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

S U P E R I O R C O U R T
(Class Actions)

N^{O}: 505-06-000025-218

JOHANNE PELLETIER

Plaintiff

v.

BOEHRINGER INGELHEIM (CANADA) LTÉE

Defendant

APPLICATION TO DISMISS PLAINTIFF'S MODIFIED APPLICATION FOR AUTHORIZATION TO INSTITUTE A CLASS ACTION AND BE APPOINTED CLASS REPRESENTATIVE (Article 168 (1) and (3) C.C.P.)

TO ONE OF THE HONORABLE JUDGES OF THE SUPERIOR COURT, SITTING IN THE CLASS ACTIONS DIVISION, IN AND FOR THE DISTRICT OF LONGUEUIL, DEFENDANT BOEHRINGER INGELHEIM (CANADA) LTÉE RESPECTFULLY SUBMITS THE FOLLOWING:

I. INTRODUCTION

1. The Defendant Boehringer Ingelheim (Canada) Ltée (« **BICL** ») submits that Plaintiff's *Demande modifiée pour autorisation d'exercer une action collective et pour être représentante* (the « **Application for Authorization** ») should be dismissed *in limine litis*. The proposed class action and Plaintiff's individual claim have already been settled through a class-wide settlement agreement duly approved by the Québec Superior Court. BICL relies upon the *res judicat*a doctrine.

2. In addition, the Plaintiff lacks the interest required to bring this proceeding. By virtue of the prior court-approved settlement, the Plaintiff granted a release in favour of BICL and undertook not to commence any action related to any matter at issue in the proposed Application for Authorization.

3. BICL respectfully submits that this honourable Court must hear and decide upon the present exception to dismiss prior to the authorization hearing.

II. THE PROPOSED CLASS ACTION

4. Plaintiff is seeking authorization to institute a class action on behalf of :

> Toutes les personnes qui se sont vu prescrire du Mirapex® parce qu'elles étaient atteintes de la Maladie de Parkinson et du Syndrome des jambes Sans Repos (SJSR) qui ont développé une addiction et/ou une dépendance au jeu, et pour assouvir cette dépendance :
>
> > -Ont dilapidé et/ou vendus leurs biens pour avoir de l'argent pour aller jouer ;
> >
> > - Se sont endettées en prenant des crédits et/ou en hypothéquant leur maison pour avoir de l'argent pour aller jouer;
> >
> > - Et enfin qui ont commis des vols de sommes d'argent pour s'adonner à cette dépendance de jeu,
>
> Et ce, depuis l'été 2018 jusqu'à la date de la correction de la faute des défenderesses.

(the "**Proposed Group**")

5. At paragraph 88 of the Application for Authorization, Plaintiff clarifies that the Proposed Group is limited to Québec.

6. At paragraph 22 of the Application for Authorization, Plaintiff admits that MIRAPEX® product monograph (Exhibit P-3) includes a specific warning related to pathological gambling and compulsive shopping.

7. According to the Plaintiff, even though she understood that she could develop pathological gambling related to the use of MIRAPEX®, she claims not to have known that pathological gambling could result in financial loss, economic problems or criminal behavior (see para. 23 and 76 of the Application for Authorization).

III. THE APPROVED SETTLEMENT AGREEMENT

8. As alleged at paragraph 80 of the Application for Authorization, a class action was instituted in 2009 regarding the MIRAPEX® in the case of *Lépine v. Boehringer*, C.S.M. 500-06-000463-097 (the "**Lépine Action**"), the whole as more fully appears from a copy of the *Requête amendée pour autorisation d'exercer un recours collectif et pour être représentante*, communicated in support herewith as **Exhibit R-1**.

9. In July of 2011, BICL concluded a Settlement Agreement in the Lépine Action (the "**Settlement Agreement**"), the English Version of which is communicated in support herewith as **Exhibit R-2**.

10. The Settlement Agreement expressly provides that the parties intend to "*resolve all past, present, and future claims of Class Members in any way arising out of or relating to the purchase or ingestion of Mirapex® by or for residents of Québec*."

