SUPERIOR COURT
(Class Action Chamber)

CANADA
PROVINCE OF QUEBEC
DISTRICT OF MONTREAL

N° : 500-06-001004-197

DATE : May 20, 2022

PRESIDING: THE HONOURABLE GARY D.D. MORRISON, J.S.C.

JEAN-FRANÇOIS BOURASSA

Applicant

v.

ABBOTT LABORATORIES LTD.
PHARMASCIENCE INC.
TEVA CANADA LIMITED
PRO DOC LTÉE
PURDUE FREDERICK INC.
PURDUE PHARMA

Petitioner-Respondents

JUDGMENT
(Respondents' applications to order the communication of documents and the examination of Applicant)

JM2455

[1] Six[1] of the plus twenty-five respondents to a proposed class action relating to Opioid Use Disorder have filed applications, some jointly, seeking Court orders requiring primarily the communication of all or part of Applicant's medical and pharmaceutical records and/or permitting his examination prior to authorization.

[2] For purposes of clarity, Petitioner-Respondents are not all presently seeking authorization to file documents.

1. CONTEXT

[3] To put these applications into context, in 2021, the Court had already rendered in the present file two judgements in relation to such issues.

[4] Since then, however, the prior applicant was replaced by Mr. Bourassa, and this at the end of December 2021. This change has given rise to these new, yet similar applications regarding the current Applicant.

[5] Applicant argues that the Court should now simply apply the two 2021 judgements and, as well, declare that the current applications constitute an abuse of procedure with a resulting order that Petitioner-Respondents pay the extra-judicial fees and expenses of his counsel.

[6] In addition to the foregoing, twelve of the respondents are actively seeking authorization to produce proof for availability during the authorization hearing. The Court has reserved judgement on those applications.

[7] It should be noted that Applicant Bourassa has already provided certain information, including documents and an affidavit, in response to various requests by the Petitioner-Respondents. This has resulted in a rather small reduction in the conclusions sought by them. Applicant contests those that remain.

[8] The Court will analyze the applications separately, per party. However, it will address the nature of the proposed class action and the applicable law on a collective basis.

2. LEGAL PRINCIPLES

[9] To be clear, not all Petitioner-Respondents are seeking permission to access Applicant's medical and pharmaceutical records. However, most do seek access to

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[1] The six Petitioner-Respondents are Abbott Laboratories Ltd., Pharmascience Inc., Teva Canada Limited, Pro Doc Ltée, Purdue Frederick Inc. and Purdue Pharma. The Court refers to them as respondents since there is no action at law against them yet.

those records with a view to taking cognizance of the content thereof and then perhaps ultimately, seeking such permission.

[10] In this context, the Court's analysis is nonetheless guided by the same legal principles applicable to applications to adduce evidence. So too, applications to examine Applicant for authorization purposes. The goal of these various applications is essentially the same, to put evidence before the court with a view to contesting the authorization of the proposed class action.

[11] An extensive list of the principles applicable to the issue of relevant proof, envisaged by Art. 574 *Civil Code of Procedure*, as stated over time by the Court of Appeal and the Supreme Court of Canada, has been enumerated by Justice Donald Bisson[2], as follows:

> *[17] Les demandes de preuve appropriée à l'étape de l'autorisation sont prévues à l'article 574 Cpc. La jurisprudence de la Cour d'appel et de la Cour suprême du Canada nous enseigne quels sont les critères applicables :*
>
> - *le juge dispose d'un pouvoir discrétionnaire afin d'autoriser une preuve pertinente et appropriée ainsi que la tenue d'un interrogatoire du représentant, dans le cadre du processus d'autorisation;*
> - *une preuve n'est appropriée que si elle est pertinente et utile à la vérification des critères de l'article 575 Cpc. Le consentement de la partie demanderesse à une preuve suggérée par la défense ne suffit pas à en autoriser le dépôt;*
> - *la preuve documentaire et l'interrogatoire proposés doivent respecter les principes de la conduite raisonnable et de la proportionnalité posés aux articles 18 et 19 Cpc;*
> - *la vérification de la véracité des allégations de la demande relève du fond. Une partie défenderesse ne peut mettre en preuve des éléments qui relèvent de la nature d'un moyen de défense au mérite;*
> - *le tribunal doit analyser la demande soumise à la lumière des enseignements récents de la Cour suprême du Canada et de la Cour d'appel sur l'autorisation des actions collectives et qui favorisent une interprétation et une application libérales des critères d'autorisation;*

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[2] *Ward* c. *Procureur général du Canada*, 2021 QCCS 109, para. 17-21; *Morfonios (Succession de Sarlis)* c. *Vigi Santé ltée*, 2020 QCCS 4351, para. 37-41; *Lauzon* c. *Municipalité régionale de comté (MRC) de Deux-Montagnes*, 2019 QCCS 4650, para. 37-38.

