SUPERIOR COURT

(Class Action Chamber)

CANADA
PROVINCE OF QUEBEC
DISTRICT OF MONTREAL

N°: 500-06-001004-197

DATE: May 20, 2025

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

JEAN-FRANÇOIS BOURASSA

Applicant

v.

ABBOTT LABORATORIES LTD.
APOTEX INC.
BRISTOL-MYERS SQUIBB CANADA CO.
ETHYPHARM INC.
JANSSEN INC.
JODDES LIMITED
LABORATOIRE ATLAS INC.
LABORATOIRE RIVA INC.
LABORATOIRES TRIANON INC.
PFIZER CANADA ULC
PHARMASCIENCE INC.
PRO DOC LTÉE
PURDUE FREDERICK INC.
PURDUE PHARMA
SANDOZ CANADA INC.
SANOFI-AVENTIS CANADA INC.
SUN PHARMA CANADA INC.
TEVA CANADA LIMITED

Respondents

RECTIFIED JUDGMENT
(on the Re-Amended Application dated September 30, 2022 for authorization to institute a class action)

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1. OVERVIEW

[1] Applicant Jean-François Bourassa seeks authorization to institute, as the appointed representative, a class action against eighteen respondents[1] as regards Opioid Use Disorder ("**OUD**").

[2] The proposed description of the putative Class is as follows[2]:

> 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, specifically in respect of the drugs OxyContin or OxyNEO, subject to the settlement agreement entered into in the court file no 200-06-000080-070 […]

[3] Firstly, it is clear that each class member must be a person "in Quebec" who has been prescribed and has consumed at least one of the opioid drugs emanating from one or more respondents and, further, is suffering or has suffered from OUD[3].

[4] Secondly, the proposed Class Period commences in 1996, thereby covering a lengthy period of time, with all that that entails, both as to facts and law.

[5] The description contains a conditional exclusion regarding a settlement agreement that was concluded in another action, being a prior Canada-wide class action involving two specific drugs, OxyContin and OxyNEO.

[6] In this regard, the Court has been informed that by judgment dated September 23, 2022, Chief Justice Martel D. Popescul of the King's Bench for Saskatchewan approved the subject settlement agreement[4], thereby enabling the settlement agreement to become effective nationally. It should be noted that Justice

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1 The Court has to date authorized settlement agreements between Applicant and 14 respondents, who are no longer involved in the present authorization proceeding. As regards Paladin Labs Inc., Applicant did not present his application given a stay of proceedings. Accordingly, the Court will confirm the suspension of proceeding as regards that respondent.

2 Re-Amended Application, dated September 30, 2022 (the "**Application**"), par. 1.

3 The manner in which a diagnosis need be made and the applicable criteria will be discussed later in the present judgment.

4 *Carruthers* v. *Purdue Pharma*, 2022 SKKB 214; Exhibit P-56.

Claude Bouchard of the Quebec Superior Court had already approved the said settlement in 2017, and this in the court file number identified in the proposed class definition[5]; his approval was conditional upon similar approvals by the courts of Ontario, Nova Scotia and Saskatchewan, all of which have since been granted.

[7] Accordingly, any claim specifically relating to the drugs OxyContin and OxyNEO would be excluded from the currently proposed class action regardless of which company manufactured same[6].

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

> 2.4.2 […] 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.

[9] This additional carve-out will be discussed further in more detail but suffice it to say at this stage that Applicant does not intend to include exclusively hospital used opioids in the proposed class action.

[10] What is Applicant seeking as compensation by way of his proposed class action?

Compensation

[11] Alleging contraventions of the *Civil Code of Quebec* ("**C.C.Q.**")[7], the *Competition Act*[8] and the *Quebec Charter of Human Rights and Freedoms* (the "**Charter**")[9], Applicant will be seeking, should the class action be authorized, the collective recovery of the following compensation:

1. Non-pecuniary damages for each class member in the amount of $30,000, plus interest and indemnity from the date of service of the application for leave to institute a class action,

2. Punitive damages in the amount of $25,000,000 to be paid by each defendant, plus interest and indemnity as of the same date mentioned above, and

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5 Exhibit P-38.
6 Exhibits P-54, P-55 and P-56.
7 CQLR c. CCQ-1991.
8 R.S.C. 1985, c. C-34.
9 CQLR c. C-12.

3. Pecuniary damages for each class member, to be determined and recoverable on an individual basis, with interest and indemnity as of the same date mentioned above.

[12] What is the legal syllogism on which Applicant's proposed class action is based?

Legal Syllogism

[13] Applicant argues that the proposed class action would be based, in part, on civil liability for injury caused by each of the defendants who manufactured, marketed, distributed and/or sold prescription opioids drugs with a safety defect thereby not affording the safety that a person is normally entitled to expect, and this without sufficient warnings as to the risks and the serious and potentially fatal dangers involved in the use thereof, which use caused members to develop OUD.

[14] This position is based essentially on Articles 1468 and 1469 C.C.Q. which read as follows:

> **1468.** The manufacturer of a movable thing is bound to make reparation for injury caused to a third person by reason of a safety defect in the thing, even if it is incorporated with or placed in an immovable for the service or operation of the immovable.
>
> The same rule applies to a person who distributes the thing under his name or as his own and to any supplier of the thing, whether a wholesaler or a retailer and whether or not he imported the thing.
>
> **1469.** A thing has a safety defect where, having regard to all the circumstances, it does not afford the safety which a person is normally entitled to expect, particularly by reason of a defect in design or manufacture, poor preservation or presentation, or the lack of sufficient indications as to the risks and dangers it involves or as to the means to avoid them.
>
> **1468.** Le fabricant d'un bien meuble, même si ce bien est incorporé à un immeuble ou y est placé pour le service ou l'exploitation de celui-ci, est tenu de réparer le préjudice causé à un tiers par le défaut de sécurité du bien.
>
> Il en est de même pour la personne qui fait la distribution du bien sous son nom ou comme étant son bien et pour tout fournisseur du bien, qu'il soit grossiste ou détaillant, ou qu'il soit ou non l'importateur du bien.
>
> **1469.** Il y a défaut de sécurité du bien lorsque, compte tenu de toutes les circonstances, le bien n'offre pas la sécurité à laquelle on est normalement en droit de s'attendre, notamment en raison d'un vice de conception ou de fabrication du bien, d'une mauvaise conservation ou présentation du bien ou, encore, de l'absence d'indications suffisantes quant aux risques et dangers qu'il comporte ou quant aux moyens de s'en prémunir.

[15] In addition, Applicant alleges that the proposed defendants were also negligent in a variety of other ways in relation to opioid drugs.

[16] That said, he goes further and alleges that the marketing of the opioids was intentionally done through deliberate misrepresentations to the effect that the opioid medications were less addictive than they knew them to actually be. This issue is not raised just in passing, without explanatory allegations. It is covered in the allegations found at paragraphs 2.39 to 2.124 of the Application, being from pages 16 to 32 thereof, as well as in common questions 5.4 to 5.6 and 5.11.

[17] In this regard, what Applicant alleges is that starting in the mid-1990s the respondents "acted in concert" to promote a false and misleading "new narrative" concerning the safety and efficacy of opioids in order to increase their use for treatment in a larger patient population, especially for chronic conditions.

[18] The Court, reading between the lines, understands that Applicant is arguing that respondents' marketing of opioid drugs, based on misrepresentations, is part of both their individual negligent conduct and, as well, their conspiratorial conduct contrary to the *Competition Act*[10].

[19] The alleged misrepresentations (the "**Misrepresentations**") are detailed by Applicant[11], as will be seen in a later section.

[20] Applicant further alleges that respondents engaged in aggressive sales tactics in order to spread the Misrepresentations[12].

[21] As a result of the Misrepresentations, and the related failure to inform and to warn, the resulting widespread use of "these dangerous and highly addictive prescription opioid drugs" allegedly gave rise to an opioid crisis throughout Canada, including in Quebec[13]. The Court will comment further on the relevance, if any, of an "opioid crisis" in the context of the proposed class action.

[22] According to Applicant, the use of such drugs in the circumstances described above has allegedly caused the Opioid Use Disorder suffered by all the putative class members[14].

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10 *Supra*, note 8.
11 Application, *supra*, note 2, par. 2.45.
12 *Idem*, par. 2.82-2.84.
13 *Idem*, par. 2.132.
14 *Idem*, par. 2.148.

[23] In addition to the forgoing, Applicant argues that the fundamental rights of putative class members under the Quebec Charter have been violated by respondents. This issue, as well as others, will be addressed in later sections.

[24] As for respondents, they contest the Application arguing that Applicant has failed to satisfy his burden of demonstration as required at law, and this for a variety of reasons, some of which apply to them as a group and others on an individual basis. These latter issues will be addressed in more detail later herein, but only after the Court has addressed the more common ones.

[25] The various common or joint issues raised by respondents include the following:

- Applicant has failed to demonstrate a defendable case against each of the respondents, lumping them all together as if they all sold the same opioid product;
- Prescription opioid drugs cannot be treated as a class of drugs given the differences between the various products, including those relating to delivery, dosage and duration, such that they cannot all be said to have been consumed by Applicant or to have caused OUD or any other claimed damages;
- Certain respondents only had a small or insignificant market share or were on the market for a short period of time, such that they cannot all be said to have caused OUD or any other claimed damages;
- Applicant did not consume any opioid drugs manufactured, marketed, distributed and/or sold by certain of the respondents;
- Applicant has made no detailed allegations and has provided no evidence that confirms that all opioid medication can cause OUD;
- Respondents did not make misrepresentations and did not either market or promote their drugs, and this especially as regards generic drugs;
- Applicant has not shown the existence of any other members, and the Court cannot simply assume that there exist putative class members who consumed the opioid drugs of all respondents;
- Health Canada had approved all the drugs to which Applicant refers;
- The proposed class action would not be proportional, and the Court should not act as a commission of inquiry;

- Certain claims would be prescribed.

2. APPLICABLE AUTHORIZATION CRITERIA AND PRINCIPLES

[26] As the courts have confirmed on numerous occasions, the class action in Quebec has several objectives[15], including to facilitate access to justice, to modify harmful behaviour by way of deterrence, to provide for victim compensation and to conserve judicial resources.

[27] The criteria that must be met in Quebec in order for a class action to be authorized and for the representative plaintiff to be designated are stipulated at Article 575 *Code of Civil Procedure* (**C.C.P.**), which reads as follows:

> **575.** The court authorizes the class action and appoints the class member it designates as representative plaintiff if it is of the opinion that
>
> (1) the claims of the members of the class raise identical, similar or related issues of law or fact;
>
> (2) the facts alleged appear to justify the conclusions sought;
>
> (3) the composition of the class makes it difficult or impracticable to apply the rules for mandates to take part in judicial proceedings on behalf of others or for consolidation of proceedings; and
>
> (4) the class member appointed as representative plaintiff is in a position to properly represent the class members.
>
> **575.** Le tribunal autorise l'exercice de l'action collective et attribue le statut de représentant au membre qu'il désigne s'il est d'avis que:
>
> 1° les demandes des membres soulèvent des questions de droit ou de fait identiques, similaires ou connexes;
>
> 2° les faits allégués paraissent justifier les conclusions recherchées;
>
> 3° la composition du groupe rend difficile ou peu pratique l'application des règles sur le mandat d'ester en justice pour le compte d'autrui ou sur la jonction d'instance;
>
> 4° le membre auquel il entend attribuer le statut de représentant est en mesure d'assurer une représentation adéquate des membres.

[28] And although the issue of proportionality is to be assessed with respect to the criteria stipulated at Article 575 C.C.P., it does not constitute an additional stand-alone criterion[16].

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[15] *L'Oratoire Saint-Joseph du Mont-Royal* v. *J.J.*, 2019 SCC 35, par. 6; *Vivendi Canada Inc.* v. *Dell'Aniello*, 2014 SCC 1, par. 1; *Bank of Montreal* v. *Marcotte*, 2014 SCC 55, par. 43; *Western Canadian Shopping Centres Inc.* v. *Dutton*, 2001 SCC 46, par. 27-29.

[16] *Vivendi*, *supra*, note 15, par. 66.

[29] The role of the court at the authorization phase is to determine whether these statutory criteria are met. It is no more and no less than a "screening role"[17].

[30] And although the court has broad interpretation and application powers[18], in the event that the authorization judge is convinced that an applicant has met the said criteria, the class action must be authorized[19].

[31] The authorization stage being purely procedural in nature, the motions judge must not deal with the merits of the case, which will only be considered subsequently should the class action be authorized[20].

[32] Accordingly, an applicant's burden is not one of preponderance of proof but rather is one of demonstration[21]. It is a low threshold, to be considered in a generous and liberal manner[22]. These two elements are important to a court's analysis.

[33] Moreover, an applicant's allegations of fact are held to be true[23]. This is a crucial component of the filtering process. Accordingly, and subject to what follows, the authorization stage is generally not the time for a contestation as to alleged facts, which is more appropriate to the post-authorization phase. In other words, a motions judge is not to analyse the grounds of defence based on contested alleged facts.

[34] That said, in order to constitute a fact that is worthy of being held to be true, an allegation cannot simply be vague, general and imprecise, nor can it simply be an inference, a conclusion, an unverified hypothesis, an opinion or a legal argument[24]. Accordingly, a class action cannot solely be based on non-factual allegations[25].

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17 *L'Oratoire*, *supra*, note 15, par. 7; *Vivendi*, *supra*, note 15, par. 37; *Infineon Technologies AG* v. *Option consommateurs*, 2013 SCC 59, par. 59 and 65.

18 *L'Oratoire*, *supra*, note 15, par. 8.

19 *Ibid*.

20 *Idem*, par. 7; *Infineon*, *supra*, note 17, par. 68; *Vivendi*, *supra*, note 15, par. 37; *Marcotte* v. *Longueuil (City)*, 2009 SCC 43, par. 22.

21 *Pharmascience inc.* v. *Option Consommateurs*, 2005 QCCA 437, par. 25.

22 *Infineon*, *supra*, note 17, par. 57-69.

23 *Idem*, par. 67; *L'Oratoire*, *supra*, note 15, par. 109; *Sibiga* v. *Fido Solutions inc.*, 2016 QCCA 1299, par. 52.

24 *Option Consommateurs* v. *Bell Mobilité*, 2008 QCCA 2201, par. 38; *Harmegnies* v. *Toyota Canada* inc., 2008 QCCA 380, par. 44; *Bourdeau* v. *Société des alcools du Québec*, 2018 QCCS 3120, par. 33 (Confirmed, 2020 QCCA 1553); *Durand* v. *Attorney General of Quebec*, 2018 QCCS 2817, par. 140-141.

25 *Sibiga*, *supra*, note 23, par. 14.

[35] If the allegation of fact is not sufficiently precise as to be held to be true, then essential allegations need generally be supported by some form of evidence so as to qualify as being arguable[26].

[36] Moreover, the individual who seeks to act as class representative must be able to ensure an adequate representation of the members. This is generally not a difficult criterion to satisfy, albeit that person must generally have an arguable case as regards his own claim that makes him a member of the class. Moreover, the authorization judge must consider proportionality when deciding whether the proposed representative can provide adequate representation on behalf of the proposed class[27].

[37] The Court of Appeal has recently confirmed anew the factors to be considered for the purposes of assessing the status of representative[28]:

> [25] La jurisprudence enseigne que les facteurs pertinents pour apprécier le critère relatif au statut de représentant, énoncé au paragraphe 575(4°) *C.p.c.*, sont l'intérêt du représentant à poursuivre, sa compétence et l'absence de conflit d'intérêts. Ces facteurs doivent être interprétés de manière libérale. Comme la Cour suprême l'écrit dans *Infineon Technologies AG c. Option consommateurs*, « [a]ucun représentant proposé ne devrait être exclu, à moins que ses intérêts ou sa compétence ne soient tels qu'il serait impossible que l'affaire survive équitablement ».
>
> [26] Ici, la juge de première instance constate la « réelle motivation des demandeurs à remplir un tel rôle » et « leur capacité pour ce faire ». La capacité, l'intérêt sincère et légitime des appelants ainsi que l'absence de conflit d'intérêts sont établis. Les exigences additionnelles imposées par la juge — concernant les tentatives faites par les appelants pour contacter d'autres personnes intéressées et la démonstration du nombre de personnes visées par le Groupe — ne sont pas pertinentes pour statuer sur leur statut de représentants.
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> [References omitted.]

[38] Subject to demonstrating a personal arguable case, satisfying the criteria applicable to the representative plaintiff appears to now be treated as a form of presumption, thereby requiring the respondent to demonstrate the existence of an exception, as described in the above citation. The nature and level of proof that is required in this regard is to be determined on a case-by-case basis.

[39] Ultimately, in case of doubt as to whether to authorize a class action, the courts have applied the approach of authorizing it and referring the action to a judge in the

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26 *L'Oratoire*, *supra*, note 15, par. 59.
27 *Marcotte*, *supra*, note 15, par. 45.
28 *D'Amico* v. *Procureure générale du Québec*, 2019 QCCA 1922, par. 25-26.

post-authorization phase who can then make all the necessary decisions, taking into consideration the more detailed proof provided by the parties[29].

[40] In keeping with the foregoing, the authorization stage is intended to prevent cases going forward that are not "defendable" or "arguable"[30] or otherwise described as being frivolous, untenable, unjustifiable or clearly unfounded[31].

[41] In that regard, the Court of Appeal confirmed, in *Sibiga*[32], that notwithstanding the objectives of class actions, as stated above, and the screening role to be exercised by the motions judge, the latter must nevertheless avoid a "lack of rigour at authorization [which] can indeed weigh down the courts with ill-conceived claims, creating the perverse outcome that the rules on class actions serve to defeat the very values of access to justice they were designed to champion".

[42] In other words, authorization is not a proverbial "rubber-stamp" process, and an applicant is required to demonstrate, on a *prima facie* basis, the existence of an "arguable" case.

[43] That said, however, the Quebec class action authorization process seems to continue to move towards a "mere formality" ("*une simple formalité*"), without yet having fully arrived there.

[44] In *L'Oratoire*[33], Justice Brown of the Supreme Court of Canada, expressly declined in 2019 to reinforce the Quebec authorization process, stating this as follows:

> [62] Despite what certain jurists would prefer (see, for example, *Whirlpool Canada v. Gaudette*, 2018 QCCA 1206, at para. 29 (CanLII) (in *obiter*); C. Marseille, "Le danger d'abaisser le seuil d'autorisation en matière d'actions collectives — Perspectives d'un avocat de la défense", in C. Piché, ed., *The Class Action Effect* (2018), 247, at pp. 252-53), it is in my opinion not advisable for this Court to [TRANSLATION] "reinforce" the
>
> [62] Malgré les souhaits exprimés en ce sens par certains juristes (voir, par exemple, *Whirlpool Canada c. Gaudette*, 2018 QCCA 1206, par. 29 (CanLII) (en *obiter*); C. Marseille, « Le danger d'abaisser le seuil d'autorisation en matière d'actions collectives — Perspectives d'un avocat de la défense », dans C. Piché, dir., *L'effet de l'action collective* (2018), 247, p. 252-253), il n'est selon moi pas opportun que notre Cour « renforce » le processus d'autorisation ou

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29 *Johnson & Johnson inc.* v. *Gauthier*, 2020 QCCA 1666, par. 21.
30 *Infineon*, *supra*, note 17, par. 61-65; *L'Oratoire*, *supra*, note 15, par. 61.
31 *L'Oratoire*, *supra*, note 15, par. 56; *Sibiga*, *supra*, note 23, par. 24; *Charles* v. *Boiron Canada inc*., 2016 QCCA 1716, par. 43; *Fortier* v. *Meubles Léon ltée*, 2014 QCCA 195, par. 70;
32 *Sibiga*, *supra*, note 23, par. 14.
33 *L'Oratoire*, *supra*, note 15, par. 62.

