

C A N A D A

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

PROVINCE OF QUEBEC  
DISTRICT OF MONTREAL

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JOAN LETARTE

N<sup>o</sup> : 500-06-000788-162

*PLAINTIFF-Applicant*

-vs-

BAYER INC.

AND

BAYER CORPORATION

AND

BAYER HEALTHCARE LLC

*RESPONDENTS-Defendants*

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**AMENDED APPLICANT'S APPLICATION FOR LEAVE TO EXTEND TIME LIMIT  
TO NOTIFY THE *ORIGINATING APPLICATION* AND TO BE RELIEVED FROM ANY  
DEFAULT TO NOTIFY THE PROCEEDINGS IN DUE TIME  
(Art. 107(3) et 84 C.C.P. )**

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**TO THE HONOURABLE JUSTICE MARTIN F. SHEEHAN, APPOINTED JUDGE FOR  
PURPOSES OF THE PRESENT PROCEEDINGS AT THE SUPERIOR COURT OF  
QUEBEC, SITTING IN AND FOR THE DISTRICT OF MONTRÉAL, APPLICANT  
RESPECTFULLY SUBMIT AS FOLLOWS:**

1. The applicants are seeking Court for leave to extend time limit to notify the Originating Application to the Defendant BAYER CORPORATION and to be relieved from any default to notify the proceeding in due time pursuant to 107 al.3 CCP, if applicable.

## **I. PROCEDURAL BACKGROUND**

2. On April 15, 2016, the Applicants filed an Application to institute a class action, as it appears from the Court file;
3. Since, the beginning of the proceeding, the Defendants Bayer Inc., Bayer Healthcare and Bayer Corporation are all represented by *Société d'Avocats Torys S.E.N.C.R.L.* (“Torys”);
4. On March 20, 2019, Justice Chantal Lamarche authorized the class action on behalf of the following group, a copy of the authorization judgement communicated herein as **EXHIBIT-1**:

*All women residing in Québec, including their successors, assigns, family members, and dependants, who were implanted with Essure and who were diagnosed with urinary tract infections, perforated organs, implant migration, pelvic pain, menorrhagia or autoimmune symptoms between July 1, 2011 and the date of the Judgment authorizing the class action.*

5. On April 18, 2019, Counsels of the Defendants commonly represented by Torys, filed a Notice of appeal, which leave to appeal was denied by Honorable Justice, Marie-France Bich, J.C.A, on June 21, 2019;
6. On August 8, 2019, the Applicants filed an Originating Application, as it appears from the Court file;
7. On January 15, 2020, a conference call for directions was held with Justice Christine Baudouin fixing a timetable for the proceedings. After which, the First Case protocol was filed and signed by all parties on 5 and 6 February 2021, in which it appears that the “*latest date on which the Application was served on all parties*” is on August 30, 2019, communicated herein as **EXHIBIT-2**;
8. On March 17, 2020, Me Geneviève Bertrand, counsel of the Defendants informed the Courts that they will not be filing any preliminary exception anymore (motion for striking allegations or motion for precision) and that parties are now at the stage of filing their experts’ reports, which deadline was March 31, 2020 according to the First case Protocol, email from Me Bertrand to Honorable Justice Bertrand communicated herein as **EXHIBIT-3**;

9. In July 2020, Me Christine Nasraoui replaced her predecessor, Me Erik Lowe, to represent the Plaintiff;
10. On August 21, 2020, Counsel of the Plaintiff addressed an email to opposing counsels informing them that she will be representing the Plaintiff and that a new case protocol should be discussed due to the suspension of judicial activities resulting from the Pandemic, as it appears from a copy of the email of Me Nasraoui to opposing counsels, **EXHIBIT-4**;
11. On August 26, 2020, Class counsels discussed and agreed on the First Amended case protocol signed on the 25 and 26 August 2020 and was approved by Justice Christine Baudouin on September 3, 2020, without further formalities, as it appears from the court file;
12. Due to the situation of the Pandemic, experts were difficult to be reached and was impossible for the plaintiff to communicate their experts' reports by January 15, 2021 as per the First amended Protocol;
13. Parties discussed, agreed and signed on December 15, 2020 the Second amended case protocol, extending the deadline to communicate the Plaintiff experts' reports to September 15, 2021, and the time limit for trial and readiness is extended to December 2, 2022, as it appears from the Court File;
14. Honorable Justice Sheehan requested a conference call for directions, which was held on December 15, 2020, in which counsels were ordered to respect the new timetable negotiated by the parties and to submit any issue that arises and requires his intervention without delay in order to avoid any delay in the proceedings, as it appears from the Court minutes, **EXHIBIT-5**;
15. On May 3, 2021, Defendants' counsel, Me Marie-Eve Gingras, communicated with the plaintiff's counsel, Me Nasraoui, inquiring on the notification to Bayer Corporation and following up on their email on the same to Me Erik Lowe, as it appears from the copy of the emails between Plaintiff's counsel, Me Erik Low, and Defendants' counsels, dated September 19, 2019 and between Plaintiff's counsel, Me Nasraoui, and Defendants' counsels on May 3 and 13, 2021 and September 9, 2021, communicated all together as **EXHIBIT-6**;