- *à ce stade, la finalité de la demande se limite au seuil fixé par la Cour suprême du Canada, soit la démonstration d'une cause défendable. Le tribunal doit se garder d'autoriser une preuve qui inclut davantage que ce qui est strictement nécessaire pour atteindre ce seuil;*

- *le tribunal doit se demander si la preuve requise l'aidera à déterminer si les critères d'autorisation sont respectés ou si elle permettra plutôt de déterminer si le recours est fondé; dans cette dernière hypothèse, la preuve n'est pas recevable à ce stade;*

- *la prudence est de mise dans l'analyse d'une demande de permission de produire une preuve appropriée; il s'agit de choisir une voie mitoyenne entre la rigidité et la permissivité;*

- *il doit être démontré que la preuve demandée est appropriée et pertinente dans les circonstances spécifiques et les faits propres du dossier, notamment en regard des allégations et du contenu de la demande d'autorisation;*

- *le fardeau de convaincre le tribunal de l'utilité et du caractère approprié de la preuve repose sur la partie qui la demande;*

- *le tribunal ne doit pas laisser les parties produire une preuve volumineuse et ne doit en aucun cas examiner la preuve produite en profondeur comme s'il s'agissait d'évaluer le fond de l'affaire;*

- *le processus d'autorisation d'une action collective n'est pas, du point de vue de la preuve, une sorte de préenquête sur le fond. C'est un mécanisme de filtrage;*

- *l'admission de preuve appropriée doit être faite avec modération et être réservée à l'essentiel et l'indispensable. Or, l'essentiel et l'indispensable, du côté du demandeur, devraient normalement être assez sobres vu la présomption rattachée aux allégations de fait qu'énonce sa procédure. Il devrait en aller de même du côté de la défense, dont la preuve, vu la présomption attachée aux faits allégués, devrait être limitée à ce qui permet d'en établir sans conteste l'invraisemblance ou la fausseté. C'est là un « couloir étroit »;*

- *puisque le fardeau du demandeur à l'autorisation en est un de logique et non de preuve, il faut conséquemment éviter de laisser les parties passer de la logique à la preuve (prépondérante) et de faire ainsi un préprocès, ce qui n'est pas l'objet de la démarche d'autorisation;*

- *pour échapper à la perspective d'une action collective, la partie défenderesse souhaitera généralement présenter une preuve destinée à démontrer que l'action envisagée ne tient pas et, pour ce faire, elle pourrait bien forcer la note, sur le thème « abondance de biens ne nuit pas ». Le juge doit résister à cette propension, tout comme il doit se garder d'examiner sous toutes leurs coutures les éléments produits par l'une et l'autre des parties, au risque de transformer la nature d'un débat qui ne doit ni empiéter sur le fond, ni trancher celui-ci prématurément, ni porter sur les moyens de défense;*

- *à l'autorisation, le tribunal doit simplement porter un regard sommaire sur la preuve, qui devrait elle-même être d'une certaine frugalité;*

- *dans tous les cas, la preuve autorisée doit permettre d'évaluer les quatre critères que le juge de l'autorisation doit examiner et non le bien-fondé du dossier. Et si, par malheur, le juge de l'autorisation se retrouve devant des faits contradictoires, il doit faire prévaloir le principe général qui est de tenir pour avérés ceux de la demande d'autorisation, sauf s'ils apparaissent invraisemblables ou manifestement inexacts;*

- *si l'on ne veut pas que les actions collectives accaparent une part indue des ressources judiciaires, ressources limitées, il serait donc utile, dans l'état actuel du droit, que l'on évite de faire au stade de l'autorisation ce qui, en réalité, appartient au fond.*

[References omitted.]

[12] In a recent decision[3], the Court of Appeal confirmed anew its decision in *Durand* c. *Subway Franchise Systems of Canada*[4], to the effect that not only does proof at the authorization stage need be essential, indispensable and limited, but that it must without question or doubt ("*sans conteste*") demonstrate that an allegation against a respondent is unlikely or is false, and this so as to avoid a contradictory debate at this early stage. In other words, the Court of Appeal has once again warned against conducting a trial prior to the trial.

[13] The requirement that evidence by a respondent need be essential, indispensable and limited is a high standard for a respondent to meet. This is intentionally so because the Court is to take as proven the allegations of fact set forth in the application for authorization to institute a class action. As a result, the Court should avoid allowing proof to be filed by a respondent that will lead down the slippery slope to an adversarial debate akin to a trial at the authorization hearing.

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3 *Nashen* c. *Station Mont-Tremblant*, 2022 QCCA 415, para. 28.

4 2020 QCCA 1647, para. 50-54.

[14] In fact, even if the Court authorizes a respondent to file proof, the authorization petitioner is not obliged to contest that proof, or even to provide an answer in response thereto[5].

[15] Consequently, there is a very limited purpose to allowing access to contradictory evidence at the authorization stage. To use an expression from the decision of the Court of Appeal in *Allstate du Canada, compagnie d'assurances* c. *Agostino*, the judge in deciding on relevant proof should use moderation and prudence, applying a "*couloir étroit*"[6], a narrow corridor that runs between the rigidity of respecting the limited filtering process and a generous permissiveness that can mistakenly lead the judge to conduct an analysis of the merits of the claim.

3. NATURE OF THE PROPOSED CLASS ACTION

[16] In order to determine what, if any, documentation or information pertaining to an applicant that a respondent should be authorized to access, it is important to understand the nature of the class action an applicant seeks to institute, as this represents the context in which the evidence is to be analyzed with a view to determining whether it is essential, indispensable and limited.