> authorization process or otherwise "revisit" its decisions in *Infineon* and *Vivendi*, which, I would add, can be said to have been endorsed by the Quebec legislature when the new *C.C.P.* came into force on January 1, 2016 (see *Commentaires de la ministre de la Justice*, at p. 420: [TRANSLATION] "[Article 575] restates . . . the former law"). I agree with my colleague Côté J., however, that the burden of establishing an "arguable case", although not a heavy one, "does exist", and "the applicant must meet it": Côté J.'s reasons, at para. 205, citing *Sofio*, at para. 24. This means that the authorization process must not be reduced to "a mere formality" […]
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> autrement « révise » ses arrêts *Infineon* et *Vivendi*, dont il est par ailleurs possible de dire qu'ils ont été entérinés par le législateur québécois lors de l'entrée en vigueur du nouveau *C.p.c.* le 1er janvier 2016 (voir *Commentaires de la ministre de la Justice*, p. 420 : « [L'article 575] reprend [. . .] le droit antérieur »). Je conviens cependant avec ma collègue la juge Côté que le fardeau d'établir une « cause défendable » — quoique peu élevé — « existe » et « doit être franchi par le demandeur » : motifs de la juge Côté, par. 205, se référant à *Sofio*, par. 24. Ainsi, il faut éviter de réduire le processus d'autorisation à « une simple formalité » […]

[45] The mere fact that the Supreme Court of Canada considered it necessary to refuse reinforcing the Quebec rules relating to class action authorization, while drawing a line short of a mere formality, speaks loudly as to where the process has developed over time.

[46] In this regard, the Supreme Court has confirmed, as it did in *Asselin*[34], that it supports "a flexible, liberal and generous approach to the authorization conditions that 'favours easier access to the class action as a vehicle for achieving the twin goals of deterrence and victim compensation' […]".

[47] What also comes to mind is the third objective of class actions as described by the Supreme Court in the first paragraph of the oft-cited decision in the matter of *Vivendi*[35], being "conserving judicial resources"/"*économiser les ressources judiciaires*", which the Quebec Court of Appeal reiterates in the case of *Sofio*[36] as follows:

> [26] Rappelons finalement que le véhicule procédural que constitue le recours collectif poursuit divers objectifs, dont, entre autres : « […] faciliter l'accès à la justice, modifier des comportements préjudiciables et économiser des ressources judiciaires ». Il n'est pas là pour permettre que se retrouvent devant les tribunaux des recours qui, par ailleurs, n'ont aucune raison d'y être. Ceux-ci consacreraient à ces dossiers du temps qui pourrait être autrement utilisé pour le

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34 *Desjardins Cabinet de services financiers inc.* v. *Asselin*, 2020 SCC 30, par. 16.

35 *Vivendi*, *supra*, note 15.

36 *Sofio* v. *Organisme canadien de réglementation du commerce des valeurs mobilières (OCRCVM)*, 2015 QCCA 1820, par. 26.

> bénéfice d'autres justiciables, nuisant ainsi, dans une perspective globale, à l'accès à la justice et à l'utilisation efficiente des ressources judiciaires.
>
> [Reference omitted.]

[48] The Supreme Court in *Asselin* went on to say, at paragraph 17 thereof, in citing Justice Brown in *Oratoire*, that such a liberal and generous approach requires the authorization judge to "pay particular attention not only to the alleged facts but also to any inferences or presumptions of fact or law that may stem from them and can serve to establish the existence of an 'arguable case'".

[49] Moreover, that Court agreed, at paragraph 18 and following, with the Quebec Court of Appeal's use of the expression "read between the lines" as being intended to "denounce… rigidity and literalism" by authorizing judges. The expression is not intended as an invitation to "rewrite a cause of action", but rather to recognize that "allegations may be imperfect but their true meaning may nonetheless be clear".

[50] The Quebec Court of Appeal in the case of *Haroch* v. *Toronto-Dominion Bank*[37] reiterates that these principles apply at the authorization stage.

[51] Moreover, this more flexible and generous approach directly impacts the issue of evidence at the authorization stage. Contrary to what is often pleaded, applicants are not always required to file evidence and any such evidence if filed can be limited.

[52] Recently, Justice Morissette of the Quebec Court of Appeal in the matter of *Homsy* v. *Google*[38], referring to the issue of "certain proof" as mentioned in *L'Oratoire*, paraphrased the current state of the law in this regard as follows:

> [24] […] Je paraphrase : ainsi donc, si les faits allégués sont suffisamment clairs, précis et spécifiques, la partie en demande est dispensée de fournir une « certaine preuve » au soutien de ce qu'elle allègue. Voilà qui à mon avis constitue une nouvelle atténuation des exigences préalables à l'obtention d'une autorisation. C'est néanmoins l'état actuel du droit positif.

[53] Moreover, in *Infineon*[39], the Supreme Court of Canada confirms that such "certain" evidence may be "limited" and yet still sufficient. In other words, such evidence is not required to prove the alleged fact but rather to render the allegation of fact such that it can be considered as true for authorization purposes.

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37 2021 QCCA 1504, par. 12.
38 2023 QCCA 1220, par. 24.
39 *Infineon*, *supra*, note 17, par. 134.

[54] It is difficult to understand in the context of proportionality how it is that notwithstanding all the foregoing guidelines and objectives, the class action authorization phase in Quebec continues to require the court to invest such important resources, in addition to the costs involved for all concerned, simply to determine whether the proposed class action is frivolous.

[55] And although the principle of proportionality was codified in the 2014 "new" *Code of Civil Procedure*[40], it often plays a minor role in the authorization phase. It tends to be argued from the perspective of respondents arguing that the proposed class action will not be proportional and therefore the court should deny authorization.

[56] Clearly, frivolous or untenable class actions should not be instituted as they would use precious judicial resources to the detriment of access to justice for others. One cannot help but wonder, however, whether the authorization phase is not unintentionally, or otherwise, being used in such a way as to have the same undesirable effect.

[57] In other words, how rigorous need an analysis be to determine that a proposed class action is or is not "frivolous", especially when using an approach that is supple, liberal and generous?

[58] Obviously, a rigorous analysis does not equate to an analysis of the possible defences on the merits. The Court is not to assess an applicant's chances of success on the merits, unless some other statutory requirement requires it.

[59] Nor is the Court to require evidence on the part of an applicant except where an allegation of fact is too vague or imprecise to assume its veracity. Even then, the required evidence can be limited to what is necessary to enable the court to assume the veracity of the allegation in question, as opposed to concluding on the probative value of the evidence. To require more would perversely mean that such evidence would need be more convincing than allegations of fact generally.

[60] In this regard, even indirect proof is permitted at the authorization stage to show that the legal syllogism of the proposed class action is not frivolous[41].

[61] What the Court should do is to conduct a serious analysis of the criteria stipulated at Article 575 C.C.P. so as to ensure that the proposed class action is not frivolous, and this while applying a supple, liberal and generous approach in respect of the desired goals and objectives of class actions, being, as stated above, and throughout the jurisprudence, to facilitate access to justice, to modify harmful

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40 Article 18, C.C.P.

41 *Pharmacie Tania Kanou (Jean Coutu)* v. *Turgeon (Succession de Côté)*, 2020 QCCA 303, par. 24 ff. (Leave to appeal denied, 2020 CanLII 68944 (SCC)).

behaviours by way of deterrence, to provided for victim compensation and to conserve judicial resources.

[62] The Court will now proceed to apply the applicable criteria and principles to the present matter.

3. ANALYSIS: ART. 575(2) C.C.P. – DO THE FACTS ALLEGED APPEAR TO JUSTIFY THE CONCLUSIONS SOUGHT?

[63] As mentioned above, there are a number of common or joint arguments that have been raised by all or, in some cases, many of the respondents. The Court considers it best to analyse those prior to considering the individual positions of certain respondents.

[64] Of these, one of the most critical issues relates to the principle of authorizing a class action against multiple defendants even in the absence of an applicant's personal arguable cause of action against each respondent individually.

[65] But before proceeding further with that issue, the Court considers it useful to describe what Opioid Use Disorder is alleged to mean in the present matter.

3.1. The alleged meaning of Opioid Use Disorder (OUD)

[66] OUD is alleged to be the following[42], which replicates the DSM-5 diagnostic criteria published in a text from the British Columbia Centre on Substance Abuse[43], which itself is said to be based on the American Psychiatric Association's Diagnostic and statistical manual of mental disorders[44]:

> 2.149. Sufferers of Opioid Use Disorder experience at least two of the following diagnostic symptoms:
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> 2.149.1. Opioids are often taken in larger amounts or over a longer period than was intended;
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> 2.149.2. There is a persistent desire or unsuccessful efforts to cut down or control opioid use;
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> 2.149.3. A great deal of time is spent in activities necessary to obtain the opioid, use the opioid, or recover from its effects;
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> 2.149.4. Craving or a strong desire to use opioids;

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42 Application, note 2, par. 2.149; see also Exhibit P-35, pages 1/5 and 2/5, and Exhibit P-28, p. 51 ff.
43 Exhibit P-37.
44 *Ibid.*; DSM-5, 5th ed., Arlington, VA: American Psychiatric Publishing Inc.

2.149.5. Recurrent opioid use resulting in a failure to fulfill major role obligations at work, school, or home;

2.149.6. Continued opioid use despite having persistent or recurrent social or interpersonal problems caused or exacerbated by the effects of opioids;

2.149.7. Important social, occupational, or recreational activities are given up or reduced because of opioid use;

2.149.8. Recurrent opioid use in situations in which it is physically hazardous;

2.149.9. Continued use despite knowledge of having a persistent or recurrent physical or psychological problem that is likely to have been caused or exacerbated by opioids;

2.149.10. Tolerance*, as defined by either of the following:

1. Need for markedly increased amounts of opioids to achieve intoxication or desired effect; and

2. Markedly diminished effect with continued use of the same amount of opioid.

2.149.11. Withdrawal*, as manifested by either of the following:

1. Characteristic opioid withdrawal syndrome; and

2. Same (or a closely related) substance is taken to relieve or avoid withdrawal symptoms.

*Patients who are prescribed opioid medications for analgesia may exhibit these two criteria (withdrawal and tolerance) but would not necessarily be considered to have a substance use disorder.

[67] In applying the criteria, OUD is established as follows[45]:

- The presence of at least 2 of these symptoms indicates an Opioid Use Disorder (OUD);

- The severity of the OUD is defined as:

  - MILD: The presence of 2 to 3 symptoms;

[45] *Ibid.*

- MODERATE: The presence of 4 to 5 symptoms;

- SEVERE: The presence of 6 or more symptoms.

[68] As of May 25, 2017, Applicant was diagnosed at Hôpital Saint-Luc of the CHUM with severe OUD according to the admissions document filed as evidence in support of his Application for authorization[46].

[69] As regards the effects of OUD on individuals, they are alleged by Applicant to be[47]:

> 2.150. Opioid Use Disorder has crippling effects on its victims, including in the form of:
>
> 2.150.1. personal injury, including addiction;
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> 2.150.2. severe emotional distress, social stigma, prejudice and discrimination resulting from addiction;
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> 2.150.3. a lack of awareness that they are suffering from Opioid Use Disorder;
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> 2.150.4. overdose, serious injury, and death;
>
> 2.150.5. out of pocket expenses relating to their drug dependence, including for treatment and recovery; and
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> 2.150.6. loss of income.

[70] It is argued by certain respondents that the criteria list DSM-5 is incomplete, but in the Court's view, whether that is true or not, the list and its application are certainly sufficient for authorization purposes.

[71] It was also argued that there is no evidence of what specific drugs cause OUD. That issue, in the Court's view, is part of what a defendant might want to flush out in more detail as part of a defence on the merits. For the purposes of authorization, the Court considers that Applicant has made, for authorization purposes, a sufficient demonstration, with evidence in hand, that opioid drugs can cause OUD.

[72] Also, the fact that in some thirteen (13) other court cases the applicants provided more evidence, including expertise, than the present Applicant does not, contrary to what is argued by certain respondents, constitute a criteria that need be applied to all

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46 Exhibit P-51 (Under Seal): "*Trouble de l'usage des opioïdes sévère*".
47 Application, par. 2.150.

cases. The Court does not consider that applicants in all medication-based class action proceedings are required to file at the authorization stage all the evidence, including expertise, in support of their proposed class action. In the Court's view, that is a bridge too far to require crossing at the authorization stage.

3.2. Respondents whose opioid drugs were not consumed by Applicant: Legal Standing

[73] In the present case, Applicant alleges that he is a Quebec resident. He has provided documented evidence[48] that supports his allegation that having been prescribed and having consumed opioids for more than a decade, he has been diagnosed with and treated for OUD in both the in-patient and out-patient programs at the Centre hospitalier de l'Université de Montréal (the "**CHUM**"), and this since 2017[49].

[74] From an historical perspective, he alleges that he suffered multiple fractures in 2005 when he fell from a roof. At the time of the accident, he was the owner of a roofing business.

[75] While hospitalized as a result of his accident, Applicant alleges that he was given a number of different opioids. After his discharge in November 2005, he asserts that he remained on prescription Dilaudid manufactured by respondent Abbott Laboratories Ltd. ("**Abbott**").

[76] From January 2006 to the moment he was admitted to the CHUM OUD program in May 2017, he alleges that he had been dispensed the following prescription opioids[50]:

1. Dilaudid, manufactured by Abbott and, in or around 2009, by Purdue Pharma ("**Purdue**");

2. Controlled-release Hydromorph Contin (hydromorphone) manufactured by Purdue;

3. Periodically, in 2010 and 2013, a generic immediate-release hydromorphone, PMS-Hydromorphone manufactured by Pharmascience Inc. ("**Pharmascience**");

4. In April 2008, Teva-Emtec-30, a codeine drug manufactured by Teva Canada Limited ("**Teva**"), and this as a result of dental surgery for an abscess;

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48 Exhibits P-51, P-52 and P-53.
49 Application, par. 2.210 to 2.232.
50 *Idem*, par. 2.216 to 2.219.

5. In December 2009, Ratio-Emtec-30, a codeine drug manufactured by then Ratiopharm Inc. ("**Ratiopharm**") which, in August 2010, merged into Teva, the use of which also resulted from an abscess;

6. In April 2015, Procet-30, a codeine drug manufactured by Pro Doc Ltée ("**Pro Doc**"), which he claims to have taken after dental surgery for an extraction that lasted 2 to 3 hours.

[77] Applicant also alleges that even prior to his accident in 2005, more particularly in early 2000, he had been prescribed, for burns he had suffered, Empracet-30, a codeine drug manufactured by Glaxosmithkline Inc[51].

[78] During his testimony before the Court, while questioned by counsel for various respondents at the beginning of the hearing, Applicant denies having been warned by a doctor or pharmacist against over-consumption of opioids, clarifying that he does not recall any warnings.

[79] It would only have been in 2014-2015 that he says he received any explanatory papers from the pharmacist, which he further states he only looked at quickly, being already at the maximum dosage for opioid medication.

[80] Between 2012 and 2017, his testimony is that he had been told that he was at the maximum dosage. The issue for him was that the maximum dosage was having no effect. Around 2015, his doctor had said to reduce the dosage and then increase it again, but he did not do that.

[81] By 2017, according to his testimony, the opioids were not doing him any good and so, he decided to stop. He went to the CHUM OUD clinic. He describes his experience with opioids as "*l'enfer sur terre*"[52].

[82] He testified that it was only while in the OUD program at the CHUM that he became aware of the risks. His treating doctor there told him that it would be a long and difficult road to end his use of opioids, and he alleges that it was. He remained at the hospital as an in-patient for 8 days to reduce his use and then for 1 year as an out-patient.

[83] Following his discharge in June 2017 from the CHUM OUD program, Applicant alleges that the continued to be prescribed Dilaudid and Hydromorph Contin, in lower dosages. He further alleges that at times he received a generic form of Dilaudid, being either Apo-Hydromorphone manufactured by Apotex Inc. ("**Apotex**") or PMS-Hydromorphone by Pharmascience. In addition, he alleges that his doctor, between

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51 It has concluded a settlement with Applicant.

52 "Hell on earth" in English.

early November and early December 2017, switched his medication to sustained-release morphine, being Teva-Morphine SR, by Teva, and Morphine SR manufactured by Sanis Health Inc.[53], as well as Statex, manufactured by Paladin Labs Inc.[54]. However, due to an alleged intolerance to morphine, his prescriptions were switched back to Dilaudid and Hydromorph Contin.

[84] He alleges having been re-admitted to the OUD program at the CHUM in February 2018, where Metadol (methadone) was administered as part of his treatment. He had once again been diagnosed with OUD[55].

[85] In July 2021, Applicant alleges that he was prescribed Dilaudid in an emergency department to alleviate the pain associated with shingles, and that his family doctor continued thereafter to prescribe it to him.

[86] Apart from demonstrating that Applicant has suffered from OUD, the foregoing demonstrates that Applicant does not purport to have consumed opioid drugs from numerous respondents, being Bristol-Myers Squibb Canada Co., Ethypharm Inc., Janssen Inc., Joddes Limited, Laboratoire Atlas inc., Laboratoire Riva inc., Laboratoires Trianon inc., Pfizer Canada ULC, Sandoz Canada Inc., Sanofi-Aventis Canada Inc. and Sun Pharma Canada Inc. (the "**Not-used Respondents**").

[87] These Not-used Respondents argue, amongst other issues, that Applicant has the duty to demonstrate an arguable case against each and every respondent he seeks to sue in the proposed class action, which he has failed to do, not having used medication manufactured, distributed or sold by all of them. Accordingly, they argue that he lacks standing against them. It is argued that Applicant only used 13 medications from 11 manufacturers, representing a rather small percentage of the industry.

[88] They put the question as to why Applicant has not limited his proceeding to only those respondents whose medication he actually consumed rather than disproportionately targeting what is tantamount to the entire opioid-drug-manufacturing industry.

[89] In support of his position that he is not required to have consumed drugs manufactured, distributed or sold by each and every respondent in order to have sufficient legal standing to sue them, he refers to the oft-cited decision of the Supreme Court of Canada in *Bank of Montreal* v. *Marcotte*[56].

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53 Applicant has settled out of court with Sanis.
54 The proceeding against Paladin has been suspended.
55 Exhibit P-52.
56 *Marcotte*, *supra*, note 15.