16. On September, 15, 2021, three experts reports by 3 different experts were communicated to opposing counsels, as set in Second amended case protocol;
17. On September 17, 2021, the exhibits in support of the *Application for authorization* were communicated to the Defendants' counsel in support of the *Originating Application*;
18. According to the Second amended case protocol, Defendants are to file their Defense on 31<sup>st</sup> of January 2022;

## II. ISSUES: NOTIFICATION TO DEFENDNATS, i.e. BAYER CORPORATION

19. The Defendant, Bayer Inc., is a corporation with offices at 77 Belfield Road, Toronto, Ontario;
20. The Defendant, Bayer Healthcare LLC, is headquartered at 1011 McCarthy Blvd, Milpitas, CA, 95035 United States;
21. The Defendant, Bayer Corporation, is an Indiana corporation with offices at 100 Bayer Road, Pittsburgh, Pennsylvania, U.S.A., 15205;
22. The notification to Bayer Corporation and to Bayer Healthcare are international notifications in the United States which must comply with the requirements of the Hague Convention of 15 November 1965 on the service abroad of judicial and extrajudicial documents in civil or commercial matters, pursuant to article 494 and 495 C.C.P.;
23. On the same day that the Originating application was filed on August 8, 2019, the Applicant mandated ABC Legal to notify the American entities of the Defendants, Bayer Corporation and Bayer Healthcare, under the Hague Convention, as it appears from a copy of the form Request of service abroad dated on August 8, 2019, communicated herein as **EXHIBIT-7**;
24. On September 19, 2019, Defendants' counsel requested Me Erik Lowe, counsel of the Plaintiff, a follow upon the service to Bayer Corporation, a copy of the email communicated herein as EXHIBIT-6;

25. Anthony Tibbs from Merchant Law Group inquired from ABC Legal an update on the service to Bayer Corporation. He was informed that a confusion occurred between Bayer Corporation and Bayer Healthcare, but this to be taken care immediately, as it appears from a copy of the communications between Anthony Tibbs and ABC Legal on August and September 2019, a copy of all communications between ABC Legal and MLG regarding the notification to Bayer Corporation on their website, communicated altogether herein as **EXHIBIT-8**;
26. On May 4, 2021, counsel of the Plaintiff followed up with ABC Legal on the service to Bayer Corporation. Another follow ups were made on August 9, 11 and 19, 2021 (EXHIBIT-8);
27. Upon being informed that the service to Bayer Corporation was not done, counsel of the Plaintiff on the 19 of August 2021, mandated again ABC Legal to serve the Originating Application to Bayer Corporation. On the 8 of September 2021, a first attempt was done to Bayer Corporation's headquarter which failed since Bayer had moved their headquarter. Bayer Corporation was finally successfully served to its representative agent on September, 9, 2021, a copy of the proof of service Bayer Corporation communicated herein as **EXHIBIT-9**;

### III. ARGUMENTS

#### *No application of article 107(3) in the context of international notification*

28. Bayer Corporation is an international notification in the United States which must comply with the requirements of the Hague Convention, pursuant to article 494 and 495 C.C.P.;
29. Pursuant to Article 107(3) C.C.P. an Originating application expires if it is not notified within three (3) months after it is filed;
30. The jurisprudence does not seem consistent on the requirements of 107(3) C.C.P. to notify an Originating Application in the case of the international notification;
31. In some cases, 107(3) C.C.P. does not seem to apply for the international notification made under of 494 C.C.P.;

32. In fact, Honorable Justice Michel A. Pinsonnault, J.C.S. concluded that articles 106 to 140 C.c.P. does not apply in cases of international requirements. He writes in *Syndic de Liquid Nutrition Franchising Corporation*, 2018 QCCS 5014: **(TAB 1)**