11. On December 19, 2011, Justice De Wever of the Québec Superior Court authorized, for the purpose of settlement, the class action on behalf of:

> Toutes les personnes résidant au Québec à qui a été prescrit et qui ont consommé le MirapexMD à quelque moment que ce soit jusqu'à la date de signature de la présente entente et toutes les personnes qui résidaient au Québec au moment où le MirapexMD leur a été prescrit et où elles en ont consommé.
>
> (the "**Lépine Class**")

The whole as appears from said decision filed in support herewith as **Exhibit R-3** (the "**Approval Decision**").[1]

12. In the Approval Decision, Justice De Wever also approved the Settlement Agreement and ruled that all members of the Lépine Class who did not validly opt out of the settlement are members of the "Settlement Class" and are therefore bound by the Settlement Agreement, the whole as more fully appears from the Approval Decision.

13. In addition, the Settlement Agreement and the Approval Decision prohibit any Settlement Class member (included in "Releasor" as per the definitions) from commencing any action related to any matter at issue in the Lépine Action. Sections 13.1 and 13.2 of the Settlement Agreement reads:

> 13.1 No Releasor may institute, continue, maintain or assert, either directly or indirectly, whether in the United States or Canada or elsewhere, on their own behalf or on behalf of any class member, any action, suit, cause of action, claim or demand against any Releasee, or any person who may claim contribution or indemnity from any Releasee, in respect of any Released Claim or any matter related thereto. Upon issuance of the Approval Order, and in consideration of payment of the Settlement Amount and for other valuable consideration set forth in this Agreement, the Releasors shall be deemed to, and do hereby, release and forever discharge the Releasees of and from any and all claims arising from or in any way related to or within the scope of the Released Claims.
>
> 13.2 Any proceeding against any Releasee related to the Released Claims shall be immediately dismissed and the Parties shall request any

[1] The Ontario Superior Court approved a similar settlement in respect of a national class (except for Québec), the whole as more fully appears from a copy of the approval decision filed in support herewith as **Exhibit R-6.**

> court in which such claim is or has been commenced to order the immediate dismissal of the same.

14. The Settlement Agreement defines **"Released Claims"** to mean:

> "any and all manner of claims, demands, actions, suits and causes of action of any nature whatsoever, including any subrogated or derivative claim, whether known or unknown, suspected or unsuspected, direct or indirect, and whether in law, under statute or in equity, that the Releasors or any of them ever had, now have, or hereafter can, shall, or may have, from the beginning of time up to the date of this Agreement, in respect of or relating in any way to any matter at issue in the Action including, without limitation, those claims actually asserted in the Action and any claim that could have been asserted in the Action."

15. The Settlement Agreement was subsequently amended on June 13, 2012 to increase the available settlement funds to the benefit of the Lépine Class, which amendment was approved by Justice De Wever, the whole as more fully appears from said amendment and decision respectively filed in support herewith as **Exhibit R-4** and **R-5**.

16. The Settlement Agreement, which was clearly intended to address claims of gambling losses allegedly related to MIRAPEX®, was widely published in 2011, as noted in Section 9.2 of the Settlement Agreement and paragraph 51 of the Approval Decision.

17. The notice plan was approved by the court, the whole as appears from the Approval Decision.

18. In her Application for Authorization, Ms. Pelletier alleges having been prescribed MIRAPEX® on or about August 19, 2009. Consequently, Ms Pelletier is a member of the Lépine Class.

19. As Ms. Pelletier never opted out of the Lépine Class, she is also a member of the Settlement Class and she is therefore bound by the terms and conditions of the Settlement Agreement and the Approval Decision.

20. The appeal period in the Lépine matter has long elapsed and the matter is now *res judicata*.

21. By virtue of Article 2633 of the *Civil Code of Québec* ("**CCQ**"), the Settlement Agreement has the authority of *res judicata*.

22. As explained more fully below, this applies not only vis-à-vis the Plaintiff, but also vis-a-vis the group she now seeks to represent with her Application for Authorization.

IV. THE DOCTRINE OF RES JUDICATA APPLIES

23. Article 2848 CCQ recognizes that:

> The authority of res judicata is an absolute presumption; it applies only to the object of the judgment when the demand is based on the same cause and is between the same parties acting in the same qualities and the thing applied for is the same.
>
> However, a judgment deciding a class action has the authority of res judicata with respect to the parties and the members of the group who have not excluded themselves therefrom.

The Same Parties

24. The Lépine Action and the Plaintiff's Application for Authorization seek the same relief based upon the same allegations of wrongdoing against the same Respondent.