[90] In that case, the Supreme Court stated, as follows, that a class-action representative is not required to have a direct cause of action against each defendant in a class action[57]:

> [43] Nothing in the nature of class actions or the authorization criteria of art. 1003 requires representatives to have a direct cause of action against, or a legal relationship with, each defendant in the class action. The focus under art. 1003 of the *CCP* is on whether there are identical, similar or related questions of law or fact; whether there is someone who can represent the class adequately; whether there are enough facts to justify the conclusion sought; and whether it is a situation that would be difficult to bring with a simple joinder of actions under art. 67 of the *CCP* or via mandatary under art. 59 of the *CCP*. As noted in *Infineon Technologies AG v. Option consommateurs*, 2013 SCC 59, [2013] 3 S.C.R. 600, this Court has given a broad interpretation and application to the requirements for authorization, and "the tenor of the jurisprudence clearly favours easier access to the class action as a vehicle for achieving the twin goals of deterrence and victim compensation" (para. 60). Article 1003(*d*) still requires the representative plaintiff to be "in a position to represent the members adequately". Under this provision, the court has the authority to assess whether a proposed representative plaintiff could adequately represent members of a class against defendants with whom he would not otherwise have standing to sue.
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> […]
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> [43] Rien dans la nature du recours collectif ou dans les critères d'autorisation prévus à l'art. 1003 n'exige une cause d'action directe par le représentant contre chaque défendeur ou un lien de droit entre eux. L'article 1003 *C.p.c.* appelle l'analyse suivante : Les recours soulèvent-ils des questions de droit ou de fait identiques, similaires ou connexes? Quelqu'un est-il en mesure d'assurer une représentation adéquate des membres? Un nombre suffisant de faits justifient-ils la conclusion recherchée? Enfin, la situation rend-elle difficile le simple recours joint, prévu à l'art. 67 *C.p.c.,* ou le mandat, prévu à l'art. 59 *C.p.c.*? Comme elle l'indique dans l'arrêt *Infineon Technologies AG c. Option consommateurs*, 2013 CSC 59, [2013] 3 R.C.S. 600, notre Cour privilégie une interprétation et une application larges des critères d'autorisation du recours collectif et « la jurisprudence a clairement voulu faciliter l'exercice des recours collectifs comme moyen d'atteindre le double objectif de la dissuasion et de l'indemnisation des victimes » (par. 60). L'alinéa 1003*d*) exige cependant du représentant qu'il soit « en mesure d'assurer une représentation adéquate des membres ». Cette disposition confère donc au tribunal le pouvoir de décider si le représentant proposé pourrait assurer une représentation adéquate des membres du groupe à l'égard des défendeurs contre lesquels il n'aurait pas en d'autres circonstances le statut

[57] *Idem*, par. 43, 45 and 46.

[45] In other words, the authorizing judge has an obligation to consider proportionality — the balance between litigants, good faith, etc. — when assessing whether the representative is adequate, or whether the class contains enough members with personal causes of action against each defendant.

[46] The facts of this case demonstrate the importance of granting the representative plaintiffs standing even where they do not have a personal cause of action against each defendant. As in *CHSLD Christ-Roi*, the same legal issues are present in the action of each class member against each Bank. Each Bank faces more or less the same issues regarding the interpretation and application of the *CPA*, and counters with the same arguments about its constitutional applicability. Even more tellingly, when questioned by the trial judge as to whether he should disregard the evidence heard from one Bank in his decision *vis-à-vis* the other Banks, the Banks argued that even if Mr. Marcotte and Mr. Laparé were found to not have standing for all of the Banks, this evidence was pertinent to the questions at issue for all the Banks and should not be disregarded (trial reasons, at para. 197).

pour poursuivre.

[…]

[45] Autrement dit, le juge saisi de la requête en autorisation a l'obligation de tenir compte de la proportionnalité — équilibre entre les parties, bonne foi, etc. — pour déterminer si le représentant proposé peut assurer une représentation adéquate, ou si le groupe compte suffisamment de membres dotés d'une cause personnelle d'action contre chacun des défendeurs.

[46] Les faits de la présente affaire font foi de l'importance d'attribuer le statut de représentant aux demandeurs même s'ils n'ont pas de cause d'action personnelle contre chacun des défendeurs. Tout comme c'était le cas dans l'affaire *CHSLD Christ-Roi*, l'action de chaque membre du groupe à l'encontre de chaque défendeur soulève des questions de droit identiques. Chaque banque se voit opposer à peu de chose près les mêmes questions d'interprétation et d'application de la *L.p.c.* et répond par les mêmes arguments sur la constitutionnalité de son application. Qui plus est, au juge du procès qui leur a demandé s'il devait ignorer la preuve produite par une banque concernant les autres, ces dernières ont répondu que cette preuve demeurait pertinente dans l'analyse des questions en litige au regard de chacune des banques et ne saurait être écartée, même si le tribunal concluait à l'impossibilité pour MM. Marcotte et Laparé de représenter le groupe à l'égard de toutes les banques (motifs de première instance, par. 197).

[91] Certain Not-used Respondents argue that in order to bring a class action against multiple defendants from the same industry without a direct cause of action against each of them, it is necessary for all such defendants to be in the exact same legal position.

[92] This, they argue, was the case in *Marcotte*, which involved the repayment of conversion charges imposed by several credit card issuers on credit card purchases made in foreign currencies, with two groups of essentially identical contractual provisions.

[93] They plead that in cases where there is an important variety of very different factual and legal relationships, then a class action against respondents with whom an applicant has no legal relationship should not be authorized[58].

[94] Insofar as medication-based class actions are concerned, they argue that as a result of the decision of the Court of Appeal in *Baratto* v. *Merck Canada Inc.*[59], an applicant can be authorized to institute a class action against multiple defendants even though he did not consume products from all of them but only on the condition that the molecule or active ingredient for all the medication is the same.

[95] In *Baratto*, after citing *Marcotte*, Justice Hogue stated the following[60]:

> [75] Ce principe [de la proportionnalité] a notamment permis d'établir que le représentant n'a pas besoin d'avoir une cause directe contre chaque défendeur. Selon moi, il n'a pas non plus à avoir consommé chacun des produits lorsque, comme ici, il allègue que les produits comportent la même molécule qui est à la source des effets secondaires dont il se plaint.
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> [Reference omitted.]

[96] This they suggest is similar to the defendants in the tobacco class action who all sold cigarettes that contained the same active ingredient, being nicotine, that was ingested in the same manner.

[97] As well, certain Not-used Respondents cite the Court of Appeal decision in *Apple Canada Inc.* v. *Badaoui*[61], where the applicant proposed to institute a class action involving five different Apple products, and this in relation to alleged problems with

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58 *Lachaine* v. *Air Transat AT inc.*, 2021 QCCS 2305.
59 2018 QCCA 1240.
60 *Idem*, par. 75.
61 2021 QCCA 432.

rechargeable batteries. That decision contained the following observation by the Court[62]:

> [71] La distinction avec la présente affaire est qu'il n'y a pas en l'espèce d'allégation ni aucune preuve dans le dossier que les piles rechargeables des iPhones sont les mêmes que celles des autres appareils et, tel que mentionné, que les consommateurs qui les ont achetés ont éprouvé les mêmes problèmes.

[98] In other words, according to the Not-used Respondents, Applicant has simply lumped together all the various drugs under the broad category of opioids without making sufficient allegations or filing sufficient evidence that they are "identical" while in fact they actually differ in terms of active ingredients, formulation, mode of administration, use, dosage, method of release and strength.

[99] In the Court's view, however, and as indicated above, the Supreme Court of Canada in *Marcotte* stated a clear and simple principle to the effect that a class-action representative is not required to have a direct cause of action against each defendant in a class action[63]. That train has left the station and the issue need not be debated anew.

[100] The Supreme Court also did not establish a criterion whereby the factual or legal situation for each defendant must be "identical" as in the form of an identical molecule for medication; nor has the Quebec Court of Appeal.

[101] The Court understands from *Marcotte*, *Baratto* and *Apple* that what is essential in such multiple respondent or industry-wide cases is that the allegations, and perhaps the evidence if any in the file, must lead the motions judge to conclude that there are identical, similar or related questions of law or fact involving the respondents. This assessment is to be done on a case-by-case basis.

[102] Moreover, the Court does not understand, contrary to what certain Not-used Respondents plead, that *Baratto* constitutes a bar to any and all drug-based class actions where the drugs in question do not have the exact same molecule.

[103] Instead, one must consider the nature of the claim as expressed through the allegations and possibly the evidence, if any. The task at hand for the authorization judge is to identify what the common elements are. Such common elements may be identical or similar or related. The role of the Court, in this regard, is not to seek out the differences.

[104] In *Baratto*, Merck had manufactured two different drugs, with different names, which were destined to treat two different medical problems, one being benign prostate

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62 *Idem*, par. 71.
63 *Marcotte*, *supra*, note 15, par. 43.

hypertrophy, and the other male hair loss. It was in this context that the Court of Appeal took into consideration the fact that notwithstanding the differences, the two drugs comprised the same molecule. It was an inclusive element, common to the putative class members.

[105] In the present case, the common element is that all putative class members were prescribed and consumed opioid drugs and further they all suffered OUD. It is the opioid, a pain medication belonging to a class of drugs known as opioids[64], that is common and inclusive, and is alleged to have caused a common medical disorder.

[106] Accordingly, the Court is of the view that in the present case, the presence of a common class of drugs, combined with a diagnosis of OUD, would be sufficient for standing against Not-used Respondents at the authorization stage.

[107] In this regard, the Court, notwithstanding the differences between the authorization of class actions in Quebec and in British Columbia, considers as particularly relevant the following excerpts cited by Applicant from the decision of Justice Brundrett of the British Columbia Supreme Court in the matter of that province's lawsuit instituted against approximately 50 corporate entities operating in the opioid pharmaceutical industry[65]:

> [64] The defendants argue that such a pleading is vague, ambiguous, and substantively inappropriate, particularly where, as here, the plaintiff has impleaded many groups of disparate defendants to complain about different products, market events, and asserted harms spanning many years from 1996 forward. The defendants submit that it is inappropriate to either "lump" defendants or causes of action together where, in reality, what is being asserted are separate claims against separate parties. The defendants submit that the plaintiff's proposed blanket allegations do nothing to particularize and delineate the particulars of each cause of action as against each defendant […] The defendants submit that, due to the lack of material facts in support of each of the plaintiff's claims, they are left guessing as to what conduct is alleged against which defendant in relation to which product.
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> [74] With respect to the allegedly impermissible grouping or lumping, I accept the plaintiff's argument and reject the defendants' submission. This is not a case where diverse groups of defendants are simply lumped together. While there are

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64 By way of example, exhibits JAN-1 (p. 30), JAN-2 (p. 29), JAN-3 (pp. 13 and 47), JAN-4 (pp. 52-53), JAN- 5 (p. 45), JAN-6 (p. 46), JAN-7 (p. 41), JAN-8 (p. 42), JAN-9 (p. 44), RL-2 (pp. 10, 40-41), R-3 (pp. 10, 41-42), RL-4 (pp. 39-40), RL-5 (pp. 14, 29-35), RL-6 (p. 26), RL-7 (p. 26), RL-8 (pp. 25-26), RL-9 (pp. 25-26), RL-11 (p. 55), RL-12 (p. 55), P-12 (p. 47), P-41 (p. 27), Apotex Exhibit B (p. 31), J.

65 *British Columbia* v *Apotex* Inc., 2022 BCSC 1, par. 64, 74 and 77.

> differences between the individual defendants, the groups of defendants include similar entities alleged to have done similar things.
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> […]
>
> [77] While I acknowledge the need for a certain level of specificity, it seems to me that the plaintiff's approach of grouping defendants is permissible in this particular context. From the plaintiff's perspective, all of the Manufacturer Defendants manufactured and allegedly vigorously and falsely marketed opioid products, and all of the Distributor Defendants allegedly distributed opioid products in quantities that exceeded any legitimate market. As the plaintiff argues, little would be gained by requiring the plaintiff to reiterate the same allegation against each defendant individually in its pleadings. Some level of categorization is permissible, and even desirable, in this particular context to make the plaintiff's case coherent and to avoid overloading the pleadings with unnecessary content.

[108] In fact, the Province of Quebec has recently adopted the *Loi sur le recouvrement du coût des soins de santé et des dommages-intérêts liés aux opioïdes*[66] (the "**New Act**"), thereby enabling the Quebec government to institute a class action on its own behalf and that of other provincial governments or institutions in order to recover health care costs resulting from the use of opioids or, alternatively, to join in class actions instituted elsewhere in Canada for that purpose, such as in the said British Columbia action against many of the same respondents identified in the present Application.

[109] Moreover, it is interesting to note that the New Act specifically envisages class actions not only by the Quebec government, but also by individuals and their heirs[67], for the recovery of damages resulting from opioid medication, being those specifically listed in Annex I of the Act. The *Notes Explicatives* include the following:

> Par ailleurs, le projet de loi étend l'application de certaines de ces adaptations à toute action prise par une personne, ses héritiers ou autres ayants cause pour le recouvrement de dommages-intérêts en réparation de tout préjudice lié aux opioïdes causé ou occasionné par une faute commise au Québec par un fabricant ou un grossiste de produits opioïdes ou l'un de ses consultants, de même qu'à tout recours collectif fondé sur le recouvrement de dommages-intérêts en réparation d'un tel préjudice.

[110] As regard the issue of causality, the New Act provides that in actions based on collective recovery, the causality between exposure to an opioid product and an illness

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66 Projet de loi nº 36, adopté le 1er novembre 2023, sanctionné et entré en vigueur le 2 novembre 2023 (The *Opioid-related and Health Care Costs Damages Recovery Act*).

67 *Idem*, sections 24 to 27.

or other injury can be established on the sole basis of statistical information or that which is drawn from various scientific studies.

[111] In the Court's view, the New Act applies to the present matter in that it came into force even before a class action has been authorized. Respondents have not voiced a contrary view. Since this is not a case where a class action had already been authorized and instituted, the Court will not comment on its application in such cases.

[112] Certain respondents have argued that Applicant has not demonstrated that their medications have caused OUD. In this case, any requirement to demonstrate a *prima facie* causality would be met for authorization purposes given that the evidence in the form of Health Canada documents, and others, filed by Applicant demonstrate that OUD is a recognized illness or condition. The Court does not require the New Act in order to arrive at that conclusion.

[113] Staying with the New Act before moving on, to the extent that the issue of prescription was raised by certain respondents, the least that one can say is that the issue of prescription is of no relevance to the debate on authorization in the present matter, and this by reason of section 33 of the New Act. That section states that no class action for the recovery of damages relating to opioids that was in effect as of November 2, 2023, or instituted within 3 years of that date, shall be dismissed on the grounds of prescription.

[114] And in any event prescription in such cases is fact-driven, such that it is to be left to the trier of fact to decide the matter on the merits.

3.3. The inference that there will be class members against all the respondents

[115] Are the allegations in the present matter sufficient to enable the Court to infer that there exist putative class members with personal causes of action in relation to each proposed defendant?

[116] There is an underlying principle applicable in multi-defendant class actions that, in the absence of complete evidence, the authorization judge can infer that there will exist a class member with a valid cause of action against each defendant.

[117] But of course, that should flow from the specific allegations and the evidence, if any, in a given case. What is available in the present matter?

[118] Applicant has filed a December 2016 report of the Canadian House of Commons Standing Committee on Health (the "**Committee**"), entitled Report and Recommendations on the Opioid Crisis in Canada[68] (the "**Report**").

[119] According to the Report, the Committee was advised that "Canadians are the second highest consumers of prescription opioids in the world"[69]. Moreover, the Committee was informed that "approximately 10 % of patients prescribed opioids for chronic pain become addicted"[70].

[120] It is interesting that the increased use of prescription opioids was also noted in Quebec with "serious consequences stemming from drug misuse in this pharmacological class", this according to a research paper issued by the *Institut national de santé publique du Québec*, entitled Opioid-related Poisoning Deaths in Quebec: 2000 to 2009[71].

[121] The purpose of filing the Report and the research paper is clearly not to identify specific manufacturers and all the opioid medication manufactured by them. That said, the Report does mention that prescription opioids "are drugs that are primarily used to treat acute and chronic pain and include such drugs as codeine, fentanyl, oxycodone, hydrocodone and morphine"[72].

[122] Moreover, the Report states that prescription opioids "are classified as Schedule I drugs under the Controlled Drugs and Substances Act"[73]. That Schedule groups together approximately forty different preparations, derivatives, alkaloids and salts that originate with the opium poppy. Also, grouped separately, are the synthetic opioids[74], such as fentanyl.

[123] Ultimately, the Report states that according to the Canadian Centre on Substances Abuse, "Long-term regular use of these drugs can result in addiction"[75], and this in relation to prescription opioid medication[76].

[124] Certain respondents argue that the use of such public material actually contradicts Applicant's choice not to restrict his proposed class action to only opioid medications destined for use in long-term chronic pain cases. The Court does not, at this stage, understand there to be a contradiction.

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68 Exhibit P-4.
69 *Idem*, p. 3; see also Exhibit P-33, p. 1.
70 *Ibid*.
71 Exhibit P-29.
72 *Idem*, p. 2.
73 *Ibid*.
74 *Idem*, p. 1.
75 *Idem*, p. 2.
76 *Ibid*.

[125] What Applicant proposes is not a class action based simply on damages resulting from the long-term use of a specific opioid medication. By its nature, the proposed class action would only encompass those class members who have suffered or are suffering from OUD, regardless of whether that results from the treatment of acute, chronic or other pain or from the use of one or multiple opioid medications, and this whether over the course of weeks or years.

[126] In the Court's view, the evidence, such as it is at this stage, as regards the large volume of consumed prescription opioids in Canada, including Quebec, the large percentage of users of prescription opioids for chronic pain that become addicted, which is one of the elements of OUD, and the lack of distinction regarding the types of opioid medications that could individually or in combination with others give rise to OUD, all support the inference for authorization purposes that amongst the class members there will be those with a direct cause of action against each putative defendant, whether individually or in combination with others.

[127] In the Court's view, the situation is similar to the one analyzed by the Court of Appeal in *Pharmacie Tania Kanou (Jean Coutu)* v. *Turgeon (Succession de Côté)*[77]. In that case, a study filed by that applicant demonstrated that professional fees charged to privately insured patients were on average 7 % higher than what RAMQ-covered patients were charged. The Court decided that one could infer from such evidence that the claimant had demonstrated a *prima facie* case against all of the 22 pharmacies it had chosen to name as respondents.

[128] It would be useful at this point to once again bring to mind the recent *Homsy* decision of the Court of Appeal, as cited above, which acts as a reminder that no evidence is required unless the alleged facts are not sufficiently clear, precise and specific, and even then, only a certain evidence as limited as it might be ("*aussi limitée qu'elle puisse être*") would be required.

[129] In this Court's view, the distinctions drawn by respondents as regards the *Turgeon* case fail to diminish the usefulness of that case to the present matter.

[130] The fact that the medical profession has identified a disorder know as OUD and has created clinics to treat users of opioid medication who suffer from it, and that government studies and reports confirm the contribution of prescription medication to addiction involving prescription drugs, not to mention the fact that much of the information is contained in medical records, all demonstrate that there exists sufficient evidence at this preliminary filtering stage to infer there are putative class members against each respondent, and this notwithstanding that Applicant does not know anyone who has suffered OUD after having used the specific opioid medication of each and

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[77] *Supra,* note 41.

every manufacturer. His absence of knowledge as regards other class members is fully understandable in this matter, especially considering issues relating to medical confidentiality.

[131] The Court will address the issues of proportionality and the various causes of action in subsequent sections herein.

3.4. Differences in the various opioid medications: Legal Standing

[132] Respondents generally argue that opioid medications should not be lumped together as Applicant suggests given the significant differences between them such that they would have their own safety and risk-warning history and, as well, that some would not contribute to OUD.