[17] An appropriate starting point in the present matter is the class definition, as described at paragraph 1 of the Re-Amended Application, which reads as follows:

> *All persons in Quebec who have been prescribed and consumed any one or more of the opioids manufactured, marketed, distributed and/or sold by the Defendants between 1996 and the present day ("**Class Period**") and who suffer or have suffered from Opioid Use Disorder, according to the diagnostic criteria herein described.*
>
> *The Class includes the direct heirs of any deceased persons who met the above-mentioned description.*
>
> *The Class excludes any person's claim, or any portion thereof, subject to the settlement agreement entered into in the court file no 200-06-000080-070, provided that such settlement agreement becomes effective as a result of the issuance of the requisite court approvals.*

[18] The definition contains a conditional exclusion regarding a settlement agreement in another legal action, which in fact relates to a prior Canadian-wide class action involving two specific drugs.

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5 *Id.*, para. 53.
6 2012 QCCA 678, para. 36.

[19] Another exclusion, or what respondents qualify as a "carve-out", is stated as follows at paragraph 2.4.2 of the Re-Amended Application:

> [...] *However, to the extent that any of the opioids listed in the following paragraphs were solely and exclusively available for use in a hospital setting (e.g., not available at any time during the Class Period to be prescribed for use in the home), such opioids are not the subject of the present Class Action.*

[20] That said, the parties do not agree as to what is the true nature of the legal syllogism being proposed by Applicant. And although the Court is not to decide the debate as to that authorization issue at this preliminary stage, it is important for it to understand what issues will be raised at the authorization hearing.

[21] Applicant argues that the proposed action is based on civil liability for injury caused by a safety defect regarding the medication, including the lack of sufficient warnings as to the risks and dangers involved in the use thereof, the whole as per Articles 1468 and 1469 *Civil Code of Quebec*.

[22] Such a safety defect regime has been described by the Court of Appeal as a no-fault regime[7], one that is applicable to prescription medication[8].

[23] Applicant argues that, accordingly, at the authorization stage, all that need be demonstrated, through allegations to be held as true, is that he suffered Opioid Use Disorder having taken prescribed opioid medication manufactured or sold by one or more of the present respondents.

[24] Petitioner-Respondents consider Applicant's characterization of his legal syllogism to be an oversimplification.

[25] They argue that in light of Art. 1469 C.C.Q., an integral part of Applicant's proposed action based on a safety defect is the so-called lack of sufficient warnings as to the risks and dangers of the prescribed medications, which is specifically identified as a source of negligence at paragraph 2.2 of the Re-Amended Application and further, as one of the common questions at pages 45 to 46 and 49 thereof.

[26] Accordingly, they propose that the issue of warnings will need be addressed at the authorization hearing.

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7 *Imperial Tobacco Canada ltée* c. *Conseil québécois sur le tabac et la santé*, 2019 QCCA 358; *Brousseau* c. *Laboratoires Abbott limitée*, 2019 QCCA 801.

8 *Brousseau* c. *Laboratoires Abbott limitée*, *supra*, note 7.

[27] In addition, respondents generally argue that Applicant Bourassa will also need to address another component of his proposed class action, being that all respondents have also committed a civil law fault by marketing their medications through misrepresentations. This, they remind the Court, is not simply stated by Applicant in passing but rather, covers allegations from paragraph 2.39 to 2.124, found at pages 16 to 32 of the Re-Amended Application and, as well, in the common questions 5.4 to 5.6 and 5.11.

[28] Moreover, they argue, Applicant also alleges that the respondents' conduct contravenes the *Competition Act*[9], the *Civil Code of Quebec*[10] and the *Quebec Charter of Human Rights and Freedoms*[11], thereby giving rise not only to compensatory damages but also to punitive damages and to pecuniary damages recoverable on an individual basis.

[29] For these reasons, Petitioner-Respondents contend that Applicant's legal syllogism is not as simple as he contends and that the various elements thereof are reflected in the common questions, such that their applications should be analyzed taking all such elements into consideration.

4. THE PARTIES' RESPECTIVE POSITIONS

[30] In general terms, and in keeping with their position that Applicant Bourassa must establish at authorization a defendable case against each individual respondent he seeks to sue in an eventual class action, the present Petitioner-Respondents seek to obtain information from him that will enable them to evaluate which of their products he took, when and for how long, and this so as to enable them to plead principally:

- that their products could not have caused his Opioid Use Disorder;
- that he may have used OxyContin and/or NeoContin and, if so, would be covered by a settlement agreement in the prior Canada-wide class action should it be finalized;
- that he may not be an appropriate class representative.

[31] They argue that there are contradictions in Applicant's allegations and documents that necessitate additional information and, as well, his examination, with a view to removing uncertainty and doubt regarding his claim and, as well, to providing a more complete factual portrait, which is required in a just and equitable legal debate on authorization.

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9 R.S.C. 1985, c. C-34.
10 Without further specification or detail.
11 CQLR, c. C-12.

[32] In his contestation of Petitioner-Respondents' present applications, Applicant argues that no new elements are being raised resulting from his replacement of the prior applicant, which could conceivably give rise to a different result from what the Court decided in its prior judgments dated February 16 and September 7, 2021, in this matter.