25. Accordingly, both groups are considered the same for the application of the *res judicata* doctrine.

The Same Cause and the Same Object

26. Under the Settlement Agreement, all members of the Lépine Class, including Ms. Pelletier, released all past, present, and future claims in any way arising out of or relating to any matter at issue in the Lépine Action.

27. The Lépine Action especially alleged that the risks of developing obsessive or compulsive behaviour, such as compulsive gambling, should have been communicated by BICL (para 3.17 of the Lépine Action).

28. The Lépine Action also alleged that compulsive behaviour such as compulsive gambling may lead to loss of employment, impoverishment, marriage breakdown, depression, etc., which risks allegedly should have been disclosed (para 3.17 of the Lépine Action).

29. Finally, the Lépine Action alleged that the claimant had lost her husband and her employment, dissipated all her assets by gambling almost daily, and finally declared bankruptcy (para 3.47 of the Lépine Action).

30. The claims asserted in the Lépine Action clearly include allegations regarding a risk of developing pathological gambling, and any and all claims for damages that might result from such gambling, including financial losses.

31. The Settlement Agreement also made provision for financial losses from gambling. Specifically, it provided for the creation of a Settlement Fund (the

"**Settlement Fund**") from which eligible claimants could receive payment for "Gambling Loss" and "Life Impact" as defined in the Settlement Agreement.

32. The Settlement Agreement also provided for the creation of three distinct funds within this Settlement Fund of CAD$2,717,600, namely: (i) The Administration Fund of CAD$215,000; (ii) The Gambling Loss Fund of CAD$2,320,000; (iii) The Life Impact Fund of CAD$317,600.

33. The Settlement Agreement broadly defines "Gambling", "Gambling Loss" and "Life Impact" as follows:

> 1.22 "Gambling" means any form of betting involving the risk of loss of money but does not include any form of business, investment or securities trading activity.
>
> 1.24 "Gambling Loss" means the net financial loss suffered by a Claimant as a result of the Claimant's Gambling, as set forth in the Claimant's Gambling Loss Evidence.
>
> 1.31 "Life Impact" means any of the following events experienced by a Claimant during the Claimant's ordinary use of Mirapex®: bankruptcy, Gambling therapy, or a significant adverse change in the Claimant's relationships with family members.

34. When the Lépine Action and the Settlement are compared to the Plaintiff's Application for Authorization, it is readily apparent that the Plaintiff seeks authorization to bring a class action against the same defendant seeking the same categories of damages and for the same legal reasons.

35. Lépine and the Plaintiff have the same juridical identity. They both purport to act on behalf of the same putative class of alleged victims of the same wrong imputed to the Respondent seeking the same damages for the same reasons.

36. The proper application of the *res judicata* doctrine therefore requires that the Application for Authorization be dismissed.

V. PLAINTIFF HAS CLEARLY NO INTEREST

37. As mentioned in para. 13 above, the Settlement Agreement and the Approval Decision prohibit any Settlement Class member, including Ms. Pelletier, from commencing any action related to any matter at issue in the Lépine Action. As such, Ms. Pelletier does not possess the required interest to bring this proceeding, amounting to a *fin de non-recevoir*.

38. It is in the interest of justice and the proportionality principle that the present Application be heard prior to the filing of any other preliminary applications and prior to the authorization hearing.

39. Approved settlement decisions must play their role in preventing settled recourses to go further. Allowing such claims to proceed would be detrimental to the settling parties and the stability of the legal system.

40. In addition, the Settlement Agreement especially provides that any such action brought by a Settlement Class Member be dismissed without delay.

41. BICL respectfully submits that this Honourable Court must give effect and enforce the Approval Decision by dismissing the present action forthwith.

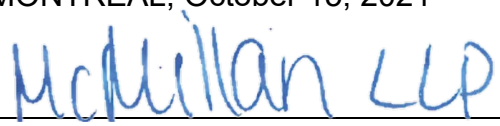
FOR THESE REASONS, MAY IT PLEASE THIS HONOURABLE COURT TO :

GRANT the present Application;

DISMISS Plaintiff's *Demande modifiée pour autorisation d'exercer une action collective et pour être représentante;*

THE WHOLE with costs

MONTREAL, October 15, 2021



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ORIGINAL

APPLICATION TO DISMISS PLAINTIFF'S MODIFIED APPLICATION FOR AUTHORIZATION TO INSTITUTE A CLASS ACTION AND BE APPOINTED CLASS REPRESENTATIVE (ARTICLE 168 (1) AND (3) C.C.P.)

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