[133] Such “differences”, as alluded to above, are argued to include:

- Active ingredients (such as morphine or hydromorphone),
- Method of release (immediate versus extended),
- Method of administration (tablets, capsules and injectables),
- Purpose of use (treatment of acute pain or chronic pain),
- Strength/potency (synthetic opioids such as fentanyl versus morphine),
- Dosage.

[134] Although this issue also relates to the causes of action, such as safety defects, at this point in the judgment, the Court will deal with it only as it pertains to legal standing.

[135] As for standing, the factual differences to which many respondents refer do not fundamentally change the fact that, for authorization purposes, all of the alleged medications deliver or delivered opioid product to the putative class members, to whom they were prescribed, and who have also been diagnosed with OUD.

[136] In the Court’s view, the types of differences raised by respondents primarily go to the question as to whether the different opioid medications, individually or in combination with others, actually cause OUD.

[137] As mentioned, Applicant alleges to have used various opioid medications over a period of years. Some appear to have had lower potency than others and to have been consumed for shorter periods of time. However, it is not at the authorization stage that

the Court can determine the contribution, if any, of the different medications that have led, individually or in combination, to the common result of OUD.

[138] Such determinations can only be made by a trial judge who has had the benefit of more complete proof. This holds true as well for arguments to the effect that medication was only for minor or short-term use.

[139] As stated above in relation to the Not-used Respondents, the Court does not consider the present matter to be analogous to the jurisprudence cited by respondents generally, which they claim limit the *Marcotte* principle.

[140] The Court has already addressed the Quebec Court of Appeal decisions in both the *Baratto* case and the *Badaoui* case.

[141] In the present matter, as described more fully above, Applicant's proposed class action would be such that all class members would have suffered the same problem, being OUD, as a result of consuming the same class of medication, being opioids. For the sake of clarity, neither Applicant nor the Court is stating that there is only one opioid, but rather that all the medications, at least at the authorization stage, belong to a class of drugs, being opioids.

[142] Moreover, in the present matter there can be no useful debate at this stage as to whether or not opioid medication constitutes a class of drugs. All the evidence to date appears to confirm that the medication in question are all opioids and part of a class of medication. Even Pfizer's Head of Regulatory Affairs, Lorella Garofalo, in her filed Affidavit, describes opioids as a pharmacological class of drugs.

[143] A review of the numerous product monographs filed at this stage, albeit not all of them for all respondents or for the entire class period as proposed, which the Court considers Applicant was not obliged to file for authorization purposes, confirm that the medication in question belongs to a class of drugs known as opioids[78] and have adverse affects similar to other opioids[79].

[144] This qualification of drugs as being part of a class known as opioids by many of the industry manufacturers, renders arguable at this stage Applicant's position that all opioid drugs can indeed be treated for authorization purposes as a class of drugs.

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[78] Exhibits JAN-1 to JAN-9 (Janssen), RL-2 (Sandoz), RL-2 (Pro Doc), RL-3 (Pro Doc), RL-4 (Pharmascience), RL-5 (Pro Doc), RL-6 (Riva), RL-7 (Pro Doc), RL-8 (Trianon), RL-9 (Pro Doc), RL-11 (Apotex), RL-12 (Pro Doc), P-12 (Sandoz), Exhibit B (Apotex), P-41 (Purdue).

[79] Exhibits P-8 and P-9 (Purdue), P-12 (Purdue), P-41 and P-42 (Purdue), P-12 (Janssen), JAN-1 and JAN-2 (Janssen), JAN-4 to JAN-6 (Janssen), RL-4 (Pharmascience), RL-5 (Pro Doc), RL-6 (Riva), RL-7 (Pro Doc), RL-8 (Trianon), RL-9 (Pro Doc), RL-11 (Apotex), RL-12 (Pro Doc), P-12 (Sandoz), Exhibit B (Apotex) and Schedule C (Aralez).

[145] Documentation from Health Canada[80] and even the 2016 Standing Committee on Health Report and Recommendations on the Opioid Crisis in Canada[81] would also tend to treat opioid drugs as a class, as do articles from other sources filed in support of the Application[82].

[146] Attempts to dissect such documents, and the medication, by counsel for respondents is more appropriate for the post-authorization stage.

[147] In the context of standing, the Court is of the view that the medication differences are not a bar to the principle regarding standing in relation to multiple defendants, subject of course to the carve-outs to the class description or to any other matter not covered by the description.

3.5. The issue of proportionality as regards members with causes of action against each respondent

[148] In the *Marcotte*[83] decision, the Supreme Court confirmed what it had said in *Vivendi*[84] and in *Longueuil*[85] regarding the authorization judge's "obligation" to consider proportionality as to "whether the class contains enough members with personal cause of action against each defendant". That is not to say that it is necessary for an applicant to personally establish a personal cause of action against each defendant[86].

[149] Proportionality with respect to class action authorization is described by the Supreme Court in *Marcotte* as follows[87]

> [45] In other words, the authorizing judge has an obligation to consider proportionality — the balance between litigants, good faith, etc. — when assessing whether the representative is adequate, or whether the class contains enough members with personal causes of action against each defendant.
>
> [45] Autrement dit, le juge saisi de la requête en autorisation a l'obligation de tenir compte de la proportionnalité — équilibre entre les parties, bonne foi, etc. — pour déterminer si le représentant proposé peut assurer une représentation adéquate, ou si le groupe compte suffisamment de membres dotés d'une cause personnelle d'action contre chacun des défendeurs.

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80 Exhibit P-33, for example.
81 Exhibit P-4.
82 Exhibits P-30, P-31 and P-2.
83 *Marcotte*, *supra*, note 15, par. 45.
84 *Vivendi*, *supra*, note 15, par. 33 and 68.
85 *Longueuil (City)*, *supra*, note 20.
86 *Marcotte*, *supra*, note 15, par. 46.
87 *Idem*, par. 45.

[150] In that same case, the Supreme Court concluded that representative plaintiffs had standing to sue "all" the banks, describing this "as a flexible approach to authorization […] [that] supports a proportional approach to class action standing that economizes judicial resources and enhances access to justice."[88]

[151] The key components of proportionality therefore are founded in the principles of good faith, the balance between litigants and the absence of an abuse of the public service provided by the courts as a result of a proposed action[89].

[152] In the present matter, the Court is of the view that at this stage these components of proportionality are met.

[153] There is no reason advanced that would lead the Court to conclude as to an absence of good faith. The evidence at this preliminary stage is not frivolous, nor is it vague and imprecise. As previously mentioned, it demonstrates that certain members of the medical profession in North America consider that there exists a medical disorder which can result from opioid use, one of the elements of which is addiction. The evidence also demonstrates on a *prima facie* basis that Canadians have been some of the largest users globally of prescription opioids. Moreover, Applicant has demonstrated that he has suffered from OUD, which required his hospitalisation and treatment on two occasions.

[154] In addition, Applicant has restricted his proposed class action to prescription opioid medication by excluding those destined for use only in hospitals as opposed to home use. He also has voluntarily excluded certain opioid medication that was covered by a prior class action settlement agreement.

[155] In the Court's view, Applicant appears at this stage to be acting in good faith to litigate an issue in which he has a serious personal interest. He has also retained experienced litigation counsel to handle the matter.

[156] Some respondents argue that if authorized, the class action would be unprecedented, while others argue that it would be potentially of such magnitude that it would be more complicated and lengthier than the Quebec tobacco mega litigation case.

[157] In this regard, certain respondents argue that there are an infinite number of factual variations, including physical symptoms and prejudices.

[158] However, in the present matter, there will be only one primary physical prejudice, being OUD.

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88 *Idem*, par. 47.
89 *Idem*, par. 45.

[159] Moreover, the 2010 Court of Appeal decision in *Goyette* v. *Glaxosmithkline inc.*[90] which they cite, actually reminds us that the relevant determinant element is the existence of common questions. The applicant in that case was held not to have raised a common question.

[160] Pharmascience, Sun Pharma, Teva and Joddes have created a list of approximately 24 issues and sub-issues that they argue will need be analyzed for the determination of civil liability per class member, of which 15 relate to the role of prescribing doctors and pharmacies.

[161] What is being suggested is that for each class member, it will be necessary to analyze not only the information provided by the prescribing physicians and the issuing pharmacists but also:

- the class member's condition/history and risk factor prior to taking an opioid;
- the reasons justifying the prescription of an opioid medication and the risk-benefit ratio;
- the reasons for the choice of the prescribed opioid;
- the reasons for the dosage of the prescribed opioid;
- the reasons for the duration of the opioid treatment;
- the assessment of the class member's pain history and the results of previous treatments, as well as of other alternatives offered in terms of treatment;
- the assessment of significant psychological, social or behavioral factors, including the assessment of risk factors for addiction;
- the assessment of the impact of pain on the patient's family or significant others;
- compliance with the manufacturer's recommendations;
- the dentification of other drugs, alcohol and sedatives taken concomitantly;
- the identification of symptoms;

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90 2010 QCCA 2054, par. 7 to 9.

- the identification as to whether each individual class member would have consumed an opioid event had he or she been duly informed of the risks.

[162] Clearly many of these issues relate to the issue of the “learned intermediary” whereas others relate to the conduct of each class member.

[163] As for the defence based on the theory of the learned intermediary as an exception to the duty to warn the consumer, that is fact driven and cannot be used as some form of automatic immunity at the authorization stage.

[164] Should the issue be raised post authorization, as certain respondents suggest it will, the judge assigned to manage the case will have all the management powers provided by law to decide the most efficient manner to prepare the case for trial.

[165] Notwithstanding the foregoing complexities, the court does not understand that there exists a principle of law to the effect that a class action should not be authorized simply because it will be too large a case. As mentioned above, proportionality is not an additional criterion for authorization of a class action.

[166] Nor is that the Court’s understanding of the decision of the Court of Appeal in *Boudreau* v. *Procureur général du Québec*[91].

[167] Paragraphs 30 and 31 thereof, as cited by certain respondents, remind us that there exists the requirement to identify an identical, similar or connected question but that if the defined class is too broad it may render it impossible to identify a single such question, which can accordingly lead to a refusal to authorize. Once again, it is the existence of a common question that is determinant. The Court will analyze both the issue of common questions and the definition of the class in a later section.

[168] Respondents raise a related argument to be addressed as part of their proportionality argument.

[169] They argue that the proposed class action would not only be a burden on the Court system but that it would also constitute a disproportionate burden on those defendants whose products were only destined to be used for short-term acute pain, contained weaker variations of opioids at low doses, were only in the market for a limited period of time or represented a small market share and for which they did not misrepresent the risks and advantages and did not aggressively promote their product; all of this being especially so in the case of the Not-used Respondents.

[170] Although such concerns by respondents may be financially understandable, it is not at the authorization stage that the Court is to assess evidence as to whether certain

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91 2022 QCCA 655.

opioid medication, alone or in combination with other opioids, did or did not cause OUD or whether it could cause OUD. Those are issues that essentially comprise a defence on the merits of the proposed class action. The Court is not to conduct a trial within a trial in order to decide whether or not to authorize the class action in whole or in part.

[171] And in any event, the post-authorization judge will be in a position to assist the parties in applying case-management measures that will facilitate the progress of the action or of any warranty actions.

[172] Moreover, given the seriousness of the issue at hand, being a medical disorder resulting from the use of opioids, and this with a backdrop of a national opioid crisis, the Court is of the view that an abuse of the court system would not result from granting the authorization being sought herein.

[173] To be clear, and as argued by respondents, responsibility for an opioid crisis should not be the object of the proposed class action. The Court does not consider that authorizing the proposed class action would be akin to establishing a commission of inquiry into a pan-Canadian opioid crisis.

[174] It is likely that no one involved in this matter, or even those simply reading the present judgement, has not already been made aware one way or another of the existence of an opioid crisis in Canada.

[175] It is in that context that the opioid crisis may be a backdrop to the proposed class action, but it is not an issue that need be the object of a determination by the Court. The issue at hand relates primarily to liability for OUD.

[176] Ultimately in such circumstances, respondents would not be subjected to an unreasonable imbalance between themselves and putative class members should the proposed class action be authorized, whereas individuals who would seek recovery for OUD from such respondents individually would suffer an unreasonable imbalance exercising personal claims if it were not to be authorized. The Court cannot for authorization purposes ignore the possibility that individuals would either look to avoid identifying themselves as OUD patients or refuse to accept the daunting task of suing numerous drug manufacturers.

[177] Moreover, the potential that any individual member could have, like Applicant, used various different opioid medications over time speaks strongly against a preference for separate class actions against the various respondents individually. Such an approach represents a far greater risk for the disproportionate use of judicial resources, including those of the various respondents.

[178] Accordingly, the issue of proportionality as regards the existence of a direct cause of action against each respondent is not, in the Court's view, a bar to authorization in the present matter.

3.6. Sufficiency of the allegations and evidence: The Arguable Case

(A) As regard respondents generally

[179] There are a number of specific issues dealing with sufficiency that should be dealt with in relation to all respondents.

[180] As a starting point, and as previously mentioned, one needs to keep in mind throughout the analysis that allegations of "fact", as opposed to opinion, bald allegations and hypothesis, are to be held as true for authorization purposes[92].

[181] In addition, given that there are multiple causes of action being alleged against respondents, the court will proceed to analyze each such cause of action separately and only authorize those that satisfy the authorization criteria[93].

(i) OUD and opioids

[182] The Court has already dealt with, at paragraphs 63 to 77, 132 to 141 and 170, the issue of the nature of OUD and its causal connection to the use of prescription medication. In the Court's view, as expressed above, the evidence is generally sufficient in that regard for authorization purposes.

(ii) The safety defect

[183] As mentioned, Applicant asserts that all prescribed opioid medication involves a "safety defect".

[184] The applicable law in this regard is set forth at Articles 1468 and 1469 C.C.Q., which read as follows:

> **1468.** The manufacturer of a movable thing is bound to make reparation for injury caused to a third person by reason of a safety defect in the thing, even if it is incorporated with or placed in an immovable for the service or operation of the immovable.
>
> **1468.** Le fabricant d'un bien meuble, même si ce bien est incorporé à un immeuble ou y est placé pour le service ou l'exploitation de celui-ci, est tenu de réparer le préjudice causé à un tiers par le défaut de sécurité du bien.

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92 *Sibiga*, *supra*, note 23, par. 52.
93 *Poitras* v. *Concession A25*, 2021 QCCA 1182.

The same rule applies to a person who distributes the thing under his name or as his own and to any supplier of the thing, whether a wholesaler or a retailer and whether or not he imported the thing.	Il en est de même pour la personne qui fait la distribution du bien sous son nom ou comme étant son bien et pour tout fournisseur du bien, qu'il soit grossiste ou détaillant, ou qu'il soit ou non l'importateur du bien.
1469. A thing has a safety defect where, having regard to all the circumstances, it does not afford the safety which a person is normally entitled to expect, particularly by reason of a defect in design or manufacture, poor preservation or presentation, or the lack of sufficient indications as to the risks and dangers it involves or as to the means to avoid them.	**1469.** Il y a défaut de sécurité du bien lorsque, compte tenu de toutes les circonstances, le bien n'offre pas la sécurité à laquelle on est normalement en droit de s'attendre, notamment en raison d'un vice de conception ou de fabrication du bien, d'une mauvaise conservation ou présentation du bien ou, encore, de l'absence d'indications suffisantes quant aux risques et dangers qu'il comporte ou quant aux moyens de s'en prémunir.

[185] The Court of Appeal in *Brousseau* v. *Laboratoires Abbott limitée*[94] describes this as a no-fault regime for goods that do not contain latent defects yet, by reason of their inherent danger, the manufacturer is required to give the user a warning as to the existence of such danger.

[186] So, the first question to consider is whether at the authorization phase, the Applicant has demonstrated the existence of an arguable case regarding the presence of a safety defect in that the prescription medication does not afford the safety which a person is normally entitled to expect, or that he was not provided sufficient warning as to the risks and dangers of its use.

[187] It is important to recall that being a no-fault regime, claimants relying on a safety defect need not prove the fault of the manufacturer[95]. Accordingly, such fault is not an issue for authorization purposes.

[188] At the merits stage, a claimant will need establish the security defect relating to the defendant's product, the injury suffered and the causal link between these two elements[96]. The defendant will then need establish either superior force or that, in

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94 *Brousseau* v. *Laboratoires Abbott limitée*, 2019 QCCA 801, par. 76 to 91.

95 *Imperial Tobacco Canada ltée* v. *Conseil québécois sur le tabac et la santé*, 2019 QCCA 358, par. 365; *Brousseau*, *supra*, note 94, par. 87 to 89.

96 *Imperial Tobacco*, *supra*, note 95, par. 358, 363-368; *Brousseau*, *supra*, note 94, par. 87 to 89.

accordant with Article 1473 C.C.Q., the the victim knew or could have known of the defect or could have foreseen the injury[97].

[189] At the authorization stage, as often stated, the claimant's burden is one of simple demonstration as to the appearance of right and not the preponderance of proof[98]. This principle is of general application and accordingly, applies to cases involving safety defects.

[190] Moreover, as regards the knowledge of risk by Applicant and, more generally, class members, one must keep in mind that such knowledge, in order to provide a manufacturer a defense, must be such that the consumer must have been informed to such an extent that enabled him or her to realistically appreciate the risk and to accept it using his or her free choice[99], especially where the danger only manifests itself over time[100].

[191] In the Court's view, one must also keep in mind at this stage that the merits judge might possibly need to evaluate whether those who have or are suffering from OUD are actually able to exercise their free choice in accepting risks.

[192] That said, the Court of Appeal in the matter of *Depuy Orthopaedics Inc.* v. *Melançon*[101], after considering the *Imperial Tobacco* case[102], confirmed that at the authorization stage, the claimant's burden regarding a safety defect is as follows:

> [11] This Court recently examined these provisions in *Imperial Tobacco Canada ltée c. Conseil québécois sur le tabac et la santé*. It specified that the elements comprising the extracontractual liability of manufacturers are the safety defect affecting the thing, the injury suffered, and the fact that the first element caused the second. There is no need to prove the manufacturer's fault. The Court stated it clearly: [TRANSLATION] "The plaintiff's burden of proof, however, goes only so far as requiring that it show that the thing does not afford the expected safety; the plaintiff does not have to identify the source of the problem". This also applies where the source of the problem is the lack or insufficiency of the required indications. The liability, therefore, is one without fault, with the only means of exoneration being those set out in article 1473 *C.C.Q.* (or superior force under article 1470 *C.C.Q.*).
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> [12] Consequently, the respondent is not required to prove the appellants' fault, be it with respect to the design or manufacture of the thing or the duty to

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97 Article 1470 and 1473 C.C.Q.; *Imperial Tobacco*, *supra*, note 95, par. 357-358 and 365; *Brousseau*, *supra*, note 94, par. 87 to 89.
98 *Pharmascience inc.*, *supra*, note 21, par. 25.
99 *Imperial Tobacco*, *supra*, note 95, par. 350-351.
100 *Idem*, par. 576 and 645.
101 2019 QCCA 878.
102 *Imperial Tobacco*, *supra*, note 95.

> warn. She need merely show an arguable case that the DePuy Pinnacle metal on metal Acetubular Cup System prostheses do not afford the safety which a person is normally entitled to expect, as well as the injury suffered and the causal link between the two.
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> […]
>
> [16] In short, the respondent has presented an arguable case based on articles 1468 and 1469 *C.C.Q.*, notwithstanding the withdrawal of the theory of the case based on the appellants' failure to satisfy their duty to warn. Moreover, this withdrawal occurred when the legal debate was not yet well-established and, therefore, cannot bind the class members. It will be up to the judge on the merits to rule on the grounds of exoneration set out in article 1473 *C.C.Q.* In this regard, it is worthwhile noting that the burden of proof lies entirely on the manufacturer, which must prove that the plaintiff knew or should have known of the danger or injury.
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> [References omitted.]