[33] He has again agreed, so as to avoid the necessity of pleading the various applications, to a discovery identical in terms as the Court had previously authorized, which Petitioner-Respondents have approvingly acknowledged but without them withdrawing their applications.

[34] Moreover, Applicant Bourassa has also provided, amongst other exhibits, the following information regarding his medical situation:

- Exhibit P-51 (under seal): his admission and hospital records, from May 25 to June 2, 2017, for his in-patient treatment for severe Opioid Use Disorder at the Addiction Unit of *Hôpital Saint-Luc*, part of the CHUM;

- Exhibit P-52 (under seal): his admission and hospital records from March 13 to March 17, 2018, once again for in-patient treatment at the Addiction Unit for severe Opioid Use Disorder;

- Annex 1[12]: RAMQ *Historique des services médicaux assurés, 1er novembre 1981 au 24 novembre 1981* (23 pages);

- Annex 2[13] : RAMQ *Historique des services assurés en pharmacie, 1er janvier 1983 au 24 novembre 2021* (27 pages), without specific mention of any medications or drugs;

- Annex 3[14] : *Déclaration de transport des usagers, Santé et Services sociaux Québec* on November 27, 2005, as well as with the *Rapport d'intervention préhospitalière du technicien ambulancier*, of the same date, indicating that he had fallen from a roof to the ground in Saint-Lin, the transport destination being *Hôpital Saint-Jérôme*;

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12 Letter of Fishman Flanz Meland Paquin, dated February 25, 2022, the annexes thereto being provided on a "strictly confidential" basis.

13 *Idem.*

14 *Idem.*

- Annex 4[15] : *Demande de prestations pour invalidité du Régime de rentes du Québec,* with attached medical report signed by Dr. Jean-Pierre Martineau on November 16, 2020 and, as well, the *Avis d'acceptation* from *Retraite Québec*;

- Annex 5[16] : *Liste d'émissions*, said to be an extract from the pharmacy records of a Jean Coutu pharmacy in Sainte-Sophie, Quebec, for the period January 1, 2007 to November 28, 2021, along with a product information sheet for Teva-EMTEC 30, DIN 00608882, from the Drug Product Database of Health Canada;

- Annex 6[17] : *Déclaration sous serment* of Applicant Bourassa, signed January 24, 2022, containing a total of four numbered paragraphs, attesting that he was never prescribed and never consumed OxyContin or OxyNeo during the period covered by the prior class action relating to those two drugs, being from 1996 to 2017, or even after that period and, further, that he was not aware of that prior class action in 2021.

[35] Applicant explains that he provided those additional documents in response to certain of the Petitioner-Respondents' applications seeking medical or other records and, as well, the right to examine him, and this with a view to avoiding costs and delays, all of which is mentioned in his counsel's letter of February 25, 2022. That benefit of course, has not come to pass.

[36] Petitioner-Respondents are of the view that this additional information provided by Applicant has not responded to their requests and has actually created contradictions and more uncertainty. This they argue justifies the fact that they have not withdrawn their applications.

[37] It is in that context that Applicant Bourassa argues abuse of procedure and claims his extrajudicial costs and disbursements.

5. ANALYSIS

[38] First and foremost, as regards the issue as to whether Applicant must establish a "defendable cause" against each respondent, that is an issue which certain respondents seem intent on raising at the authorization hearing.

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15 *Idem.*
16 *Idem.*
17 *Idem.*

[39] The argument is raised at this stage primarily as a justification for accessing all or part of Applicant's pharmaceutical records.

[40] In the Court's view, and as stated above, this issue should not be decided at this preliminary stage. There are two reasons not to decide this issue, referred to by certain respondents as the "Marcotte issue", at the pre-authorization phase.

[41] Firstly, Applicant has identified the medication he has taken during the Class Period. The Court understands from reading his proceeding, and as confirmed by class counsel, that if he did not mention a medication as having been taken by him, then it was not. In the Court's view, that should be sufficient at this stage.

[42] Moreover, Applicant Bourassa has also filed an affidavit to confirm that he did not take two specific medications, and this in response to comments and inquiries made by certain Petitioner-Respondents. The Court will address this in more detail later.

[43] Secondly, in the Court's view, it is not in the interest of justice and its sound administration to decide the so-called Marcotte issue presently, in advance of the authorization hearing, and thereby unintentionally create the necessity for any of the parties to seek leave to appeal an authorization issue prior to the authorization hearing having actually been conducted.

5.1. Abbott

[44] Abbott pleads that Applicant's position is contradictory and incomplete, creating additional doubt and uncertainty, and hence the need for clarification.

[45] In view of the additional information provided by him, as mentioned above, Abbott has reduced its original request for medical and pharmaceutical records to "Mr. Bourassa's complete medical records at the private clinic in Saint-Sauveur specialized in the treatment of pain mentioned at paragraph 2.216 of the Re-Amended Proceeding, from November 2005 to December 2009".

[46] Abbott continues to seek that particular information because it considers that it relates to an important contradiction involving essential core facts, which consequently requires further information so as to enable respondents to plead authorization on a fair and equal level.

[47] Applicant alleges[18] that he was injured as a result of a fall from a roof on November 27, 2005. He claims to have suffered multiple fractures to his left fibula and ankle and to have begun taking an opioid drug while hospitalized.

