

SUPERIOR COURT

CANADA
PROVINCE OF QUEBEC
DISTRICT OF QUEBEC

No: 200-06-000022-015

DATE: April 4, 2011

PRESIDED BY: THE HONOURABLE DOMINIQUE BÉLANGER, j.c.s.

FRÉDÉRIC BISSON

Applicant

v.

JOHNSON & JOHNSON
and
LIFESCAN CANADA LTD
and
LIFESCAN INC.

Respondents

J U D G M E N T

**on the motion for authorization to bring a class action for the purpose of
settlement and approval of an out of court settlement**

1. The applicant asks the Court to authorize the bringing of a class action and to name him representative for the purpose of approving an out of court settlement reached with the respondents.
2. On December 4, 2002, the applicant filed a motion for authorization to bring a class action on behalf of the members of the group that he now describes as follows:

All Quebec residents who bought and used a SureStep® blood glucose meter produced before August 1, 1997, and for which the serial number is between those whose first five characters start with L6000 to L7205 or with a serial number between L7206-GA-00001 and L7206-GA-01128 or

OFFICE TRANSLATION

produced after February 1, 1996, and/ or who used SureStep® test strips produced before March 1, 1998, or after February 1, 1996, as well as the personal representatives of the members of the group who are deceased.

3. Two other class action procedures were filed in Canada; one in British Columbia and the other in Ontario.
4. On September 10, 2010, the parties concluded a nation-wide agreement.

The dispute

5. Johnson & Johnson is an enterprise that is engaged in researching, producing and providing *SureStep®* glucose meter products and test strips to the market.
6. Lifescan Canada Ltd. is an enterprise that is affiliated with Johnson & Johnson.
7. *SureStep®* glucose meters and test strips are used by people suffering from diabetes, in order to take daily measurements of their blood sugar levels.
8. The motion to authorize the bringing of a class action states that in 1996 and 1997, *SureStep®* glucose meters and test strips were defective such that they gave a false reading. A voluntary recall of the products ensued.
9. The file in Quebec was suspended and the debate was carried out in Ontario where the demand for certification was strongly contested.
10. The certification of the action raised the question of determining whether the producer's liability could be found in the absence of direct damages, as it seems that neither the representative nor the members experienced health problems following the malfunctioning of the glucose meters. The members therefore claim punitive and general damages, alleging that the defendants knew that they had put defective glucose meters on the market.
11. Once the action was certified, several examinations were held over a period of many months. The debate in Ontario lasted for a period of approximately nine years.
12. The trial was set for May 2010, for a period of six weeks.
13. On December 15, 2010, Madame Justice Carolyn Horkins approved the settlement that was submitted to her in Ontario.

Settlement Agreement

14. The settlement provides for a compensation of \$4,000,000 to be distributed in the following manner:

Product distribution:	\$1,250,000
Outreach program administration:	\$270,000
Awareness campaign:	\$700,000

OFFICE TRANSLATION

Diabetes Quebec:	\$185,000
Fonds d'aide aux recours collectifs du Québec:	\$15,000
Ontario Class Proceedings Fund:	\$80,000
Ontario lawyers' fees:	\$1,500,000
Total:	\$4,000,000

15. The settlement provides that the defendants will present the Canadian Diabetes Association with five thousand glucose meters and accessories at a total value of \$1,250,000 that the Association will distribute across Canada, by way of an outreach program.

16. In addition, a sum of \$700,000 will be provided to the Canadian Diabetes Association in order to support an awareness campaign targeting Canadians and informing them of the dangers of undiagnosed diabetes.

17. After reading the settlement, it was not clear if Quebecers would have access to the outreach program and the glucose meters distributed by the Canadian Diabetes Association, which is not well-established in Quebec.

18. The Court required additional evidence in order to properly identify the Quebec portion of the settlement.

19. This additional evidence showed that about 15 percent of the defective glucose meters were distributed to Quebec residents.

20. Michael Cloutier, President of the Canadian Diabetes Association, affirmed that the advertisements and warnings would be in both French and English and distributed as much in Quebec as the rest of Canada, as well as on the bilingual website of the Association, thus permitting the Quebec members to be informed of the program and the possibility for them to participate.

21. Diabetes Quebec said it was ready to collaborate in order to inform the members of the group of Quebec of the existence of the outreach program.

22. The awareness campaign that will be implemented by the Canadian Diabetes Association and will aim to raise awareness in the general population of the seriousness of the disease will not be broadcast in Quebec.

23. To compensate, a sum of \$185,000 will be given to Diabetes Quebec.

24. On January 10, 2011, the Fonds d'aide aux recours collectifs took notice of the undertaking that it would receive a sum of \$15,000.