[193] This is in keeping with the principle that the authorization stage is intended to weed-out cases that are clearly frivolous or without merit and to enable those that are "arguable" to proceed forward[103].

[194] What is the alleged safety defect in this matter?

[195] The Court understands it to be twofold, the first being that the product itself does not objectively afford the safety that a reasonable person is normally entitled to expect[104] and, as well, that there are risks and dangers involved in the use of opioid medication. Applicant also adds that there was a lack of sufficient indications as to the risks and dangers involved in the use of the medication.

[196] The Court of Appeal in the matter of *Brousseau*[105] describes the absence of sufficient indications this way:

> [81] According to article 1469 of the *Civil Code of Québec*, the lack of sufficient indications as to the dangers a thing involves or as to the means to avoid them is therefore considered to be a safety defect.
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> [82] Indeed, when a manufacturer provides users with adequate information on a product's dangers, users can make an informed choice whether or not to purchase it, use it or stop using it or they can ask the manufacturer or the learned

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103 *Infineon*, *supra*, note 17, par. 89.
104 *Imperial Tobacco*, *supra*, note 95, par. 412.
105 *Brousseau*, *supra*, note 94, par. 81-86.

> intermediaries questions so as to avoid or protect against the occurrence of the risks and dangers it involves.
>
> [83] The information must be specific and the manufacturer's warnings must be sufficient for users to [TRANSLATION] "fully realize the danger and the risk associated with using the thing as well as the potential consequences thereof and to know what to do (or not do) in order to protect against those consequences or remedy them, as the case may be".
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> [84] As for the intensity of the manufacturer's duty to warn, it [TRANSLATION] "is directly proportional to the extent of the potential danger and injury resulting from the use of the thing".
>
> [85] As such, [TRANSLATION] "a product intended for ingestion, or implantation or introduction into the body, requires a particularly high degree of information, especially when the injury liable to result from its use is serious or there is a considerable probability that it will occur."
>
> [86] In short, [TRANSLATION] "manufacturers have a duty to inform users of the product's risks and dangers and of the manner in which to protect against them, such that if a manufacturer breaches this duty, the product will not afford the safety that a person is normally entitled to expect, and the manufacturer's liability will arise".
>
> [References omitted.]

[197] In the Court's view, Applicant has demonstrated for authorization purposes that prescription opioid medication contains an inherent danger and does not afford the expected safety to its users, with the result that it can and has given rise to OUD. Applicant has gone further, stating that he had not been made aware in a timely manner of the risks thereof.

[198] In addition, as mentioned, he has filed numerous federal government reports, Health Canada documents and other published material regarding the dangers relating to the use of prescription opioids and the existence of OUD[106].

[199] These documents illustrate the arguable nature of Applicant's case as regards the issue of a safety defect and it being the cause of OUD.

[200] Moreover, Applicant has demonstrated that the risk of OUD did materialize, that he personally was diagnosed with same and that it was difficult for him to stop using such medication.

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[106] Exhibits P-1, P-2, P-4, P-7, P-20, P-33, P-34, P-35, P-36 and P-37.

[201] Applicant acknowledges that he was made aware of problems relating to the use of such medication but only much later when he was already at a maximum dosage and, as well, when he was told at the OUD clinic that he would have a difficult time trying to stop using opioid medication.

[202] Certain respondents sought to argue that Applicant was less than forthright when claiming to have never been advised over the years of the risks, and that he must have been made aware of those risks at some earlier point in time by a variety of means, including by way of his doctors, pharmacists or the labelling on their products. But simply arguing that the Applicant "must have known" in the present circumstances is not sufficient to defeat authorization.

[203] Some have argued that their product monographs also constitute warnings. However, at the authorization stage the Court is not in a position, at least not in this matter, to determine whether those documents contain, in the sections destined to consumers, sufficient warnings for a reasonable consumer and even if he did, for what period of time. The factual issue of when labelling and monographs became useful, if ever, is particularly relevant given the length of the proposed Class Period.

[204] Other respondents argue that Applicant must identify what representations were made, by whom and in what way they were false and reckless. The Court does not agree that such a demanding requirement exists at the authorization stage.

[205] As for all the possible defences that can be raised in this regard by respondents, as valid as they may or may not be, they are based primarily on facts and as such are not to be argued and decided by the Court at the authorization stage, as indicated in the extract from *Depuy Orthopaedics Inc.*[107] cited above regarding an applicant's burden for authorization. Those are fact-driven defences that the decider of fact will be better equipped to decide on the merits once all relevant evidence has been filed[108]. It would be premature to decide such issues at this stage.

[206] Moreover, the Court cannot now decide whether Applicant, having started to consume prescription opioid medication, could have even stopped using same had he been informed earlier of the risks or whether he was already suffering some of the symptoms associated with OUD that would have made it difficult or impossible for him to have stopped at that particular point in time. These too would be fact-driven issues destined to be decided at the merits stage.

[207] Nor is the Court to now conduct a mini-trial on these factual issues so as to address the concerns expressed by certain respondents regarding proportionality. At the risk of repetition, the Court of Appeal has on numerous occasions stated clearly that

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[107] *Depuy Orthopaedics Inc.*, *supra*, note 101.
[108] *L'Oratoire*, *supra*, note 15, par. 42.

authorization motion judges are not to decide issues on the merits, as that would exceed the simple filtering process of authorization, unless of course the outcome of the proposed class action depends on a pure question of law, which is not the case herein as regards the issue of a safety defect.

[208] In the Court's view, Applicant has demonstrated an arguable case for authorization purposes regarding the issue of a safety defect pertaining to the opioid drugs manufactured by respondents.

(iii) The *Quebec Charter of Rights and Freedom*[109]

[209] Applicant's claim in relation to the Charter is based essentially on sections 1 and 49 thereof, which read as follows:

1. Every human being has a right to life, and to personal security, inviolability and freedom. He also possesses juridical personality.	**1.** Tout être humain a droit à la vie, ainsi qu'à la sûreté, à l'intégrité et à la liberté de sa personne. Il possède également la personnalité juridique.
49. Any unlawful interference with any right or freedom recognized by this Charter entitles the victim to obtain the cessation of such interference and compensation for the moral or material prejudice resulting therefrom. In case of unlawful and intentional interference, the tribunal may, in addition, condemn the person guilty of it to punitive damages.	**49.** Une atteinte illicite à un droit ou à une liberté reconnu par la présente Charte confère à la victime le droit d'obtenir la cessation de cette atteinte et la réparation du préjudice moral ou matériel qui en résulte. En cas d'atteinte illicite et intentionnelle, le tribunal peut en outre condamner son auteur à des dommages-intérêts punitifs.

[210] A Charter claim based on the unlawful and intentional interference with a right or freedom recognized by it is one of the few instances in Quebec law that provides a claimant with a statutory right to seek punitive damages.

[211] Such damages are independent from compensatory damages in that they are intended not to compensate the claimant but to both punish wrongdoers for past conduct and to deter them from continuing their unlawful and intentional conduct[110].

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109 *Supra*, note 9.

110 *Richard* v. *Time Inc.*, 2012 SCC 8, par. 177 and 178; *de Montigny* v. *Brossard (Succession)*, 2010 SCC 51, par. 48 to 50.

[212] In the *Imperial Tobacco* case[111], the Court of Appeal had the opportunity to comment as follows as regards Charter claims in relation to safety defects:

> [990] Ainsi, afin de déterminer si un comportement est fautif au sens du droit commun, les normes édictées par la *Charte* sont pertinentes. Comme l'indiquait le juge Dalphond dans *Genex Communications inc. c. Association québécoise de l'industrie du disque, du spectacle et de la vidéo* : « une contravention aux normes de conduite prescrites par la *Charte* constitue une faute civile au sens de l'art. 1457 *C.c.Q*. ».
>
> [991] En somme, l'exigence d'une atteinte illicite énoncée à l'alinéa 1 de l'article 49 requiert, d'une part, le constat d'une violation non justifiée d'un droit protégé par la *Charte*. D'autre part, l'atteinte illicite nécessite de démontrer que l'atteinte résulte d'un comportement fautif.
>
> [992] La Cour rejette le moyen voulant que le juge ait commis une erreur révisable en statuant que le comportement des appelantes constitue une atteinte illicite au sens de l'article 49 de la *Charte*.
>
> [993] En l'espèce, la conclusion du juge selon laquelle des atteintes illicites ont été commises par chacune des appelantes n'est pas ébranlée par les arguments avancés en appel. La nature fautive de l'atteinte tient au manquement des appelantes à leur obligation de renseignement, et ce, jusqu'aux dates de notoriété dans chaque dossier. Ces déterminations suffisent à conclure que les appelantes ont commis des atteintes illicites pendant toute la période qui s'étend de l'avènement de la *Charte* à la fin de la période visée.
>
> [994] Quant à l'illicéité des atteintes sous le rapport de la transgression des normes incluses dans la *Charte* elle-même, il ressort que la norme de conduite qui découle de l'article 1 de la *Charte* requiert de toute personne qu'elle ne se conduise pas de manière à offrir au public un produit susceptible de causer la mort (droit à la vie), qui augmente substantiellement le risque de mortalité (droit à la sûreté), affecte la santé et contraint à subir des traitements médicaux invasifs et douloureux (droit à l'intégrité), et ce, tout en banalisant le caractère mortel et toxicomanogène du produit. Les différentes normes de conduite qui découlent de la *Charte* requéraient certainement que les appelantes ne fassent pas de publicité qui représente la cigarette de manière positive, commanditent des activités sportives ou artistiques, ou encore agissent de manière à semer la confusion du public.
>
> [References omitted.]

[213] Accordingly, it is not frivolous *per se* to claim punitive damages in relation to the alleged failure to inform or the duty not to disinform users about the serious risks

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[111] *Imperial Tobacco*, *supra*, note 95, par. 990 to 994.

associated with the use of a medication that is being or has been offered to the public. This is in keeping with the right of such users to their health and well-being, as guaranteed by section 1 of the Charter. This has been the case in claims where the manufacturer has made positive assertions about the product, downplaying the risks.

[214] In the present matter, all putative class members would have had their health and well-being directly affected by prescription opioid medication in that they all allegedly are suffering or have suffered Opioid Use Disorder.

[215] Numerous respondents argue that in keeping with jurisprudence, a violation of the Charter requires an unlawful and intentional interference with the health of class members, whereas in the present matter there is no evidence of respondents conspiring in this regard or trivializing the nature and risks of opioid medication, particularly not in relation to each respondent. They add that the allegations are insufficient in this regard.

[216] With respect, the Court is of the view that it is not necessary to demonstrate a conspiracy to succeed under the Charter. And in any event, as mentioned above, Applicant need not establish by evidence every element of his claim at the authorization stage.

[217] One only need consider the allegations made by Applicant from paragraph 2.43 onwards to understand that he is making sufficient allegations that, if ultimately proven by the preponderance of proof, could give rise to a claim pursuant to the Charter against respondents.

[218] Moreover, even Health Canada, in its 2018 “Notice of Intent to Restrict the Marketing and Advertising of Opioids”[112], concluded that the pharmaceutical industry’s “marketing and advertising of opioids has contributed to increased prescription sales and availability of opioids”[113]. For the purposes of authorization, such evidence also contributes to the sufficiency, and hence the arguability of Applicant’s case as it relates to all the opioid manufacturers, given that the Notice of Intent targets that entire industry.

[219] A judge at the post-authorization stage will be better placed to assess the preponderance of proof in relation to certain, or perhaps even all manufacturers as regards a Charter claim.

[220] But that is not the Court’s role at this stage.

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112 Exhibit P-33.
113 *Idem*, page 1 of 3.

[221] As stated by my colleague Justice Courchesne in the case of *Pohoresky*[114], it would be "premature" to decide at the authorization stage that "there is absolutely no possible basis for the reward of punitive damages in light of the allegations".

[222] In the Court's view, Applicant in the present matter has presented an arguable case for authorization purposes given his allegations[115] and the documentary evidence[116] submitted in support of his application, as well as those emanating from certain respondents on which he relies[117].

(iv) The *Competition Act*[118]: false or misleading representations

[223] Pursuant to section 52(1) of the *Competition Act* (the "***Act***"), no person should, for certain purposes, knowingly or recklessly make a representation to the public that is false or misleading. More specifically, that section states as follows:

52 (1) No person shall, for the purpose of promoting, directly or indirectly, the supply or use of a product or for the purpose of promoting, directly or indirectly, any business interest, by any means whatever, knowingly or recklessly make a representation to the public that is false or misleading in a material respect.	**52 (1)** Nul ne peut, de quelque manière que ce soit, aux fins de promouvoir directement ou indirectement soit la fourniture ou l'utilisation d'un produit, soit des intérêts commerciaux quelconques, donner au public, sciemment ou sans se soucier des conséquences, des indications fausses ou trompeuses sur un point important.

[224] Section 52(1.1) stipulates the following as to the burden of proof applicable to that prohibition:

(1.1) For greater certainty, in establishing that subsection (1) was contravened, it is not necessary to prove that	**(1.1)** Il est entendu qu'il n'est pas nécessaire, afin d'établir qu'il y a eu infraction au paragraphe (1), de prouver :
(a) any person was deceived or misled;	**a)** qu'une personne a été trompée ou induite en erreur;

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114 *Pohoresky* v. *Otsuka Pharmaceutical Company Limited*, 2021 QCCS 5064.

115 See as examples: Application, par. 2.39, 2.42, 2.44, 2.45, 2.61, 2.65 to 2.67, 2.83 to 2.94, 2.132, 2.138, 2.139, 2.141, 2.143, 2.146, 2.147 and 2.148.

116 See as examples: P-1, P-2, P-4, P-8 to P-10, P-12, P-13, P-15, P-19, P-28 to P-31, P-33 to P-36, P-40, P-41, P-42 and P-43.

117 See as examples: Pharmascience RL-4; Sandoz P-12, RL-2; Purdue P-8, P-9, P-12, P-41, P-42; Pro Doc RL-3, RL-5, RL-7, RL-9, RL-12; Apotex Exhibit B, RL-11; Janssen P-12, P-43, JAN-1 to JAN-9.

118 *Supra*, note 8.

> **(b)** any member of the public to whom the representation was made was within Canada; or
>
> **(c)** the representation was made in a place to which the public had access.

> **b)** qu'une personne faisant partie du public à qui les indications ont été données se trouvait au Canada;
>
> **c)** que les indications ont été données à un endroit auquel le public avait accès.

[225] Any person who contravenes subsection (1) is guilty of an offence and on conviction is liable to a fine or imprisonment[119]. This is one of the Part VI offences under the *Act*.

[226] The *Act* also provides a special remedy, being the recovery of damages. In this regard, section 36(1) of the *Act* states as follows:

> **36 (1)** Any person who has suffered loss or damage as a result of
>
> **(a)** conduct that is contrary to any provision of Part VI, or
>
> **(b)** the failure of any person to comply with an order of the Tribunal or another court under this Act,
>
> may, in any court of competent jurisdiction, sue for and recover from the person who engaged in the conduct or failed to comply with the order an amount equal to the loss or damage proved to have been suffered by him, together with any additional amount that the court may allow not exceeding the full cost to him of any investigation in connection with the matter and of proceedings under this section.

> **36 (1)** Toute personne qui a subi une perte ou des dommages par suite :
>
> **a)** soit d'un comportement allant à l'encontre d'une disposition de la partie VI;
>
> **b)** soit du défaut d'une personne d'obtempérer à une ordonnance rendue par le Tribunal ou un autre tribunal en vertu de la présente loi,
>
> peut, devant tout tribunal compétent, réclamer et recouvrer de la personne qui a eu un tel comportement ou n'a pas obtempéré à l'ordonnance une somme égale au montant de la perte ou des dommages qu'elle est reconnue avoir subis, ainsi que toute somme supplémentaire que le tribunal peut fixer et qui n'excède pas le coût total, pour elle, de toute enquête relativement à l'affaire et des procédures engagées en vertu du présent article.

[227] What allegedly is being or has been misrepresented and by whom?

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[119] Section 52(5) of the *Act*.

[228] Applicant alleges that with Purdue's manufacture of a time release formulation of oxycodone in the mid-1990s, there began a "new narrative" in the pain-medication industry, whereby opioids could be considered safe for widespread use in relation to chronic conditions.

[229] Applicant alleges that respondents "generally acted in concert to promote the false and misleading narrative […] concerning the safety and efficacy of opioids in an effort to increase the acceptance of such drugs for treatment in a much larger patient population than that which was previously considered acceptable"[120].

[230] Applicant further alleges that for the same reason, respondents "also failed to disclose the risks of using opioids"[121].

[231] In other words, Applicant makes these statements as regards all of the respondents, and this essentially in relation to the entire Class Period. The general categories of the misleading representations, which Applicant refers to collectively as the "Misrepresentations", are said to be the following[122]:

> 2.45. The new narrative concerning the use of opioids, which was promoted by the Defendants, misrepresented that:
>
> 2.45.1. the risk of opioid addiction was low, and that doctors could use screening tools to exclude patients who might become addicted;
>
> 2.45.2. use of opioids resulted in improved function;
>
> 2.45.3. withdrawal from opioids could easily be managed;
>
> 2.45.4. opioids were appropriate for long-term use;
>
> 2.45.5. opioids had less adverse effects than other pain management drugs;
>
> 2.45.6. use of certain opioids provided patients with long-lasting pain relief;
>
> 2.45.7. increased dosages of opioids could be prescribed, without disclosing the increased risks; and

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120 Application, par. 2.43.

121 *Idem*, par. 2.44. Note that the Court refers to the pharmaceutical companies as Respondents, not Defendants, given that an action at law has not yet been authorized against them. Similarly, Mr. Bourassa is not yet a plaintiff.

122 *Idem*, par. 2.45.

2.45.8. that “abuse deterrent” formulations of opioids were effective.

(collectively the “**Misrepresentations**”).

[232] For each of these categories, Applicant has made additional related assertions[123].

[233] As for the manner in which theses alleged Misrepresentations were “spread”, Applicant asserts that the respondents, as a group, engaged in “aggressive marketing and sales practices” to[124]:

1. health care professionals[125];
2. medical students[126];
3. patient advocacy groups[127] by funding; and
4. the public[128].

[234] At the same time, respondents allegedly “failed to properly warn both health care professionals and consumers of the risks and dangers associated with opioid use” in the Information for Patients and Product Monographs, as found in the *Compendium of Pharmaceuticals and Specialties* (“**Compendium**”)[129].

[235] In this regard, Applicant cites the 2020 decision of this Court in *Gauthier* v. *Johnson & Johnson*[130] whereby a class action was authorized in relation to the alleged absence of specific and clear warnings of risks regarding the use of Tylenol products containing acetaminophen, in alleged violation of both the *Competition Act* and the *Consumer Protections Act*. Of importance was the authorization of the class action notwithstanding that the manufacturer had respected the federal labelling standards.

[236] Moreover, Applicant essentially claims that the “marketing and advertising” of the opioids by the pharmaceutical industry has contributed to increased prescription sales and availability of opioids, citing Health Canada’s above-mentioned 2018 *Notice of Intent to Restrict the Marketing and Advertising of Opioids*[131].