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[18] Re-Amended Application dated December 17, 2021 ("RAA"), para. 2.212 and 2.213.

[48] After being discharged from the hospital on November 28, 2005, Mr. Bourassa alleges that he "remained on prescription Dilaudid"[19].

[49] He further alleges that from 2006 until his admission in May 2017 to the CHUM, he was dispensed by pharmacies, on prescription, Dilaudid and Hydromorph Contin, and periodically in 2010 and 2013, immediate-release hydromorphone[20].

[50] It was during that same time frame, beginning in January 2006 and until mid-2017, that Mr. Bourassa was alleged to have been followed by a physician at a private clinic in Saint-Sauveur, specializing in the treatment of plain[21]. The records from that clinic are those which Abbott seeks to access.

[51] The confusion to which Abbott refers pertains to the allegation that Applicant started using prescription opioids in 2005 whereas two documents provided by him appear to suggest it was in 2007, such that the Court can no longer take as proven his account of events. The documents in question, on which Abbott relies for arguing such confusion, are the following:

1. Exhibit A-1:

   This document was provided by Applicant in March 2022 as part of Exhibit P-51. It is part of the CHUM's admission records, dated May 25, 2017.

   The notes in the document appear to have been taken by an admissions professional.

   At the first page of Exhibit A-1, it is indicated that 9 years earlier, Mr. Bourassa had suffered an accident.

   Abbott argues that that note would place the accident in 2008, not in 2005 as alleged by Applicant.

2. Exhibit A-2:

   This document is page 3 of 8 of the CHUM admission documents, also forming part of Exhibit P-51 provided by Applicant.

   In the section dealing with surgeries and other relevant prior events, the professional completing the form indicated that the fall from a roof happened in 2008.

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19 RAA, para. 2.214.
20 RAA, para. 2.216-2.217.
21 RAA, para. 2.215.

3. Exhibit A-3:

   This document is page 6 of 8 of the same 2017 CHUM admission document. In the section on pain, the reply to the question as to how long Applicant has had pain is 9 years. That too would refer to 2008.

4. Exhibit A-4:

   At page 1 of 2, also part of the CHUM 2017 admission records filed by Applicant at Exhibit P-51, it is indicated that the patient is taking opioids since 8 years. That would translate to 2009.

5. Annex 5 (Letter of attorney Mark Meland, February 25, 2022):

   At page 2 of 8, being the second page of a list of medications provided by a pharmacist affiliated with Jean Coutu, located in Sainte-Sophie, Applicant was given Dilaudid on September 3, 2007, and Hydromorph Contin on August 14, 2007, not in 2005 as alleged.

[52] These documents may possibly, as Abbott might argue at authorization, create certain confusion or even contradict Applicant's allegations as to when he had his accident and started being prescribed opioids.

[53] In the Court's view, however, for the present purposes, the context of these documents is such that they do not give rise to a conclusion that they are essential and indispensable for the purposes of manifestly contradicting Applicant's allegations.

[54] In the same Exhibit P-51, at Bates page 011, in the section on medication, it indicates that Applicant has been using other opioids for a total of 12 years, which would translate back to 2005, as alleged by him.

[55] At Exhibit P-52, also provided by Applicant in response to comments by certain respondents, at page 145, in the section on surgeries and other prior events, it refers to Applicant's surgeries in 2005-2006.

[56] In addition, Annex 3 provided by Applicant is the ambulance transportation form that confirms that on November 27, 2005, Applicant was transported from Saint-Lin, Quebec to the hospital in Saint-Jérôme as a result of his eight-meter fall to the ground from a roof on which he was working.

[57] In such circumstances, the Court does not consider it essential and indispensable for authorization purposes to require Applicant to provide Abbott, or any of the other Petitioner-Respondents, with his complete medical records from the Saint-Sauveur pain-treatment clinic.

[58] The information on which Abbott and others rely in this regard is acquired at the time of admission into a specialized treatment program. Given that particular context, coupled with the fact that the documents do not originate with Applicant Bourassa and do not appear to have been reviewed or approved by him, that information may will be of limited utility at the authorization stage in the present matter.

[59] As for the prescription filled in 2007 at the Sainte-Sophie pharmacy, that does not, in the Court's view at this preliminary stage, constitute contradictory information of a nature that would prevent the Court from taking as established the allegation that Applicant began being prescribed opioids in 2005-2006. Information from that pharmacy does not exclude the possibility that other medication had been prescribed previously. And, as mentioned above, the ambulance transport report clearly shows when Applicant's fall occurred, in 2005.

[60] One should also keep in mind that whether the starting point is 2005, 2006, 2007 or 2008, those years are all included in the proposed class period.

[61] As well, Abbott does not provide a reasonable argument as to the importance of the difference in the starting point. If it is essentially a matter of credibility, that is not generally a matter to be determined at authorization.

[62] In addition to the foregoing, Petitioner-Respondents all suggest that in medication liability cases, the Courts appear to always allow access to medical records at the authorization stage.

[63] That is indeed often the case. That said, it is not entirely unusual for applicants seeking class action authorization in relation to the use of a medication to provide absolutely no critical information that may be found in his or her medical records.

[64] Understandably, once a party puts his or her state of health at the heart of a class action claim, the absence of any supportive information, including documents, may be an important factor, as other judges have observed.