*[67] Le Tribunal retient de tout ce qui précède que les dispositions se retrouvant aux articles 106 à 140 C.p.c. ne s'appliquent pas lorsqu'il s'agit de notifier ou de signifier à l'extérieur du Canada (à l'étranger) un acte judiciaire en matière civile ou commerciale.*

*[68] En pareilles circonstances, les dispositions des articles 494 à 496 C.p.c. doivent être appliquées obligatoirement, car le Tribunal ne dispose d'aucune discrétion à ce sujet et que le plaideur international doit s'y plier.*

33. This was reiterated in *Omega Laboratories Ltd. c. Claris Lifesciences Ltd.*, 2018 QCCS 833 (CanLII), as seen at paragraph 11; **(TAB 2)**

***If applicable, the delay provided in 107 (3) C.C.P. is not mandatory and could be extended by Court upon request***

34. In some other cases, the delay of three (3) months provided for in Article 107 (3) C.C.P. seemed to be applicable in the cases of international notification done pursuant to 494 C.C.P., though it is not mandatory (is not “de rigueur”) and can be extended by the Court on request;

➤ *Surin c. Apple inc.*, 2021 QCCS 2217, par. 22. **(TAB 3)**

35. The time required to notify one of the Defendants, BAYER CORPORATION went beyond the three (3) months delay set in 107(3) C.C.P.;

36. In fact, the default (if any) to notify the proceedings in time did not cause any prejudice to the Defendant Bayer Corporation;

37. Bayer Corporation was at all material times represented by the same law firm as the other Defendants;

38. Bayer Corporation was aware of the existence of the proceedings and was even part of the proceedings since it all commenced in 2016;

39. The latter were collaborating with Plaintiff's counsel in the progress of the proceedings since the filing of the Originating Application;

40. Aside, counsels of the Defendants did not bring up that there will be an issue of irregular service to Bayer Corporation before the expiry of the delay or at any other material time during the development of the procedure and before the possible expiration of the right of action of the Plaintiff, the Counsel of the Plaintiff would have file the present Application in due time, asking this Court to extend the delay under article 107 C.C.P., as it is not a strict delay (84 C.C.P.), all in the spirit of corporation between counsels, pursuant to article 20 C.C.P.;

➤ *Droit de la famille — 21783, 2021 QCCS 1797 (CanLII), par. 32. (TAB 4)*

41. It is only on the 3<sup>rd</sup> of May 2021, that counsels of the Defendants brought up the issue of the notification to Bayer Corporation to the attention of Me Nasraoui, despite numerous communications between the counsels to advance the proceedings, all contrary to their duty to co-operate and keep one another informed of the facts conducive to a fair debate, as commanded by article 20 C.c.p.;

42. Up to May 2021, Counsel of the Plaintiff, Me Nasraoui was under the impression that all Defendants were served, as it appears from all the case protocols signed between the parties, in which it appears that the “*latest date on which the Application was served on all parties*” is on August 30, 2019;

43. Considering the above, a late service did not cause any prejudice to Bayer Corporation, but the lack of any diligence by the counsels of the Plaintiff “*cures the defect of not having formally served them in the delay provided for by 107(3) C.C.P.*”;<sup>1</sup>

➤ *Asaduzzaman c. 8703060 Canada inc., 2021 QCCS 1134, par. 44-45. (TAB 5)*

44. Further, the Defendants strategy to be silent on the issue of the late notification to one of the Defendant as to be submitting any issue on the expiration of the right of action against the

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<sup>1</sup> It was not a case where international notification was required.

Defendant is yet another variation of its previously unsuccessful attempt to bring up the same argument in front of this Court before the merits of the case;

45. In fact, during the authorization hearing, the Defendants argued that the cause of action was prescribed since 2011. An argument that was dismissed by the authorization judge, as it appears from the paragraphs 66 and 67 of the Authorization Judgement (EXHIBIT-1) :

#### 2.4 *La prescription*

[65] *Les défenderesses soutiennent que le recours personnel de Mme Letarte est prescrit puisque, dès 2011, elle se dit convaincue qu'Essure est la cause de ses Problèmes de santé, mais choisi de « prendre son mal en patience » jusqu'en 2014. Or, elle entreprend son recours en mai 2016, soit bien après le délai de prescription de trois ans.*

[66] *La jurisprudence enseigne que le Tribunal doit faire preuve de grande prudence avant de conclure au rejet d'une demande d'autorisation au motif de prescription. Il y a lieu de le faire dans les cas manifestes seulement.*