Analysis

OFFICE TRANSLATION

25. Before approving a transaction, the Court must assure itself that it is fair, equitable and in the best interest of the members of the group¹.

26. The criteria that should guide the Court are now well known in Quebec. They were restated again recently by the Honourable Gratien Duchesne, j.c.s., in *Brochu c. La Société des loteries du Québec et autres*².

“[32] Based on the decision *Bouchard et al. c. Abitibi Consolidated et Fonds d'aide aux recours collectifs*, in which Justice Yves Alain, j.c.s., restated the criteria that were clarified by the Superior Court of Ontario, the Court determines that it must consider the following factors in its analysis, while adapting them to the case at hand:

- the action's probability of success;
- the importance and the nature of the evidence to be produced;
- the conditions of the transaction;
- the recommendations of the lawyers and their experience;
- the amount of future costs and the probable length of the litigation;
- the recommendation of a neutral third party, as the case may be;
- the number and nature of the objections to the transaction;
- the good faith of the parties;
- the absence of collusion.” (citations omitted; TRANSLATION)

27. In its analysis of the fair and equitable character of a nation-wide settlement that is already approved in another jurisdiction, the Court must assure itself that the members of Quebec receive their fair share.

28. We note that no member opposed the approval of the transaction.

29. According to the plaintiffs' lawyers, the claim based on the profits generated by the sale of the product did not exceed \$8 million, while the defendant claims that it can deduct the cost of recalling the product, which was about \$3.6 million. In addition, the defendant denies all liability.

30. No proof was made regarding the probability of success of a class action in Quebec, or of the importance and nature of the evidence to be produced. No debate occurred in Quebec.

¹ *Wilhelm B. Pellemans c. Vincent Lacroix et autres*, C.S. Montréal, 500-06-000302-055, 23 mars 2011, j. Prévost, paragr. 20

² C.S. Québec, no 200-06-000017-015, 23 mars 2010, j. Duchesne

OFFICE TRANSLATION

31. It remains that the transaction states that no person experienced negative consequences as a result of the malfunctioning of the glucose meters.
32. The direct damages would therefore be very low, if not inexistent. In Quebec, as abroad, that has a certain impact on the claim.
33. The Ontario and Quebec lawyers, forming part of the same judicial group, have great experience in the area of class actions and they recommend the settlement.
34. The Court also notes that the Canadian Diabetes Association and Diabetes Quebec both seem satisfied by the settlement.
35. The Court would like to specify that it would have been preferable to have had a common trial between the different jurisdictions for the approval of the settlement. In fact, proceeding otherwise means that one of the jurisdictions will be faced with a precedent, and in certain cases this can be problematic.
36. However, given the particular circumstances in the case at hand, and the evidence contained in the different affidavits, the Court considers that the submitted settlement is in the interest of the Quebec members and that it warrants approval.
37. However, certain clauses of the transaction and certain requested conclusions are not appropriate.

Problematic clauses of the transaction

1. Jurisdiction of the courts

38. Clause 12.5 of the agreement could present problems, as it goes against the *Quebec Code of Civil Procedure*.

“12.5 Jurisdiction of the Courts

- 1) Subject to section 12.5(4), each Court maintains its exclusive jurisdiction with respect to Actions instituted in its jurisdiction, the Parties mentioned therein, and the Fees of the Lawyers of the Group in the Action.
- 2) Subject to section 12.5(4), the Plaintiffs and Defendants agree that no Court must render a decision or give any instructions with respect to any subject regarding a shared jurisdiction unless such a decision or instruction is a prerequisite for an additional decision or instruction given by another Court that shares the jurisdiction on the given subject.
- 3) Notwithstanding the preceding, but subject to section 12.5(4), the Courts of Ontario have jurisdiction regarding the implementation, administration and execution of the terms of this Settlement Agreement and the Plaintiffs, the Members of the group and the Defendants submit to the jurisdiction of the Courts of Ontario for the implementation, administration and execution of the agreement contained in this Settlement Agreement. The questions linked to the administration of the Settlement Agreement and the other subjects not specifically linked to a claim by a Member of a group of British Columbia or a Member of a group of Quebec must be decided by the Courts of Ontario.

OFFICE TRANSLATION

4) The Plaintiffs and Defendants will be able to address the Courts of Ontario in order to obtain guidance regarding the implementation, administration and execution of this Settlement Agreement.” (the formatting is of the Court; TRANSLATION)

39. This clause thus provides that the courts of Quebec conserve jurisdiction to hear individual claims of Quebec members. This is entirely in line with Quebec law, as it rests on courts of Quebec, in this case the Superior Court of Quebec, to hear a member's claim and to determine, in the case of a litigation, the means of evidence and procedure, even if a nation-wide settlement is reached.