[65] However, there is no rule applicable in class action authorization proceedings to the effect that access to medical records must always be given to a respondent. Each case is to be decided on its own merits, in the context of its particular circumstances.

[66] In the present matter, Applicant Bourassa has voluntarily provided his medical records regarding his 2017 and 2018 admissions to a treatment clinic specialized in Opioid Use Disorder[22], being in excess of 230 pages. Such disclosure is an important factor in the Court's analysis of the request for medical records by Abbott and other Petitioner-Respondents.

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[22] Exhibits P-51 and P-52.

[67] As regards Abbott's argument, shared by others, that fair play and the equity of the process support granting access to the documents, the Court does not consider that access to documents, including medical records, should be granted simply on the basis of equity. As stated above, the case law has set out the applicable criteria. Petitioner-Respondents need demonstrate that the information is essential and indispensable, as well as limited. If that criteria is not met, the principle of equity, absent a statutory provision, is insufficient to carry the ball over the goal line.

[68] There is another issue that the Court considers it is useful to address. Abbott is seeking not only access to certain documents, but also the Court's authorization to file same into the court file.

[69] In this regard, the Court would not have authorized the filing of the totality of the document in question had access been granted, and this given that the Court has not yet taken cognizance of the documents. That analysis could be done subsequent to access, including at the outset of the authorization hearing.

[70] The Court states the foregoing, keeping in mind the comments of Justice Mark Schrager of the Court of Appeal in *E.L.* c. *Procureur général du Québec*[23], to the effect that the decision to authorize the production of documents at this stage cannot be done in the abstract, such that the judge must be provided the opportunity to assess the documents prior to rendering a decision.

[71] For the foregoing reasons, Abbott's application will be dismissed.

5.2. Pharmascience and Teva

[72] These two Petitioner-Respondents are also arguing, like Abbott, that Applicant's own documents have created confusion, thereby requiring the need for clarification.

[73] They seek to examine Applicant Bourassa on two topics, being:

(a) when and how he was made aware of the alleged risks associated with any and all opioid products; and

(b) whether he was aware of the alleged risks associated with opioids prior to the use of products manufactured by Teva Canada Limited or Pharmascience Inc.

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[23] 2021 QCCA 782, para. 15.

[74] In addition, they seek access to the following documents, and this at least 10 days prior to the proposed examination:

(a) a complete copy of Applicant's medical records for the period covered by the allegations of the Re-Amended Application, being 2005 to 2021; and

(b) a complete copy of his pharmacy records for the same period covered by the allegations of the Re-Amended Application.

[75] Subsidiarily, these Petitioner-Respondents seek limited document access, focusing on medical and pharmaceutical records that mention their products and, even more specifically, the prescription for the medication named Teva-Emtec 30, allegedly prescribed and dispensed to Applicant on April 2, 2008, along with all documents remitted to him with that prescription or medication.

[76] As regards document access, they argue that the pharmacy records for the Sainte-Sophie Jean Coutu[24], mentioned above, indicate that on April 2, 2008, Applicant Bourassa was dispensed Teva-Emtec, 300-30 mg, whereas the name "Emtec" for the molecule in question only started being used in 2017, not back in 2008 as shown in the pharmacy record.

[77] With all due respect, that argument as a reason to access all of Applicant's medical and pharmaceutical records is without merit.

[78] Firstly, Teva is not saying that the specific molecule did not exist before 2017, but rather only that the molecule in 2008 was marketed under a different name.

[79] Secondly, it is not Applicant Bourassa who selected the product name used by the Sainte-Sophie Jean Coutu pharmacy in its list of medications filed as Annex 5. It is the pharmacy or the RAMQ.

[80] Thirdly, the fact that Applicant uses in his proceeding[25] that same brand name for what the Sainte-Sophie pharmacy dispensed to him on April 2, 2008, does not constitute, contrary to what respondents argue, evidence that he has lied or his allegation is false, thereby justifying access to records. It is entirely possible that the pharmacy list, generated on November 29, 2021[26], would refer to the then-existing brand name for a given molecule and its DIN number rather than its name years earlier when dispensed. Using the current name of that same molecule does not constitute a key to the vault to which respondents would otherwise not have access.

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24 Annex 5 (page 1) to the February 25, 2022 letter of Plaintiff's counsel.

25 RAA, para. 2.219 (ii).

26 The date and time are indicated at the upper right hand corner of each page.

[81] Petitioner-Respondents go further, arguing that this name issue could be seen as tainting all of Applicant's allegations of fact. That argument is, to say the least, unconvincing.

[82] Insofar as the other arguments raised by these two Petitioner-Respondents in their application, they too are unconvincing and have, for the most part, been addressed in the portion hereof dealing with the Abbott application.

[83] In the Court's view, Pharmascience and Teva have not satisfied their burden of demonstration to justify the document access they seek. They have not made the case, at this stage, that the information and documents are essential, indispensable and limited.

[84] As regards their proposed examination of Applicant, the Court will allow it, just as it did for the previous applicant in this matter and this as it pertains to the issue of when and how he was made aware of risks associated with the use of any or all opioid products. The Court will also allow the authorized Petitioner-Respondents to ask whether such knowledge was acquired prior to his starting to use their opioid products, but without Applicant being required to provide documentary proof as when he started such use, the Court having already decided as to the issue of access to his pharmaceutical and medical records.