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123 *Idem*, par. 2.46 to 2.78.
124 *Idem*, par. 2.82 and 2.84.
125 *Idem*, par. 2.84.1 and 2.95 to 2.111.
126 *Idem*, par. 2.84.2 and 2.112 to 2.113, and Exhibit P-21.
127 *Idem*, par. 2.84.3 and 2.114 to 2.122, and Exhibits P-44, P-46 and P-47.
128 *Idem*, par. 2,84.4 and 2.123 and 2.124.
129 *Idem*, par. 2.83 and 2.85 to 2.94, and Exhibits P-9.
130 2020 QCCS 690.
131 Exhibit P-33.

[237] According to Applicant, the opioid manufacturers in the United States essentially made the same Misrepresentations in the same or similar manner, for which some of them were condemned by way of judgment to pay damages or, alternatively, settled out of court[132].

[238] Respondents are quick to point out that prior to the September 30, 2022 Re-Amended Application, the vast majority of the alleged facts in relation to the Misrepresentations involved Purdue and its OxyContin and OxyNEO products, which drugs are no longer covered by the proposed class action herein as a result of the National Settlement that has been approved in another matter[133], as discussed above.

[239] Moreover, they argue that there is a scarcity of specific factual allegations in relation to many respondents as regards marketing.

[240] In other words, for many respondents there is a factual void as to what each of them specifically did that qualifies as punishable conduct under the *Act*.

[241] That may well be, but it bears remembering that at the authorization stage, the Court is to determine not if Applicant is likely to succeed or if respondents have what may be a reasonable defence on the merits, but rather, as part to the filtering process, if the Applicant's case is "defendable" or "arguable" given his allegations and any elements of proof that support the legal syllogism.

[242] As mentioned above, the Court of Appeal in *Homsy*[134] recently addressed anew the issue of proof at the authorization phase. Both Justices Morissette and Sansfaçon cite with authority the following extract from the Supreme Court of Canada decision in the matter of *L'Oratoire Saint-Joseph du Mont-Royal* v. *J.J.*[135]:

> [59] Furthermore, at the authorization stage, the facts alleged in the application are assumed to be true, so long as the allegations of fact are sufficiently precise: *Sibiga*, at para. 52; *Infineon*, at para. 67; *Harmegnies*, at para. 44; *Regroupement des citoyens contre la pollution v. Alex Couture inc.*, 2007 QCCA 565, [2007] R.J.Q. 859, at para. 32; *Charles*, at para. 43; *Toure*, at para. 38; *Fortier*, at para. 69. Where allegations of fact are "vague", "general" or "imprecise", they are necessarily more akin to opinion or speculation, and it may therefore be difficult to assume them to be true, in which case they must absolutely "be accompanied by some evidence to form an arguable case": *Infineon*, at para. 134. It is in fact strongly suggested in *Infineon*, at para. 134 (if not explicitly, then at least implicitly), that "bare allegations", although "insufficient to meet the threshold requirement of an arguable case"

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132 Application, par. 2.125 to 2.131.
133 *Idem*, par. 2.27 to 2.28.9, and Exhibits P-38, P-39, P-54, P-55, P-56, P-57 and P-58.
134 *Homsy*, *supra*, note 38.
135 *L'Oratoire*, *supra*, note 15, par. 59.

> (emphasis added), can be *supplemented* by "some evidence" that — "limited though it may be" — must accompany the application in order "to form an arguable case".
>
> [References omitted.]

[243] Justice Morissette's paraphrasing of this citation, as indicated above[136], reminds us that in Quebec, the state of the law is to the effect that evidence is not required if the allegations are clear, precise and specific.

[244] Accordingly, an applicant is not required to provide evidence at the authorization stage to support allegations of fact, which are to be considered as being true, unless those allegations are vague or imprecise, in which case some proof is required so as to avoid such allegations being considered as mere opinion or hypothesis as opposed to fact.

[245] As regards any exhibits that are introduced by an applicant in support of the allegations, their sole purpose in described by Justice Morissette as follows[137]:

> [17] […] Quant aux pièces produites au soutien des allégations, elles ont pour seul but d'étayer le caractère soutenable des prétentions et ne servent aucunement à établir – en clair, à prouver – l'existence d'un fait quelconque. Il en est ainsi à tel point que le juge saisi de la demande doit s'abstenir d'exprimer un avis sur la force probante de ces pièces.
>
> [Reference omitted.]

[246] The principle that the authorization judge should not comment on the probative value of an applicant's supporting exhibits is drawn from, as Justice Morissette indicates, the Supreme Court decision in *L'Oratoire Saint-Joseph du Mont-Royal*[138].

[247] The rationale is said to be that any elements of proof filed by applicants at the authorization stage only need be "*prima facie*" in nature, such that contrary proof by a respondent's should only be made at a later stage, post-authorization[139].

[248] As observed by Justice Morissette[140], over the years, there has been an evolution, as demonstrated in more recent jurisprudence, that favours a decrease in what is being required to authorize a class action.

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136 *Homsy*, *supra*, note 38, par. 24.
137 *Idem*, par. 17.
138 *L'Oratoire*, *supra*, note 15, par. 22.
139 *Homsy*, *supra*, note 38, par. 22.
140 *Ibid.*

[249] In other words, the articles governing authorization set forth in the *Code of Civil Procedure* have not been amended, but the manner in which they are being interpreted and applied by the courts, particularly at the appellate level, is generally becoming less stringent, and accordingly, more favourable to authorization.

[250] In the Court's view, as far as the allegations pertaining to aggressive marketing are concerned, even if one were to conclude that they are perhaps too vague and imprecise as regards all or some of the respondents individually, the statement from Health Canada's 2018 *Notice of Intent to Restrict Marketing and Advertising of Opioids*, mentioned above, is more than sufficient to supplement same for authorization purposes. The following is an extract from the Notice of Intent[141]:

> Canadians are the second highest users per capita of prescription opioids in the world, and rates of opioid prescribing and opioid-related hospital visits and deaths have been increasing rapidly. Prescriptions written by health professionals are a common source of opioids in Canada. Health professionals receive information from a variety of sources to inform their prescribing decisions and advice to patients, including from the pharmaceutical industry. While there is value in the pharmaceutical industry conveying educational and scientific information about a health product, evidence suggests that the marketing and advertising of opioids has contributed to increased prescription sales and availability of opioids.
>
> The pharmaceutical industry's marketing practices can take many forms of direct and indirect activities and incentives, including, for example, manufacturer-sponsored presentations at conferences, continuing education programs, advertisements in medical journals, and personal visits from sales representatives. It can also include use of promotional brochures, fees for research, consulting or speaking, reimbursement for travel and hospitality expenses to attend industry-sponsored events, and gifts of meals, equipment, and medical journals and texts.
>
> [Underlining that of the Court.]

[251] Moreover, as regards the generic manufacturers, Applicant refers to the proceedings instituted by the *Régie de l'assurance maladie du Québec* ("**RAMQ**") in the 1990s and early 2000s against certain generic manufacturers regarding gifts and other incentives to Quebec pharmacists for the purpose of increasing sales of generic drugs.

[252] The view that the increase in opioid prescriptions is linked to various forms of marketing by manufacturers is even stated in the opening paragraph of the Report of

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141 Exhibit P-33, p. 1.

the House of Commons Standing Committee on Health regarding the opioid crisis in Canada[142].

[253] In addition to traditional marketing and sales tactics, one need keep in mind, as stated above, that the claim based on the *Act* includes the issue of warnings and more precisely failure to warn.

[254] In this regard, and as mentioned above, Applicant refers to the failure of respondents to sufficiently warn and inform putative class members of the serious risks and dangers associated with opioid use in the Information for Patients and Product Monographs sections contained in the Compendium[143].

[255] Applicant alleges that over time warnings have gone from nonexistent, to insufficient and then later to being more complete than previously, especially as a result of the required use of Serious Warnings and Precautions boxes in Product Monographs and on labelling[144].

[256] On October 2, 2003, Health Canada issued a *Notice of the Guidance for Industry: Product Monograph*[145] advising that a Serious Warnings and Precautions box should be included in the Product Monographs for "clinically significant or life threatening safety hazards"[146]. Although described in Part I as information destined to health professionals, such Serious Warning and Precautions box information is also to be included in a lay-language version destined to consumers in accordance with section 5.5.4 of Part III[147], along with a variety of other information such as precautions, missed dosages, overdose and side effects, to name just a few.

[257] Although the Guidance does not have the force of law[148], such documents "are meant to provide assistance to industry and health care professionals on how to comply with the policies and governing statutes and regulations"[149].

[258] Applicant alleges that respondents knew of the risks associated with the use of their opioid drugs and should have made "robust warnings" throughout the proposed Class Period.

[259] In the Court's view, Applicant's position as expressed through its allegations and evidence forms part of its arguable case at this stage.

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142 Exhibit P-4, p. 3 (p. 13 of 46).
143 Application, par. 2.85 to 2.94; see also as examples Exhibits P-8, P-9, P-10 and P-11.
144 *Idem*, par. 2.92, and Exhibit P-12.
145 Exhibit P-40, section 3.4.1, p. 12 (p. 20 of 78).
146 *Ibid.*
147 *Idem*, p. 33 (p. 43 of 78).
148 *Idem*, p. 1 (p. 5 of 78).
149 *Ibid*.

[260] The Court need not for authorization purposes, contrary to what many respondents suggest, analyse the Product Monographs over the years for all the various drugs manufactured by each and every respondent, attempting to determine which contain sufficient warnings and at what point in time they did or did not contain such warnings, not to mention analysing labelling on product packaging, and this with a view to determining whether Applicant will likely succeed with its case on the merits against all or some of the respondents. That is an exercise to be conducted by a merits judge at some point in time post authorization.

[261] Nonetheless, for authorization purposes, it is interesting that Applicant's Table 2, being extracts on the marketing of opioids, taken from various exhibits including Government of Canada documents[150], as well as different authors[151], also refers to product monographs of certain respondents.

[262] By way of example, same state that abuse or the development of addiction to opioids is either "not a problem with people who require this medication for pain relief" or in properly managed patients with pain "has been reported to be rare"[152]. While others state that concerns about abuse and addiction, or even diversion, "should not prevent the proper management of pain"[153].

[263] Additional evidence of marketing and promotional activity is identified in other exhibits[154].

[264] Suffice it to say that at this stage, given all the foregoing, the Court is of the view that Applicant has demonstrated an arguable case in this regard against respondents.

[265] Given both the allegation that respondents acted in concert (as opposed to a "conspiracy" as argued by certain respondents[155]) and the evidence emanating from Health Canada that refers to the issue of marketing as being industry-wide, the Court is of the view that for the purposes of authorization, it is not required that specific allegations be made in this regard against each respondent individually.

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150 Exhibits P-33 and P-4.

151 Exhibits P-1, P-2, P-5, P-22, P-23 and P-24.

152 Exhibits P-8, P-9, P-41, P-42 (Purdue); P-43 (Janssen); RL-2 (Sandoz and Pro Doc); RL-3 (Pro Doc); RL-4 (Pharmascience); RL-5 (Pro Doc); RL-7 (Pro Doc); RL-6 (Laboratoire Riva); RL-11 (Apotex); RL-12 (Pro Doc).

153 Exhibits P-12, P-41 (Purdue); JAN-1 to JAN-9, P-12, P-43 (Janssen); P-12, RL-2 (Sandoz and Pro Doc); RL-3, RL-5, RL-7, RL-9, RL-12 (Pro Doc); RL-4 (Pharmascience); RL-6, RL-8 (Laboratoire Riva); RL-11 and Exhibit B (Apotex); Schedule C (Aralez).

154 Exhibits P-5, P-14, P-15, P-19, P-20, P-43 to P-49.

155 The Court understands Applicant to use "in concert" as opposed to "conspiracy", so as to distinguish from the criminal nature of the latter.

[266] The Court does not share the view expressed by respondent Janssen that it should follow the decision of the Court of Appeal in *Perreault* v. *McNeil PDI inc.*[156] because in the present matter, the Court considers that the allegations and evidence show an arguable case as to the "intention" component of a claim under the *Act*.

[267] Nor does the Court agree with Janssen that the Court of Appeal for British Columbia decision in *Wakelam* v. *Wyeth Consumer Healthcare/Wyeth Soins de Sante Inc.*[157], particularly at paragraphs 74 and 91 thereof, stands for the principle that in relation to every claim pursuant to section 36 of the *Act*, the elements thereof be established against each and every proposed defendant individually at the authorization stage of all multi-defendant class action applications.

[268] Ultimately, Applicant has made allegations against all the respondents which the latter qualify as vague and imprecise, not only because they disagree with him, but also because they insist on being provided specifics and/or evidence applicable to each and every one of them. They reject allegations that target them as a whole or as an industry.

[269] Firstly, the court should not always discount allegations simply because an applicant alleges that "all" respondents have done something. Each case is to be assessed on its own merit.

[270] Secondly, if it is necessary for the court to conduct a hearing within a hearing in order to determine whether certain respondents should not be included in certain allegations, then that determination should be left to a post-authorization judge.

[271] Thirdly, as mentioned above, evidence is not always required by an applicant in support of his authorization application.

[272] Fourthly, in the case of evidence having been produced by an applicant at the authorization phase, should that evidence demonstrate in a serious and credible manner that a given industry has conducted itself in a certain way, as for example, what is stated in the 2016 Report of the Standing Committee on Health[158], the court is entitled for authorization purposes to make inferences based thereon as to the conduct of industry members. This, in the Court's view, is especially so in cases pertaining to consumers health, as opposed to defects in goods such as furniture and electronic products.

[273] And ultimately, even in the case of doubt, which is not the Court's position in this matter, the class action is to be authorized so as to respect the Legislator's objective of facilitating access to justice.

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156 2012 QCCA 713.
157 2014 BCCA 36 (Application for leave to appeal refused, 2014 CanLII 51663 (SCC)).
158 Exhibit P-4.

[274] In the Court's view, these principles take precedence over the arguments raised by respondents in this matter, particularly in relation to the *Act*.

(v) Applicant's personal cause of action

[275] In an earlier section hereof, at paragraphs 73 to 85, the Court referred to many of the facts relating to Applicant's personal cause of action.

[276] Essentially, Applicant's personal experience is covered at paragraphs 2.210 to 2.239 of the Application and is further supported by exhibits P-51 to P-53, which pertain to his medical records.

[277] As mentioned, the Court authorized a limited examination of Applicant, which took place in open court immediately preceding the authorization hearing.

[278] By way of summary, he confirmed his use of prescription opioid medication, with dosage increases over time, and further, that over the course of numerous years, he was not informed by either his doctor or his pharmacists of any problems regarding the use of opioid medication and was not given any warnings in that regard.

[279] In addition to the main opioid medication he was taking, he also took other medication for dental surgery and for an abscess. As well, his doctor briefly switched him from Dilaudid and Hydromorph Contin to morphine and Statex, but he states that he did not tolerate the morphine and was returned to his previous medications.

[280] He acknowledged that in 2014 or 2015, while he was already at the maximum dosage, he received an explanatory sheet from the pharmacist, which he states he only looked at quickly.

[281] Applicant testified that from 2012 to 2017, he was at the maximum dosage of Dilaudid and Hydromorph Contin. In 2017, his doctor refused to increase the dosage further notwithstanding that the opioid medication was no longer having any effect. It was only then, when he was given his last prescription, that his doctor raised concerns regarding his opioid use. It was at that time that he decided to strop taking opioid medication because it was no longer doing him any good. He went to the CHUM for help.

[282] He testified that it was during his discussions with a doctor at the CHUM, while voluntarily hospitalized for 8 days, that he became aware of the risks of opioid consumption. He was told that it would be a difficult road ahead for him ("*une grosse côte à monter*").

[283] After his hospitalization at Hôpital Saint-Luc, the treating doctor prescribed a different molecule, Hydromorphone, to control the pain and this for between 8 months to

one year. However, in March 2018, he was again hospitalized for OUD, this time for four days.

[284] In the Court's view, Applicant has established a *prima facie* personal cause of action against all the respondent manufacturers, save and except for any individual exclusion contained in the following sections. The evidence at this stage demonstrates that he used prescription opioid medication and developed a medical disorder, OUD, directly as a result thereof. He required hospitalization in a specialized treatment plan that continued as an out-patient to assist him in stopping his use of opioids. He even had to be rehospitalized in order to achieve success in his attempt to stop using them.

(B) Other arguments specific to certain individual respondents regarding an "arguable case"

[285] In this section, The Court will address the more salient arguments raised by certain individual respondents that have yet to be analysed and discussed as regards their personal situation.

(i) The injectable medications of respondents Pfizer and Abbott

[286] Both Pfizer and Abbott have argued that their injectable medications should be excluded from the proposed class action by reason of the hospital carve-out mentioned above, being that they "were solely and exclusively available for use in a hospital setting".

[287] Those respondents respectively rely on the Affidavit of Pfizer's Lorella Garofalo and the sworn statement obtained by Abbott from Dr. François Fugère.

[288] At the end of the hearing, Applicant's counsel advised the Court that they agree to drop from the proposed class action the injectables of both Pfizer and Abbott given those affidavits.

(ii) Respondent Sandoz's Supeudol

[289] In addition to the various issues raised by respondents generally as discussed above, Sandoz argues that Applicant alleges having been given Supeudol while in the hospital and, therefore, it should be removed from the class action by reason of the hospital carve-out.

[290] Sandoz, as part of that position, argues that the medication was delivered to Applicant by injection. Applicant confirms in his testimony before the Court that he received injections in the hospital, but he cannot confirm which medication it was.

[291] Moreover, the evidence does not clearly indicate that Supeudol is only delivered by way of an injectable

[292] As well, at this stage, the evidence does not indicate clearly that Supeudol injections are “solely and exclusively” used in a hospital setting. In the absence of an agreement between the parties or a renunciation by Applicant such as in the case of Abbott and Pfizer, Applicant correctly argues the Court should not conduct a trial within a trial in order to decide this factual element.

[293] It should also be noted that at this stage, Supeudol has not been shown to be the same as the injectable medications of either Abbott or Pfizer. Applicant’s Schedule I of respondents’ opioids does not describe it in the same or similar way as either of Abbott’s or Pfizer’s injectables.

[294] Supeudol will accordingly not be removed from the proposed class action at this stage.

[295] And in any event, should it be established in a post-authorization phase that an applicant has advanced a manifestly unfounded case against a respondent, appropriate recourses might well be available to that respondent as a result.

(iii) Certain injectables of respondents Purdue and Sandoz

[296] Although Applicant has renounced to including Abbott’s and Pfizer’s injectables, he has not renounced to Purdue’s or Sandoz’s injectables even though they appear to be the same.

[297] The Court understands that Applicant distinguishes the situation of Abbott and Pfizer from other respondents by reference to the affidavits produced by the former.

[298] One need keep in mind that the Affidavit of Pfizer’s Lorella Garofalo, at paragraph 15, states the following:

> 15. It is because of this that the names of these medications often include a reference to “injection”, “injections” or “injectables”. This conveys the fact that unlike other opioids, the medications so named can only be administered after prescription by a physician by way of a hypodermic needle or an intravenous drip dispensed by a hospital pharmacy.

[299] The Court understands for authorization purposes that those words apply to all the opioid medications that are described as being an injectable and that are targeted by Applicant in this matter.