40. The role of the court does not stop once a settlement has been approved. It continues until the members' claims have been liquidated.

41. But what about the Quebec portion of a nation-wide settlement other than an individual claim?

42. The Court is of the opinion that the legislature intended that the entire Quebec portion of a settlement remain under the jurisdiction of the courts of Quebec.

43. The *Civil Code of Procedure* is clear: the distribution of amounts awarded by the judgment or agreed on by homologated agreement is done under the control of the court³, in the same way that the court disposes of the remainder as it sees fit and in considering, in particular, the members' interest.

44. In principle, and although we do not anticipate an execution problem in the case at hand, paragraphs 3 and 4 of clause 12.5 should not be confirmed by the Court.

45. The Court put this problem to the parties' lawyers who agreed that the judgment could approve the settlement, with the exception of these provisions.

The right to resiliate the settlement

46. However, the settlement provides that the present judgment must conform to Schedule B3 of the settlement, permitting the parties themselves to resiliate the settlement if the judgment that approves it does not conform to what the parties foresaw:

“2.3 Motion to approve the settlement

(1) As soon as possible following the rendering of the judgment in question in paragraph 2.2(2), and once the Notices of trial have been published, the Plaintiffs must file motions to ask the Courts whether they approve this Settlement Agreement.

(2) The Ontario judgment approving this Settlement Agreement to which article 2.3(1) here-above refers should generally be in the form of the document attached to the present in Schedule “B1”.

³ C.C.P., art. 1033.1

OFFICE TRANSLATION

- (3) The Quebec and British Columbia judgments approving the Settlement Agreement which is the subject of article 1.2(1) here-above should generally be in the form of the document attached to the present respectively in Schedule “B2” and “B3”. The Quebec and British Columbia judgments should reflect and, where possible, follow the form of the Ontario judgment, while understanding that the Quebec judgment must address what is necessary for an authorization to bring a class action and the procedure to exclude oneself from it.
- (4) The content and form of the judgments approving this Settlement Agreement which is the subject of article 2.3 here-above will be considered important provisions of this Settlement Agreement and the default of any Court to approve the judgments at issue here-above will create a right to resiliation under article 11 of this Settlement Agreement.

[...]

11.1 The right to resiliation

- (1) the Defendants, the Plaintiffs and the Lawyers of the group will have the right to resiliate the Settlement Agreement if:

[...]

(d) the form and content of one final judgment or another of the Ontario Court, the British Columbia Court and the Quebec Court does not respect the content of article 2.3(4) of this Settlement Agreement.”

(TRANSLATION)

47. A transaction must be approved in its entirety or rejected in its entirety⁴. This seems to be generally accepted as a principle in all jurisdictions. In any case, it is the state of the law in Quebec regarding class actions.

48. In Quebec, a transaction has, between the parties, the authority of a final judgment. What is more, once the Court homologates it, it is subject to compulsory execution⁵.

49. In class actions, a transaction must be approved by the Court.

50. A judgment approving a transaction becomes executory like any other judgment.

51. A transaction is thus susceptible to compulsory execution and cannot be reconsidered, unless the judgment approving it is appealed or retracted.

52. Taking for granted that the Court cannot modify *proprio motu* a settlement in a class action suit, it must indicate, in the conclusions of its judgment, that which it considers appropriate and that which conforms to the law in effect.

⁴ *Brochu c. La Société des loteries du Québec et autre*, *supra*, note 2, paragr. 27

⁵ C.C.Q., art. 2633.

OFFICE TRANSLATION

53. As we will see later on, the parties ask the Court to reach certain conclusions that are unnecessary or do not conform to the law.

54. The Court informed the lawyers of the difficulties stemming from paragraphs 2.3 and 12.5(3) and (4) of the settlement.

55. The parties' lawyers indicated to the Court that they consented to the Court approving the transaction with the exclusion of these provisions.

56. That is therefore what will be done.

Various conclusions sought

57. In any case, the conclusions of the judgment approving the settlement must be rendered in conformity with Quebec law.

58. The applicant asks the Court to authorize the bringing of a class action against the respondents *solely for the purpose of the transaction*.

59. As the Honourable André Prévost, j.c.s. has already underlined, there do not exist several types of authorizations in Quebec⁶.

[20] Where a transaction is concluded before the action has been authorized, the parties frequently ask the Court to authorize the action "for the sole purpose of approving the transaction", as is the case here.

[21] Does that mean that several types of authorization according to the circumstances might exist?

[22] The Court does not believe so. Moreover, Article 1003 C.C.P. does not make any distinction.

[...]

