebec, for the cost of all insured services furnished or to be furnished pursuant to s. 10 of the *Hospital Insurance Act*, R.S.Q. c. A-28".

[71] Whether the Quebec Minister of Health and Social Services can be a class member in British Columbia does not have to be decided here, nor does the possibility that litigants may act on his behalf in British Columbia, probably without his knowledge.

[72] Plaintiff argues further that "significantly much more work has been done by the Consortium on the common law claims than the work done to date on the civil law claim in Quebec"[27].

[73] The value of the work done by the Consortium on the common law claims would be $178,506.25 and the value of work done on the civil law claim in Quebec would be $12,405.85[28].

[74] When the matter is further scrutinized, it appears that MLG has recorded $99 346.25 worth of time charges for its work in the "common law claims"[29]. Given the fact that examinations have been conducted in Quebec and that the present file has been

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23 Paragr. 72 of Plaintiff's Plan of Argument.
24 Exhibit C.
25 At paragr. 30 b of the Amended Notice of Civil Claim dated February 20, 2019.
26 CQLR c P-40.1.
27 Paragr. 67 of Plaintiff's Plan of Argument.
28 Paragr. 69 of Plaintiff's Plan of Argument.
29 Paragr. 18 and 19 of the Statement in lieu of testimony (Article 555 *C.C.P.* (sic)) of Antony Leoni dated November 10, 2020, Exhibit G.

"active" for almost two years, the Court has to be skeptical as to how time charges have been allocated to the different proceedings.

[75] In his Statement[30], Me Leoni testifies that he is informed that 17 Quebec residents have made contact with MLG regarding this case, while 131 residents of the common law provinces have made contact with the RHE and that 95 of those people are from British Columbia.

[76] More significant in the Court's view is that only 7 Quebec residents have made contact with RHE.

[77] In conclusion, the Court is not satisfied that both proceedings have an "undeniable link" in the sense that the outcome of one proceeding depends on the other, given the significant difference in the factual basis of both claims.

[78] The risk of contradictory judgments, given this factual difference, is indifferent.

[79] While a refusal of the stay might occasion additional work to Plaintiff Hakim's counsel, given the advancement of the present proceedings, given their expertise in class actions, and given the relative simplicity of an authorization hearing in Quebec, the Court does not believe that it is imposing an unbearable burden on counsel.

[80] The Court has not been convinced that Quebec counsel were actively involved in the BC proceedings, nor that Quebec legislation is significantly considered. Very little interest has been demonstrated by Quebec residents in the BC proceedings nor has any demonstration of their participation thereto been advanced.

[81] The Court is not satisfied that the interests of Quebec residents are protected by the British Columbia proceedings nor that the imperatives of proportionality, fairness and orderly progress of proceedings would be met if the Quebec proceedings were stayed[31].

CONCLUSION

[82] It is the Applicant's burden to prove that staying the Quebec proceeding is in the interest of Québec residents and would further the proper administration of justice. Plaintiff has not convinced the Court that such is the case.

[83] The Court will not exercise its discretion in favor of a stay.

[84] Defendants had prepared their defence against the Motion for Authorization and confirmed their availability for a one day hearing in December 2020. This date has now passed. The Court is nonetheless available to hear the Application for authorization prior to the scheduled hearing in British Columbia.

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30 Paragr. 20.

31 *Lebel* v. *Boehringer Ingelheim (Canada) Ltd/ltéé*, 2021 QCCS 6.

[85] The Court has informed the parties at hearing that it would set a hearing date for authorization in early April 2021, should the request for a stay be denied. The Court sets the date for April 1st, 2021.

FOR THESE REASONS, THE COURT:

[86] **DISMISSES** Plaintiff Amanda Hakim's Application for a temporary stay of the present proceedings.

[87] **FIXES** the hearing on authorization to exercise a class action on April 1st, 2021.

[88] **WITH COSTS** against Plaintiff.

SYLVAIN LUSSIER, J.S.C.

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Me François-David Paré
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Hearing date: December 18, 2020