[300] Applicant's current position could lead to an undesirable result whereby putative class members who were administered for example Codeine Phosphate Injection made or distributed by Abbott and Pfizer would not be able to claim in relation to same whereas others who were administered Codeine Phosphate Injection made or distributed by Sandoz could. How is a putative class member supposed to know the name of the particular manufacturer of the injected medication?

[301] That uncertainty goes to the heart of the class description and the ability of individuals to know whether they qualify as class members.

[302] There are numerous other similar examples.

[303] Sandoz is said to manufacture or market HYDROmorphone Hydrochloride Injection USP which remains in the proposed class action, whereas Pfizer's version thereof has been removed, without there being any reason provided by Applicant to explain that there is a difference as to the two medications, including as to their use.

[304] Similarly, Pfizer's Morphine Sulfate Injections USP has been removed while Sandoz's Morphine Sulfate Injection USP has not, again without any explanation by Applicant as to the differences, if any, between them, including their use.

[305] In addition to those medications that include the word "injection", there are other injectables that do not include that same word. For example, Abbott's and Pfizer's Morphine Forte and Morphine Extra-Forte, both of which are withdrawn by Applicant from the list of drugs to be covered by the proposed class action.

[306] In that regard, Sandoz is alleged[159] to have manufactured, marketed and/or sold Morphine HP 25 and Morphine HP 50, both of which Applicant refers to as "injection" products, but its products are not withdrawn, again without there being any reason provided by Applicant to explain that there is a difference between the medications and their use.

[307] Similarly, Abbott's Dilaudid injectable (as opposed to tablets), Dilaudid Sterile Powder, Dilaudid-HP, Dilaudid-HP-Plus and Dilaudid-XP, all injectables, have been removed by Applicant from its list of drugs covered by the class action, whereas Purdue's Dilaudid injectable (as opposed to tablets), Dilaudid Sterile Powder, Dilaudid-HP, Dilaudid-HP-Plus and Dilaudid-XP have not.

[308] Neither have Sandoz's Hydromorphone HP Forte, Hydromorphone HP 10, 20 and 50 been removed, notwithstanding that the Court understands them to all be injectables and further that Dilaudid is hydromorphone.

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[159] Application, par. 2.30.

[309] The Court respects Applicant's decision to remove certain injectables as being included in the hospital-use only carve-out. However, it is also of the view that the understanding of putative class members is such a critical issue that absent a reasonable explanation from an applicant, the Court is obliged to render the class action more user-friendly to putative members by rendering it less confusing and, where appropriate, by modifying an applicant's logic which may be too difficult for members to understand and to apply.

[310] To be clear, that is not to say that in the present matter every injectable is to be excluded. But those that appear to be same as the opioid medications that have voluntarily been removed by Applicant, should also be excluded, not only to avoid confusion in the minds of putative class members, but also because not to do so would equate to condoning a subjective approach that may be seen as lacking clarity and a certain logic.

[311] Accordingly, the following opioid medications will be removed from the proposed class action:

(A) Purdue:

- Dilaudid injectables,
- Dilaudid Sterile Powder,
- Dilaudid-HP,
- Dilaudid-HP-Plus, and
- Dilaudid-XP.

(B) Sandoz:

- Codeine Phosphate Injection,
- Hydromorphone HP Forte, 10, 20 and 50,
- HYDROmorphone Hydrochloride Injection USP,
- Morphine Sulfate Injection USP, and
- Morphine HP 25 and 50.

(iv) Respondent Purdue's OxyContin and OxyNEO

[312] As mentioned above, a national class action regarding OxyContin and OxyNEO has been fully approved by the courts of the various jurisdictions in which proceedings had been instituted. As a result, those two medications are not covered by the proposed class action in this matter.

[313] Accordingly, a person who has only been prescribed and has only consumed one or both of those two medications would not be a class member of the class action proposed in this matter.

[314] However, any person who has been prescribed and has consumed OxyContin and/or OxyNEO can nonetheless still be a class member in the present matter in relation to any other of the listed opioid medications which he has been prescribed and has consumed during the Class Period, including those manufactured by Purdue, as long as he has met all other criteria set out in the class description.

[315] As for Supeudol, as mentioned above, the Court is unable at this stage to make an obvious connection to Abbott's and Pfizer's injectables that have been voluntarily withdrawn by Applicant, and hence it remains on the list of medications covered by the proposed class action.

(v) Respondent Janssen's Duragesic fentanyl patch

[316] Janssen disagrees with Applicant that its therapeutic information for Duragesic fentanyl patches, as seen at Exhibit P-43, does not contain a sufficient warning. At this stage, all respondents are of the same view as regards their own medication.

[317] Janssen argues that its Duragesic patches should not be considered a serious risk for users particularly given that it is only for patients with cancer who have already been on opioids.

[318] Firstly, of course, and as mentioned above, the sufficiency of risk warnings is not to be decided at this stage but rather post-authorization when the evidence is more complete.

[319] That said, however, it is worth noting that Janssen's advertising, as seen in Exhibits P-19 and P-43, is not clearly destined only for cancer patients but rather is said to be for those who have been on weak opioids which have been insufficient for chronic pain, and this with a rather large photo of a middle-aged couple fly-fishing.

[320] The point of this comment is to demonstrate that at this early stage there is no justification for the Court to remove Duragesic fentanyl patches from the proposed class

action and, further, that Applicant has made a sufficiently arguable case as regards that medication.

(vi) Respondents Apotex and other generic drug manufacturers regarding the regulatory process

[321] Apotex and other generic manufacturers, in addition to their various other arguments, many of which are analyzed above, explain that “new” drugs are strictly regulated pursuant to the *Food and Drug Regulations*[160] and that product monographs are to comply with governing statutes and regulation, for the purpose of which Health Canada has issued its *Guidance Document, Product Monograph*[161].

[322] They argue that generic manufacturers, in order to market a new drug, must, amongst other requirements, demonstrate an equivalence to a Canadian reference product made by the innovator of the brand drug and, as well, must also use essentially the same efficacy and safety information as does the innovator for their product monograph. In other words, they should not be held liable for the content of their monographs given that they cannot change its content.

[323] The Court at this stage is not to conclude in this regard.

[324] Firstly, the factual analysis as to the content of the monographs is an exercise to be conducted post authorization. One should keep in mind that even Health Canada describes a monograph as “a factual, scientific document”[162].

[325] Moreover, a product monograph “is intended to provide the necessary information for the safe and effective use of a new drug and also serve as a standard against which all promotion and advertising of the drug can be compared”[163].

[326] In the Court’s view, this confirms the factual nature of the monograph, with the scientific components also forming part of the factual framework.

[327] Secondly, as matters now stand, the issuance of a notice of compliance by Health Canada does not automatically provide a drug manufacturer with either an immunity, a government guarantee or a complete defence to product liability claims. A judge on the merits would be better equipped to assess whether regulatory compliance is relevant to the issue of liability in the present matter given the relevant facts.

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160 C.R.C., c. 870, part C, division 8, New Drugs.
161 Exhibit P-40.
162 *Idem*, section 1.2 (p. 9 of 78).
163 *Idem*, section 1.1 (p. 9 of 78).

[328] Accordingly, the court does not view regulatory compliance as a bar to the authorization of the proposed class action but rather, as part of a defence to be argued before the judge on the merits.

(vii) Respondent Bristol-Myers Squibb Canada regarding its "Mature Products"

[329] BMS Canada argues that its products are what they refer to as "Mature Products", in they have been made available for sale in Canada "over a long time period", as attested to in the Sworn Statement of its Associate Director of Financial Planning and Analysis, Steve Webb[164].

[330] The affiant then attests to having been told by someone else, a former products manager, that none of the products "is promoted, including to the Plaintiff, potential class members, formularies and health authorities, hospitals, distributors pharmacies, physicians or to Canadian patients"[165].

[331] With respect, this hearsay evidence is not sufficient to justify the Court excluding, at the authorization stage, such medications from all or part of the proposed class action, especially when the affiant affirms that BMS Canada had previously "supported" certain promotional activities, albeit that it never had a marketing budget.

[332] In the Court's view, this issue will need be presented to a post-authorization judge as part of its defence, with additional evidence. That judge would be better placed to analyze and conclude as to BMS Canada's position, particularly given what appears to possibly be advertising by it at Exhibits P-42 and P-43.

(viii) Respondent Joddes and its alleged liability for Sorres Pharma Inc. ("**Sorres**")

[333] Applicant alleges that respondent Joddes was the parent company of Sorres, a Canadian corporation, wholly owned by its parent, and which, during the Class Period, "voluntarily dissolved on November 24, 2014"[166]. It is alleged that Sorres manufactured, marketed and/or sold opioids in Quebec, the only product identified by Applicant being Hydromorphone tablets[167].

[334] No other opioid medication is alleged to have been manufactured, distributed or sold by either Sorres or Joddes.

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164 Exhibit BMS-1, par. 20.
165 *Idem*, par. 21.
166 Application, par. 2.16
167 *Ibid.*

[335] Joddes acknowledges that it was the parent company of Sorres. It argues, however, that section 226 of the *Canada Business Corporations Act*[168] provides a complete bar to any claims against it as the shareholder of Sorres. Sections 226(1), (2)(a)(b)(c) and (4) read as follow:

> **226 (1)** In this section, shareholder includes the heirs and personal representatives of a shareholder.
>
> **(2)** Notwithstanding the dissolution of a body corporate under this Act,
>
> **(a)** a civil, criminal or administrative action or proceeding commenced by or against the body corporate before its dissolution may be continued as if the body corporate had not been dissolved;
>
> **(b)** a civil, criminal or administrative action or proceeding may be brought against the body corporate within two years after its dissolution as if the body corporate had not been dissolved; and
>
> **(c)** any property that would have been available to satisfy any judgment or order if the body corporate had not been dissolved remains available for such purpose.
>
> […]
>
> **(4)** Notwithstanding the dissolution of a body corporate under this Act, a shareholder to whom any of its property has been distributed is liable to any person claiming under subsection (2) to the extent of the amount received by that shareholder on such distribution, and an action to enforce such liability may be brought within two years after the date of the dissolution of the body corporate.

> **226 (1)** Au présent article, actionnaire s'entend notamment des héritiers et des représentants personnels de l'actionnaire.
>
> **(2)** Nonobstant la dissolution d'une personne morale conformément à la présente loi :
>
> **a)** les procédures civiles, pénales ou administratives intentées par ou contre elle avant sa dissolution peuvent être poursuivies comme si la dissolution n'avait pas eu lieu;
>
> **b)** dans les deux ans suivant la dissolution, des procédures civiles, pénales ou administratives peuvent être intentées contre la personne morale comme si elle n'avait pas été dissoute;
>
> **c)** les biens qui auraient servi à satisfaire tout jugement ou ordonnance, à défaut de la dissolution, demeurent disponibles à cette fin.
>
> […]
>
> **(4)** Nonobstant la dissolution d'une personne morale, conformément à la présente loi, les actionnaires entre lesquels sont répartis les biens engagent leur responsabilité, à concurrence de la somme reçue, envers toute personne invoquant le paragraphe (2), toute action en recouvrement pouvant alors être engagée dans les deux ans suivant la dissolution.

[168] R.S.C. 1985, c. C-44.

[336] Clearly more than double the two (2) year period elapsed between the voluntary dissolution of Sores on November 24, 2014, and the initial application for authorization to institute a class action filed by counsel to Applicant and his predecessors on or about May 23, 2019.

[337] Applicant argues that the scope of Joddes' own business activities is unclear. But a court is not to authorize a class action simply to enable an applicant to conduct an investigation as to whether a defendant, in this case Joddes, should be sued for other reasons.

[338] Moreover, contrary to Applicant's submission, the fact that it may have had the same civic address as another respondent is not sufficient to authorize a class action against it.

[339] As regards the issues of Joddes being an *alter ego* for Sorres, there is insufficient allegations at this stage for the Court to conclude favourably for Applicant.

[340] Nor has Applicant specifically sought the revival of a claim, and the Court will not decide the issue as if he had.

[341] Accordingly, the Court is of the view that Applicant has failed to demonstrate an arguable case as against either Sorres or Joddes, whether on the latter's own account or in its capacity as the parent company of Sorres. As a result, the Court will not authorize the class action against Joddes.

4. ANALYSIS: ARTICLE 575(1) C.C.P. – DO THE CLAIMS OF THE PUTATIVE MEMBERS OF THE PROPOSED CLASS ACTION RAISE IDENTICAL, SIMILAR OR RELATED ISSUES OF LAW OR FACT?

A. The Class Description

[342] In order to conduct a proper analysis of the questions, as to whether any of the issues raised are identical, similar or related, it is first necessary to take into consideration the class description.

[343] Although mentioned herein, for ease of reference the Court reiterates the description proposed by Applicant:

> 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, specifically in respect of the drugs OxyContin or OxyNEO, subject to the settlement agreement entered into in the court file no 200-06-000080-070 […]

[344] In addition to the OxyContin and OxyNEO exclusion, discussed above, there is the previously mentioned "carve-out" relating to exclusive use in hospital settings, which reads as follows:

> 2.4.2 […] 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.

[345] In the Court's view, that carve-out should form part of the description for the purpose of clarity for the members.

[346] The Quebec Court of Appeal identifies the four (4) characteristics of the class description in the oft-cited decision in *George* v. *Québec (Procureur général)*[169]*,* being as follows:

1. La définition du groupe doit être fondée sur des critères objectifs,
2. Les critères doivent s'appuyer sur un fondement rationnel,
3. La définition du groupe ne doit être ni circulaire ni imprécise,
4. La définition du groupe ne doit pas s'appuyer sur un ou des critères qui dépendent de l'issue du recours collectif au fond.

[347] Moreover, the description must be clear, sufficiently so because it is essential for individuals to be able to determine that they are members of the class[170].

[348] In the present matter, certain respondents argue that the description is so confused and broad that it does not enable individuals to determine whether or not they are class members. This is critical as it can lead to the refusal by the motions judge to authorize the proposed class action[171].

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169 2006 QCCA 1204, par. 40.
170 *Western Canadian Shopping Centres Inc.*, *supra*, note 15, par. 38.
171 *Boudreau*, *supra*, note 91, par. 24-26.

[349] That said, the Court can redefine the description[172], not to the point of changing the nature of the proposed class action but for the purpose of assisting in aligning the class to the proposed action at law.

[350] A variety of arguments were raised by respondents as regards the Applicant's proposed description of the class.

[351] As for the argument that the class period is too long, especially as regards prescription, the Court has already referred above to the newly adopted *Opioid-related Damages and Health Care Costs Recovery Act*, which appears to render moot the argument based on prescription. The Court will not repeat here all that it discussed above in this regard.

[352] The only other reason suggested for limiting the class period appears to relate to the view that the Applicant is reaching too far and is creating an unmanageable law suit. The Court has already addressed this issue and does not, at this stage, consider it to be such an overreach that would justify a refusal to authorize. The availability of evidence on the merits will dictate if it is an overreach.

[353] Another argument is that the definition is so broad that it would include illicit opioids. In the Court's view, the requirement that the members have been prescribed the medication is a sufficient criterion to frame the description so as to exclude individuals who have only accessed illicit opioid medication.

[354] That said, some respondents have submitted very constructive comments suggesting that the description should:

- Refer to the specific opioid products identified by Applicant,
- Specifically exclude OxyContin and OxyNEO given the settlement of a national class action, as mentioned above,
- Specifically exclude products solely and exclusively available for use in a hospital setting as opposed to use in the home, and
- Require that Opioid Use Disorder be diagnosed by a medical professional.

[355] The Court fully agrees with the need to refer to those medications that are included, while specifically excluding certain others. Doing so would facilitate individuals being able to identify whether or not they are class members.

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[172] *Sibiga*, *supra*, note 23, par. 136.

[356] The requirement that Opioid Use Disorder be diagnosed by a physician, and this so as to avoid self-diagnosis problems, is reasonable and, as well, is acceptable to Applicant.

[357] Some respondents add that the DSM-5 diagnostic criteria set out at Exhibit P-37 must have been applied by the physician for the purpose of making the diagnosis.

[358] The Court considers that requiring the use of one diagnostic criteria at this stage would not be appropriate. There is insufficient information presently available to the Court to know when OUD was first recognized as a medical disorder by the medical profession. The requirement of having a diagnosis for OUD should not be used, even inadvertently, in a manner that might, during the class period, limit the class to only those diagnosed after the medical profession formally recognized the disorder. Moreover, if an individual suffered the symptoms of such disorder prior to it being formally recognized, or for any other reason without a then-contemporary diagnosis by a physician, a retroactive diagnosis by a physician should be sufficient. Accordingly, the Court will not modify the description so as to require a physician's diagnosis to be issued simultaneously to the individual having suffered the defining symptoms.

[359] Hence, the Court will not require that OUD be diagnosed in accordance with the DSM-5 criteria. The Court cannot exclude at this stage that there exists other criteria recognized by the medical profession.

[360] For the foregoing reasons, the Court modifies the class description to read as follows:

> All persons in Quebec who have been prescribed and consumed any one or more of the opioid medications identified in Schedule I attached hereto, manufactured, marketed, distributed and/or sold by the Defendants between 1996 and the present day **("Class Period")** and who have been diagnosed by a physician as suffering or having suffered from Opioid Use Disorder.
>
> The Class excludes any person's […] claim, or any portion thereof, […] in relation to the drugs OxyContin and OxyNEO, as well as in relation to opioid drugs that were solely and exclusively available for use in a hospital setting and not prescribed for use in the home.
>
> The Class also includes the direct heirs of any deceased person who during his or her lifetime met the above description, subject to the same exclusions.

B. The Identical, Similar or Related Issues

[361] This statutory criterion, stipulated at Article 575(1) C.C.P., is often simply referred to as being the existence of common questions, although it is actually much broader than that.

[362] Respondents argue that due to numerous factors, including what they consider as an overreach by Applicant as to length of the Class Period and the lumping together of so many different opioid medications, and the resulting infinite variations, there are no relevant, meaningful common questions leading to a collective decision. One respondent describes it as the creation of an "amalgam of individual trials".

[363] At the heart of their arguments lies the view that in the proposed class action the existence of a safety defect, the disclosure of risks and dangers, the making of misrepresentations, including through marketing practices and strategies, the causation and recovery of non-pecuniary damages and the assessment of punitive damages cannot be decided on a collective basis.

[364] The threshold for establishing common questions is considered in case law to be low[173], such that even only one (1) identical, similar or related question of law or fact is sufficient[174]. So, it is still essential to identify at least one such question, a task rendered more difficult if the description of the class is too large, thereby diluting the questions[175]. Failure to identify one is fatal to the authorization of the class action[176].

[365] The Supreme Court of Canada in *Vivendi Canada Inc.* v. *Dell'Aniello*[177] states the principle as follows, which is still applicable under Quebec's current *Code of Civil Procedure*:

> [58] […] To meet the commonality requirement of art. 1003(a) C.C.P.[178], the applicant must show that an aspect of the case lends itself to a collective decision and that once a decision has been reached on that aspect, the parties will have resolved a not insignificant portion of the dispute […] All that is needed in order to meet the requirement of art. 1003(a) C.C.P. is therefore that there be an identical, related or similar question of law or fact, unless that question would play only an insignificant role in the outcome of the class action. It is not necessary that the question make a complete resolution of the case possible […]
>
> [References omitted.]