[25] The jurisprudence recognizes that the determination of whether the conditions to bring an action are met is done "in light of the allegations of the motion, the exhibits filed and the means of contestation raised". In the case of an authorization associated with the approval of a transaction, the settlement agreement will generally be filed as an exhibit and the court will consider it in the evaluation of the conditions of Article 1003 C.C.P.

[26] Can we therefore consider that, in such a case, the authorization to bring a class action covers only the approval and execution of the transaction? That appears hardly conceivable.

[27] To start with, from a contextual point of view, the transaction is only one exhibit amongst others, as well as amongst the allegations of the motion.

⁶ *Demers c. Johnson & Johnson corporation et autres*, 2009 QCCS 4885

OFFICE TRANSLATION

[28] Further, as the settlement agreement is generally intrinsically linked to the questions of fact and law at the heart of the dispute, it appears difficult to disassociate them.

[29] Finally, the criteria regarding the representability (Article 1003 d) of the applicant and the difficulties relative to obtaining an individual mandate of the members or the joining of the particular actions (Article 1003 c) cannot be different at the time of the authorization of the action, based on whether they are associated or not with the approval of a transaction.

[30] Overall, there exists only but one form of authorization of a class action. It is foreseen at Article 1003 C.C.P. and applies uniformly to all situations which give rise to the bringing of a class action.” (citations omitted; TRANSLATION)

60. Before approving a settlement, it is necessary that the class action be authorized, in order to put in place the appropriate procedural vehicle to be able to approve the transaction and ensure its execution.

61. Before the authorization, the action does not exist, at any rate on a collective basis⁷.

62. It is only after the authorization judgment that the action can exist.

63. In principle, after having been authorized, the representative forms its demand according to the ordinary rules⁸, by way of a motion to institute proceedings⁹.

64. Where an agreement is reached before the bringing of a class action is authorized, the Court does not require the representative to officially form the demand by serving the motion to institute proceedings because a transaction can be concluded not only to end the dispute, but equally for the future¹⁰.

65. In order to approve an agreement, the action must have been authorized, as it is the only appropriate procedural vehicle to permit the Court to protect the interest of the group members in the matter of class actions.

66. The bringing of the action will thus be authorized according to Article 1003 of the *Code of Civil Procedure*; the conditions for its authorization being met.

67. However, the applicants allege that the Court should make several orders that, according to the Court, are unnecessary.

68. For example, they ask the Court to declare that all members of the group of the Quebec settlement that are not excluded from the group be bound by the transaction. That is the effect of the law.

⁷ *Thompson c. Masson*, [1993] R.J.Q. 69 (C.A.), J.E. 92-1770 (C.A.)

⁸ C.C.P., art. 1011

⁹ C.C.P., art. 110, 111 and following

¹⁰ C.C.P., art. 2631

OFFICE TRANSLATION

69. The same applies for a declaration that another action instituted in Quebec by a member of the group be rejected. The Court cannot, in advance, establish that an action that has not yet be instituted be rejected, as it is useless for the Court to order and declare the present judgment binding on each member of the group.

70. The *Code of Civil Procedure* contains, in Book IX, articles 999 to 1052 that constitute a complete code regarding class actions in Quebec. Many of the provisions are of public order and it is unnecessary for the Court to affirm the law in its judgment.

71. The Court will also approve the notice announcing the approval of the settlement.

72. **FOR THESE REASONS, THE COURT:**

73. **AUTHORIZES** the bringing of the class action against the respondents;

74. **GRANTS** the applicant, Frédéric Bisson, the status of representative for the purpose of the class action on behalf of the group here-after described (the “Quebec settlement group”):

All Quebec residents who bought and used a SureStep® blood glucose meter produced before August 1, 1997, and for which the serial number is between those whose first five characters start with L6000 to L7205 or with a serial number between L7206-GA-00001 and L7206-GA-01128 or produced after February 1, 1996, and/ or who used SureStep® test strips produced before March 1, 1998, or after February 1, 1996, as well as the personal representatives of the members of the group who are deceased.

75. **APPROVES** the transaction reached between the parties on September 10, 2010, in its English and French versions attached to the present judgment, with the exclusion of paragraphs 2.3(3) and (4) and 12.5(3) and (4) of the settlement;

76. **TAKES NOTICE** of the acceptance by the Fonds d'aide aux recours collectifs of the payment of the amount of \$15,000;

77. **APPROVES** the notice announcing the approval of the settlement reached, this notice being attached to the present judgment;

78. **DECLARES** that every person covered by the transaction can exclude themselves from the group, in the 90 days following the date of the first publication of the notice announcing the authorization to bring the class action and the approval of the transaction;

79. **WITHOUT COSTS.**

DOMINIQUE BÉLANGER, j.c.s.