[67] *Or, la lecture des transcriptions de l'interrogatoire de Mme Letarte ne permet pas de conclure qu'il est manifeste que son recours soit prescrit. À titre d'exemple, à la page 47 des transcriptions, elle affirme que c'est en 2014 qu'elle a fait le lien entre Essure et ses Problèmes de santé. Même si ailleurs dans son témoignage elle affirme avoir été convaincue en 2011 que ses saignements abondants étaient causés par Essure, le Tribunal estime qu'il doit être prudent avant de déclarer le recours prescrit sans bénéficier de toute la preuve à cet égard. Il s'agit d'une question qui sera débattue au fond à la lumière de l'ensemble de la preuve.*

46. In fact, in all threes case protocol, “*ce contrat judiciaire*”, signed by the parties, it appears that the “*latest date on which the Application was served on all parties*” is on August 30, 2019. This Court should consider this as a tacit renunciation of prescription in the sense of 2883 C.c.Q;

- *Centre intégré de santé et de services sociaux de Laval c. Carrier*, 2016 QCCS 4661 (CanLII), para. 25 : **(TAB 7)**

*« Le contrat judiciaire (protocole d'instance) formé tout au long de l'évolution procédurale du dossier est important et doit être respecté à moins de circonstances importantes, ce qui n'est pas le cas en l'espèce. »*



➤ *Terrana c. Caruana*, 2020 QCCA 677 (CanLII), para. 25. **(TAB 8)**

The Court of Appeal has considered admissions in a proceeding as a tacit renunciation of prescription in the sense of 2883 CCQ :

47. Further, the interests of justice and the class members require that the debate be fully held with all the parties, since the action has been authorized by this Court against all three defendants;

48. No delay can be attributed to the negligence of the Plaintiff or her counsels, but the latter displayed a significant degree of diligence;

➤ *Surin c. Apple inc.*, 2021 QCCS 2217, par. 28. (Tab 3)

49. In fact, as noted by Honorable Justice Thomas Davis, where international service is required and a defendant did not suffer any significant prejudice, and the party has displayed a significant degree of diligence, this Court regularly relieved the party from the requirements of 107(3);

➤ *Surin c. Apple inc.*, 2021 QCCS 2217, par. 32. (TAB 3)

➤ *Asaduzzaman c. 8703060 Canada inc.*, 2021 QCCS 1134 (CanLII), par. 45 (TAB 5). This Court extended the delay for notification of 107(3) CCP, due to the pandemic and since the defendant did not suffer any prejudice.

➤ *Noel c. Otto Fuchs Beteiligungen KG*, 2021 QCCS 1976. **(TAB 6)**. Justice Chantal Chatelain, J.C.S. in a class action proceeding extended the delay of service of the Application to authorize due to the Pandemic, since it's an international notification (494 C.C.P.).

50. Considering all of the above and in light of the facts that the default to notify the proceedings to one of the Defendants, Bayer Corporation, in time will not cause any prejudice to the Defendants but is in the interests of justice and of the class members;

51. The Applicant is requesting this Honourable Court for leave to extend time limit to notify the Originating Application to the Bayer Corporation and to be relieved from any default to notify the proceedings in due time;

52. Considering the foregoing, this application is well founded in facts and law;

**FOR THESE REASONS, MAY IT PLEASE THE COURT:**

**GRANT** the present Application;

**EXTEND** the deadline to notify the Application for authorization to institute a class action to the defendant **Bayer Corporation** to September 10, 2021;

**RELIEF** the Applicant from any default to notify the proceedings to Bayer Corporation in due time;

**THE WHOLE**, without judicial costs, except if contestation.

**MONTREAL, November 3, 2021**

*Merchant Law LLP*

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**MERCHANT LAW GROUP LLP**

Attorneys for the Applicant

N<sup>o</sup>: 500-06-000788-162

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**SUPERIOR COURT OF QUÉBEC**  
(CLASS ACTION)  
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*Defendants*

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**AMENDED APPLICANT'S APPLICATION FOR LEAVE TO  
EXTEND TIME LIMIT TO NOTIFY THE *ORIGINATING*  
*APPLICATION* AND TO BE RELIEVED FROM ANY DEFAULT  
TO NOTIFY THE PROCEEDINGS IN DUE TIME  
(Art. 107(3) et 84 C.C.P.)**

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**ORIGINAL**

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