[85] The said examination is to be conducted before the Court at the authorization hearing, for a maximum duration of 1.5 hours, to be shared, either equally or by agreement, by all the Petitioner-Respondents who are authorized herein by the Court.

[86] In the Court's view, however, the present Petitioner-Respondents have not satisfied their burden of demonstrating that any additional information or documents are essential or indispensable for the authorization hearing.

5.3. Pro Doc

[87] Pro Doc also seeks access to documents[27], as well as the authorization to conduct an examination of Applicant.

[88] **5.3 (a):** As regards access to documents, Pro Doc seeks to receive the following[28]:

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[27] During the hearing, Pro Doc withdrew its conclusion D (iii) as regards access to certain documents, although it continues to seek access to others.

[28] It should be noted that Pro Doc is not seeking authorization to file anything at this stage, and reserves its rights to seek such authorization later.

(i) all the medical files of Applicant Bourassa regarding his treatment at the private clinic in Saint-Sauveur, as alleged at paragraph 2.215 of his Re-Reamended Application;

(ii) the prescription he was given for Procet-30, and all other documents given to him concerning Procet-30.

[89] Insofar as the medical records from the Saint-Sauveur clinic are concerned, these were also requested by Abbott. For the same reasons expressed above, the Court will not authorize access thereto.

[90] Pro Doc raises the issue that Applicant purportedly suffered from neck cancer. It says that it learned this by means of a transcript from a Quebec Court, Small Claims Court hearing in 2014, in the District of Terrebonne, during which Applicant testified as a roofing expert and informed the Court that in 2012, he had not renewed his *Régie du bâtiment* licence as a roofing contractor because he had neck cancer.

[91] Moreover, Pro Doc argues that Mr. Bourassa filed for bankruptcy in 2014, and this given that his roofing business had failed and that he had insufficient revenue to pay his debts, all unrelated to his fall.

[92] By way of its subsequent re-amended application, dated March 11, 2022, Pro Doc seeks to file the said transcript as exhibit RL-29 and Applicant's bankruptcy file as exhibit RL-30. Pro Doc also seeks to file related judgments and court records as exhibit RL-28.

[93] According to Pro Doc, this information is integral to Applicant's case as to causality, in that it contradicts his allegation that he ceased working due to the pain resulting from his fall.

[94] What exactly has Applicant actually alleged in this regard?

[95] At paragraphs 2.237 and 2.238 of his Re-Amended Application, he alleges the following:

2.237 Although he was able to work intermittently after a lengthy recovery from his accident in November 2005, he ultimately was unable to continue working due to his OUD (Opioid Use Disorder).

2.238 In November 2020, Mr. Bourassa applied for disability benefits under the Quebec Pension Plan, which application was supported by his family doctor, as he did not believe that Mr. Bourassa would ever be able to work again.

[96] In the Court's view, any statement that in 2012, Applicant did not renew his contractor licence due to neck cancer, would not reasonably on its face manifestly contradict a much broader statement that he was ultimately unable to work due to Opioid Use Disorder.

[97] This issue of causality would be one, amongst others, that would need be determined in the post-authorization phase when more detailed proof would become available should the class action ultimately be authorized.

[98] Moreover, the fact that Applicant has not mentioned that he had neck cancer is not, per se, a reason for the Court to authorize Pro Doc to access his medical records.

[99] In the Court's view, Applicant has no obligation for the purposes of authorization, to mention every medical condition he has ever encountered.

[100] In addition, from the perspective of proportionality, one should keep in mind that Applicant has only referred to one prescription of one medication with respect to Pro Doc, and this in relation to dental surgery. In the Court's view, this does not speak favourably to Pro Doc's application to access all medical records from the Saint-Sauveur clinic.

[101] Counsel for Pro Doc reminded the Court that due to investigative efforts on the part of certain respondents, including his client, they have been able to remove prior applicants from the action. They are looking to see whether that can and should be done with the current Applicant, who has only been involved in that role for a few months now.

[102] The Court's role is certainly not to promote removing applicants seeking to institute class actions, thereby blocking the advancement of a proposed class action. Appellate courts have often reminded class-action authorization judges that the objective is not to find the "perfect" applicant/class representative.

[103] The Court concludes that Pro Doc has not demonstrated that accessing the medical records in this case is essential, indispensable and limited, at least not at the authorization stage.

[104] In this regard, it would require, at the least, a mini-trial to enable the Court to make the factual distinctions argued by Pro Doc as to what contribution neck cancer may have actually had on Mr. Bourassa's decision to cease working versus simply not renewing a licence, and whether that outweighed the impact of other pain and Opioid Use Disorder on his inability to work. That issue, if relevant at all, would best be left to a post-authorization stage, if that is ever to be the case, where the judge will benefit from more detailed proof.

[105] As stated above, one cause of pain would not necessarily "manifestly" contradict another.

[106] Moreover, it is worth repeating that this is not a case where an applicant has provided no specifics or supporting documents. Applicant Bourassa has provided both, including his medical records relating to his treatments for Opioid Use Disorder.

[107] **5.3 (b):** As regard the prescription for Procet-30, Applicant states[29] that on April 17, 2015, he was dispensed, as mentioned above, Procet-30, a Pro Doc drug and this for pain related to a dental procedure.

[108] Pro Doc argues that this singular reference to Procet-30 raises questions because there is no specific allegation of causality, and it is not clear that one prescription would create Opioid Use Disorder.

[109] As well, Pro Doc argues that it is unclear why, after 11 years on primarily two opioid drugs, Applicant Bourassa decided to seek treatment for Opioid Use Disorder.

[110] In the Court's view, none of these arguments justify Pro Doc's access to additional documents. There is no reasonable explanation given as to why accessing those documents would be essential and indispensable for the purposes of authorization.

[111] At this stage, there is no reason to conclude that Applicant's allegation in this regard should not be taken as true, and the Court does not intend to conduct a trial within a trial in this regard.

[112] In the Court's view, there is no rule requiring a class-action applicant to file every document he or she may possess, including prescriptions, at the authorization stage. Each case is to be assessed on its own facts and context.

[113] **5.3 (c):** As mentioned, Pro Doc is also seeking authorization to examine Applicant. It requests a two-hour examination on the following issues:

(i) when and how Mr. Bourassa acquired knowledge of the risks associated with analgesic opioids;

(ii) his specific complaints as regards Pro Doc in relation to Procet-30, which he would have consumed on or about April 17, 2015;

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[29] Re-Amended Application, para. 2.219 (iv).

(iii) his work history in the field of roofing since 2005 and the reasons for having stopped working; and

(iv) his medical history and the treatments he underwent in relation to neck cancer.

[114] Of these, the only issue that the Court considers appropriate at this stage, and this given the Court's above mentioned comments in relation to Applicant's work and medical history, relates to Applicant having acquired knowledge of the risks associated with analgesic opioids. As stated above, the Court authorized same in relation to the prior applicant. The present applicant does not object.

[115] Accordingly, the Court will authorize an examination by Pro Doc of Applicant Bourassa in relation to the same issues authorized for Abbott, and this as per the terms and conditions hereinafter stated.

[116] **5.3 (d):** Pro Doc seeks to have the Court reserve its rights to later seek permission to file documents.

[117] The Court understands that Pro Doc does not want to be seen to renounce to such right, but an order by the Court to "reserve" such right is of no value. Either Pro Doc has a right or it does not, and the Court need not intervene in matters of this nature in order to either preserve or resurrect a right; presently, it is an academic issue.

5.4. Purdue

[118] Both Purdue entities had sought to access Applicant's pharmaceutical records and to reserve the right to conduct an examination of him regarding whether he was ever prescribed and used OxyContin and OxyNeo between 1996 and 2017. They also wanted to know whether he was previously aware of another opioid class action involving those two medications.

[119] In order to provide Purdue more certainty, Mr. Bourassa signed an affidavit dated February 24, 2022, stating that he was never prescribed and never used OxyContin or OxyNeo between 1996 and 2017. He further stated therein that he had no knowledge of that parallel class action prior to his involvement in the present class-action proceedings.

[120] After having made its representations, and after the Court had taken the matter under reserve, Purdue's counsel, by email dated May 4, 2022, informed the Court that their clients were withdrawing their application to obtain Applicant's pharmaceutical records, as well as to reserve the right to conduct an examination of him.

[121] Accordingly, the Court will not analyse the representations made as regards same.

5.5. Abuse of Procedure

[122] In the Court's view, Applicant has failed to demonstrate an abuse of procedure on the part of Petitioner-Respondents.

[123] Firstly, having replaced the prior applicant in December 2021, Mr. Bourassa exposed himself to being the subject of applications relating to his documents and his examinations insofar as his personal claim is concerned. It is not abusive for Petitioner-Respondents to exercise such rights in his regard. In the Court's view, this is not a question of *res judicata* since Mr. Bourassa has an entirely separate personal claim than his predecessor.

[124] Secondly, the agreement between the parties at the time class counsel sought to change the applicant in December 2021 clearly envisaged that such applications by respondents might be presented. It would be an affront to that agreement on which the Court relied to approve the change of applicant, to now qualify those applications as abusive.

[125] Applicant's position in this regard is not well-founded and is to be dismissed.

FOR THESE REASONS, THE COURT:

GRANTS in part the applications of Pharmascience Inc., Teva Canada Limited and Pro Doc Ltée to examine Applicant;

ORDERS the examination of Applicant Jean-François Bourassa by counsel for Pharmascience Inc. and Teva Canada Limited and for Pro Doc Ltée to be conducted in court before the authorization judge, on the same day as and immediately preceding the authorization hearing, for a combined total duration of one and one-half ($1^1/_2$) hours, with that time to be shared equally between them or as per their agreement, which said examination is to be limited to the issues of when and how Applicant was made aware of risks associated with any or all opioid products and, as well, whether such knowledge was acquired prior to his starting to use those particular respondents' opioid products, without Applicant being obliged to provide documents in that regard;

DISMISSES all the remaining applications as to all other issues;

DISMISSES Applicant's application in abuse of procedure;

THE WHOLE with judicial costs to follow in accordance with the authorization judgment to be rendered in this matter.

Gary D.D. Morrison, J.S.C.

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Date of Hearing : March 21, 2022