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173 *Boudreau*, *supra*, note 91, par. 30.
174 *Ibid.*
175 *Ibid.*
176 *Idem*, par. 31.
177 *Vivendi*, *supra*, note 15, par. 58.
178 Now Article 575(1) C.C.P.

[366] In *Vivendi*, the Supreme Court also reminds us that the response to the common question need not be the same for each class member, nor need it give rise to a successful outcome for all members[179].

[367] Instead, what makes the question common is if "it can serve to advance the resolution of every class member's claim"[180], notwithstanding the possibility of nuanced and diverse responses given the circumstances of each class member. The goal is to avoid repetition as to the analysis of facts and law[181] in numerous individual cases.

[368] In *Sibiga* v. *Fido Solutions inc.*[182], the Quebec Court of Appeal adopts the "flexible" approach proposed by the Supreme Court of Canada in *Vivendi*.

[369] The Court of Appeal also referred to the warning contained in the *Vivendi* decision against overemphasizing the differences rather than focusing on the identification of one or more questions that will advance the class action by reason of there being a "sufficiently similar situation" [183].

[370] In *Baratto* v. *Merck Canada Inc.*[184], the Court of Appeal recognized that one can have common questions even if there exists differences amongst the class members, including the use of different medication.

[371] Similarly, there can be commonality even when there could be different compensation, given that various measures and modalities be put into place so as to account for the differences between the members[185].

[372] Although respondents might be correct to mention that there may be many different factual variations amongst class members resulting in different legal analysis, the role of the Court at this stage, as just mentioned above, is not to focus on all the differences but rather to identify what issues of fact and law are identical, similar or related in order to avoid the courts repeating the analysis in multiple different and over-lapping law suits, an approach that speaks loudly against proportionality.

[373] One can imagine that some putative class members consumed only one medication manufactured or marketed by one respondent. Others, such as Applicant, may have consumed numerous medications from a number of different manufacturers. Some for a long period of time, while others for shorter periods of time, but all having suffered or are presently suffering from OUD.

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179 *Vivendi*, *supra*, note 15, par. 45.
180 *Idem*, par. 46.
181 *Idem*, par. 44.
182 *Sibiga*, *supra*, note 23, par. 122.
183 *Idem*, par. 123.
184 *Baratto*, *supra*, note 59, par. 71.
185 *Idem*, par. 72.

[374] Respondents argue that these combinations make a single class action unmanageable and disproportionate.

[375] If one were to adhere to respondents' thinking, there would result the possibility of multiple class actions involving medications from only one manufacturer per action, and this for only a shorter period of time than the proposed class period. In each such action, the defence based on the informed intermediary might be raised.

[376] But how can that be proportionate, unless of course very few people had the time, energy, resources and willingness to share publicly their OUD in order to either act as class representative or to take on alone an opioid manufacturer? In the Court's view, this is not a vision that is in keeping with the access to justice philosophy underlying class actions.

[377] And should all those who have suffered OUD be required to institute separate actions, it would involve an even greater contradiction to the principle of proportionality.

[378] With these principles and arguments in mind, what are the questions proposed by Applicant?

[379] The questions are the following[186]:

> 5.1. Do the opioid products manufactured, marketed, distributed and/or sold by the Defendants pose serious health risks to their users due to, *inter alia*, their addictive nature?
>
> 5.2. Do the opioid products manufactured, marketed, distributed and/or sold by the Defendants offer the safety that Class Members could normally expect and do they have a safety defect within the meaning of articles 1468-1469 CCQ?
>
> 5.3. Did the Defendants provide (…) sufficient information on the risks and dangers of using their opioid products?
>
> 5.4. Did the Defendants trivialize or deny the risks and dangers associated with the use of opioids?
>
> 5.5. Did the Defendants employ marketing strategies which conveyed false or misleading information, including by omission, about the characteristics of the opioid products they were selling?
>
> 5.6. Did the Defendants fail to properly monitor the safety of their opioid products and/or take appropriate corrective action to adequately inform

[186] Application, par. 5.1 to 5.12.

users of such safety risks, as knowledge evolved as to such safety risks and side effects?

5.7. Have the Class Members suffered damages as a result of their Opioid Use Disorders?

5.8. What is the amount of non-pecuniary damages suffered by the Class Members?

5.9. Can the Class Members ask for collective recovery of their non-pecuniary damages?

5.10. Did the Defendants intentionally interfere with the right to life, personal security and inviolability of the Class Members?

5.11. Did the Defendants knowingly put a product on the market that creates addiction and Opioid Use Disorder?

5.12. Are the Defendants liable for punitive damages as a result their egregious conduct, and if so, in what amount?

[380] First and foremost, contrary to what respondents argue, the proposed class action, and more specifically the issues and questions it raises, is not in the Court's view analogous to the issues raised in *Cozak* v. *Procureure générale du Québec (Ministère de la Sécurité publique du Québec)*[187]. In that case, as mentioned by the authorization judge[188], the proposed class action generally raised all of the various living conditions encountered by those detained in the subject detention facility.

[381] In the present matter, the focus is on the singular result of class members having suffered OUD after consuming opioid medication. This is not the same as the Cozak claim including problems relating to, among others, sleeping conditions, quality of food, health services, searches and the conduct of correctional agents.

[382] Nor is it the same as the case of *Rozon* v. *Les Courageuses*[189], where it was necessary for each class member to establish "fault" based on the separate facts of each event of alleged sexual harassment that occurred over the course of more than 30 years[190].

[383] First of all, in the present matter there would be no requirement to prove fault in relation to any alleged safety defect.

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187 2020 QCCS 1989 (Confirmed, 2021 QCCA 1376).
188 *Idem*, par. 118.
189 2020 QCCA 5.
190 *Idem*, par. 90.

[384] Moreover, as for fault relating to the medications themselves, there is no indication or argument made at this stage that any given medication would have been modified or altered during the Class Period, such that its individual ability to cause or contributing to causing OUD would not likely have changed during its time in the marketplace, unlike the *Imperial Tobacco* case mentioned above.

[385] This latter case demonstrates how the number of defendants, the length of the class period and the differences in the consumption of various products containing nicotine, modified over the years, and even causing different health problems, some resulting in death, is not a barrier to the authorization of a class action.

[386] Respondents attempt to distinguish that case, as already mentioned, by arguing that it involved only one ingredient, nicotine, whereas the medications in the present matter involve numerous different molecules. It is worth repeating, as stated above, that all the said drugs contain an opioid. They are all in the same class of drugs. In the Court's view, respondents' distinction is without any resulting difference in the present matter.

[387] The respondents tend to deny that even one common question exists mainly because they do not accept that Applicant has demonstrated an arguable case as regards any of its causes of action. The Court has already addressed those issues.

[388] The challenge for authorization judges is often the application of the principles established by law and relevant jurisprudence to the particular facts of a given case.

[389] Respondents have cited several decisions that they argue demonstrate that this case should not be authorized. The court does not intend to analyze and distinguish each such case, beyond what is already indicated above. Suffice it to say, however, that the Court considers this case to be one that does contain at least one question that meets the criteria as stated above.

[390] That said, the Court does not consider that Applicant's first question sufficiently ties into the class description which focuses on Opioid Use Disorder.

[391] The Court modifies the question to read as follows:

> 5.1. Did and/or do the opioid products manufactured, marketed, distributed and/or sold during the Class Period by the Defendants, as identified at Schedule I, cause opioid use disorder in class members and pose other serious health risks to them due to, inter alia, their addictive nature?

[392] In the Court's view this question covers a common, similar and related issue, such that the resulting reply will advance the case of individual class members. So will

others. There is no requirement for the Court to now comment on each proposed question.

[393] As for question 5.9, however, a modification would be useful. No doubt a party can “ask” for a conclusion, but the real issue is whether or not a party is legally entitled to receive it. A minor modification would be appropriate so that the section will read as follows:

> 5.9. Are the Class Members legally entitled to collective recovery of their non-pecuniary damages?

[394] The Court is of the view that the other questions in sections 5 and 6 can remain as they are for authorization purposes.

5. ANALYSIS: ARTICLE 575(3) C.C.P. – THE IMPRACTICABILITY OF PROCEEDING BY MANDATES OR CONSOLIDATION OF PROCEEDINGS

[395] This requirement intends to limit the use of class action proceedings to cases where other available legal means, such as by the use of mandates, is difficult and impracticable given the circumstances.

[396] The Court has already mentioned that the nature of the proposed class action, especially the requirement for class members to suffer or have suffered from a diagnosed case of opioid use disorder, is such that the identification of members is to be found primarily in confidential medical records. That by itself limits the ability of Applicant to identify putative members. Moreover, it would be understandable that members would not necessarily want to publicly acknowledge that they have suffered from OUD.

[397] In the Court’s view, given the foregoing, the composition of the class makes it difficult and impracticable to apply the rules for mandate in order to take part in judicial proceedings on behalf of others. The respondents have not argued that the consolidation of proceedings is of any practical relevance to the present matter.

[398] Accordingly, the criteria of Article 575(3) is met by Applicant.

6. ANALYSIS: ARTICLE 575(4) – THE APPOINTED CLASS REPRESENTATIVE

[399] Although the burden of demonstration for the purposes of appointing a representative plaintiff is considered low, the latter must nevertheless be in a position to provide an adequate representation for the members.

[400] The Supreme Court of Canada in *Infineon* identifies three (3) factors to be considered, being to have a personal interest, to be competent and to not have a

conflict with the class members[191]; it also affirmed that these factors should be interpreted liberally such that no proposed representative should be excluded unless it is shown that his interest and competence are such that it would be impossible for the matter to proceed fairly[192].

[401] Even in the event of a conflict, the Supreme Court warned that the court should hesitate to refuse the authorization of the proposed class action, as that would be a draconian measure[193]. Such refusal would only be appropriate in exceptional cases.

[402] Certain respondents have argued that Mr. Bourassa does not have a personal cause of action against each and every one of them, but the Court has concluded that Applicant has a sufficient cause of action to proceed.

[403] Others argue that he is unreliable, lacks the requisite probity and credibility and, further, could not even understand the proceedings.

[404] The Court does not agree with the harsh criticisms leveled at Mr. Bourassa.

[405] Firstly, it has not been demonstrated that he lacks probity and credibility. In fact, and without concluding as to credibility issues at this stage, the Court found him to be transparent while testifying.

[406] Secondly, Mr. Bourassa accepted to testify and to attend before the Court for that purpose, demonstrating his commitment to the case.

[407] He also accepted to replace prior applicants in this matter, all of whom had withdrawn, and this in part under the scrutiny of respondents. To attack him on a personal level, as some have already done, is not only contrary to the above principles established by the Supreme Court but it has also failed to induce him to withdraw. The court in such circumstances interprets this as a sign of his serious commitment to the case.

[408] As for the argument that he has failed to advance the case, the Court views that as an unfair assertion at this point in time, the parties knowing full well that he only became involved to replace a previous applicant, and this relatively close to the hearing dates. Moreover, he has moved the matter to the authorization hearing, including testifying before the Court.

[409] Finally, the fact that all the principal proceedings and the vast majority of plans of argument and evidence have been prepared and submitted in English, whereas the

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191 *Infineon*, *supra*, note 17, par. 149.
192 *Ibid.*
193 *Idem*, par. 150.

Applicant may have a limited knowledge of the language, with the result that he had not read the entire Application of over 50 pages, is an argument that the Court considers unworthy of counsel, especially considering Mr. Bourassa's relatively recent arrived in the file.

[410] All elements considered, the Court is of the view that it is indeed appropriate in this matter to appoint Mr. Bourassa as the class representative.

7. CONCLUSION

[411] The criteria of Article 575 C.C.P. having been satisfied by Applicant, the class action will be authorized and Mr. Bourassa will be appointed as the class representative.

[412] In keeping with Article 576 C.C.P., the class action will proceed in the District of Montreal, where Mr. Bourassa received his medical treatment and has elected domicile, and further where most proposed defendants have their place of business as identified in the Application.

[413] A notice to class members will need to be given to the class members at the expense of the proposed defendants, the details of which will be finalized at a future meeting to be scheduled by the Court.

8. DECISION

FOR THESE REASONS, THE COURT:

[414] **GRANTS** in part the Re-Amended Application dated September 30, 2022 for authorization to institute a class action, the nature of which is an action in compensatory and punitive damages based on the extracontractual responsibility of manufacturers, the safety of their opioid medications, the *Competition Act* and the *Charter of Rights and Freedoms*;

[415] **EXCLUDES** Joddes Limited from the authorized class action;

[416] **CONFIRMS** the continued suspension of the Re-Amended Application dated September 30, 2022 as against Paladin Labs Inc.;

[417] **MODIFIES** the list of opioid medication Schedule I as per the attached;

[418] **APPOINTS** Jean-François Bourassa as representative plaintiff;

[419] **ORDERS** that Exhibits P-51, P-52 and P-53 be maintained under seal, subject to a decision of the Superior Court to the contrary;

[420] **AUTHORIZES** the representative plaintiff to institute the class action for the benefit of the following persons, being members of the class:

> All persons in Quebec who have been prescribed and consumed any one or more of the opioid medications identified in Schedule I attached hereto, manufactured, marketed, distributed and/or sold by the Defendants between 1996 and the present day **("Class Period")** and who have been diagnosed by a physician as suffering or having suffered from Opioid Use Disorder.
>
> The Class excludes any person's […] claim, or any portion thereof, […] in relation to the drugs OxyContin and OxyNEO, as well as in relation to opioid drugs that were solely and exclusively available for use in a hospital setting and not prescribed for use in the home.
>
> The Class also includes the direct heirs of any deceased person who during his or her lifetime met the above description, subject to the same exclusions.

[421] **IDENTIFIES** the principal questions of law and fact to be dealt with collectively as follows:

1. Did and/or do the opioid products manufactured, marketed, distributed and/or sold during the Class Period by the Defendants, as identified at Schedule I, cause opioid use disorder in class members and pose other serious health risks to them due to, inter alia, their addictive nature?

2. Do the opioid products manufactured, marketed, distributed and/or sold by the Defendants offer the safety that Class Members could normally expect and do they have a safety defect within the meaning of articles 1468-1469 CCQ?

3. Did the Defendants provide sufficient information on the risks and dangers of using their opioid products?

4. Did the Defendants trivialize or deny the risks and dangers associated with the use of opioids?

5. Did the Defendants employ marketing strategies which conveyed false or misleading information, including by omission, about the characteristics of the opioid products they were selling?

6. Did the Defendants fail to properly monitor the safety of their opioid products and/or take appropriate corrective action to adequately inform users of such safety risks, as knowledge evolved as to such safety risks and side effects?

7. Have the Class Members suffered damages as a result of their Opioid Use Disorders?

8. What is the amount of non-pecuniary damages suffered by the Class Members?

9. Are the Class Members legally entitled to collective recovery of their non-pecuniary damages?

10. Did the Defendants intentionally interfere with the right to life, personal security and inviolability of the Class Members?

11. Did the Defendants knowingly put a product on the market that creates addiction and Opioid Use Disorder?

12. Are the Defendants liable for punitive damages as a result of their egregious conduct, and if so, in what amount?

[422] **IDENTIFIES** the principal issues and questions of law and fact which are particular to each of the members as follows:

1. The specific nature of their Opioid Use Disorder, in particular which of the diagnostic criteria symptoms they experience or experienced; and

2. Other than the damages recovered collectively, what other damages have the class members suffered?

[423] **IDENTIFIES** as follows the conclusions sought:

GRANT the Plaintiff's Class Action;

CONDEMN the Defendants solidarily to pay to each of the Class Members the amount of $30,000 in non-pecuniary damages with interest and additional indemnity since the service of the application for leave to institute a class action;

CONDEMN each of the Defendants to pay the sum of $25,000,000 in punitive damages with interest and additional indemnity since the service of the application for leave to institute a class action;

CONDEMN the Defendants to pay to each Class Member a sum as pecuniary damages to be determined on an individual basis, increased by interest at the legal rate and the additional indemnity provided for in article 1619 of the *Civil Code of Quebec*, since service of the *application for leave to institute a class action,* and to be recovered individually;

CONDEMN the Defendants to pay the Plaintiff's full costs of investigation in connection with the misrepresentations made by the Defendants;

ORDER the collective recovery of these awards;

DETERMINE the appropriate measures for distributing the amounts recovered collectively and the terms of payment of these amounts to the Class Members;

ORDER the liquidation of the individual claims for any other damage sustained by the Class Members;

DETERMINE the process of liquidating the individual claims and the terms of payment of these claims pursuant to articles 599 to 601 C.C.P.

THE WHOLE WITH COSTS, including experts' fees and notice costs.

[424] **FIXES** the delay for exclusion from the class at sixty (60) days from the notice to members;

[425] **ORDERS** that any class member who has not requested exclusion from the class within the said sixty (60) days from the notice to members is bound by any judgement to be rendered in the class action;

[426] **ORDERS** the publication of a notice to class members according to the terms and directives to be determined by the Court at a future hearing, the date and time of which will also be determined by the Court, the cost of such notice and its publication to be at the expense of defendants;

[427] **ORDERS** that the class action be instituted before the Superior Court in the District of Montreal;

[428] **REFERS** the present file to the Chief Justice of the Court for the purposes of appointing a new case management judge for the next phases;

[429] **THE WHOLE** with judicial costs against respondents.

Gary D. D. Morrison

Signature numérique de Gary D. D. Morrison
Date : 2025.05.20 11:16:58 -04'00'

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Dates of Hearing: November 7, 8, 9, 14, 15, 16, and 17, 2022

Schedule 1

Bourassa v. Abbott Laboratories, Limited et al.
(500-06-001004-197)

Defendants' Opioids (updated as at February 26, 2024)

1) ABBOTT LABORATORIES, LIMITED			
Dilaudid (tablets)	Kadian		
2) APOTEX INC.			
Apo-Fentanyl Matrix	Apo-Hydromorphone CR	Apo-Oxycodone/Acet	Apo-Hydromorphone
Apo-Oxycodone CR	Apo-Tramadol/Acet		
3) BRISTOL-MYERS SQUIBB CANADA CO.			
Endocet	Numorphan	Percocet-Demi	Percodan-Demi
Endodan	Percocet	Percodan	
4) ETHYPHARM INC.			
M-Ediat	M-Eslon		
5) JANSSEN INC.			
Duragesic	Nucynta Extended-Release	Tramacet	Tylenol With Codeine No. 3
Jurnista	Nucynta IR	Tylenol With Codeine Elixir	Tylenol With Codeine No. 4
Nucynta CR	PAT-tramadol/Acet	Tylenol With Codeine No. 2	Ultram
6) LABORATOIRE ATLAS INC.			
Codeine Phosphate Syrup	Doloral	Linctus Codeine Blanc	
7) LABORATOIRE RIVA INC.			
Codeine 15	Codeine 30	Rivacocet	Triatec-30
RIVA-Tramadol/Acet			
8) LABORATOIRE TRIANON INC.			
Codeine 15	Codeine 30	Triatec-30	

Defendants' Opioids (updated as at February 26, 2024)

9) PFIZER CANADA ULC			
Robaxisal C 1/2	Robaxisal C 1/4		
10) PHARMASCIENCE INC.			
282 Tablets	Acet-Codeine 60	pms-Butorphanol	pms-Opium and Belladonna SUP
292 Tablets	Exdol-15	pms-Codeine	pms-Oxycodone
Acet 2	Exdol-30	pms-Fentanyl MTX	pms-Oxycodone CR
Acet 3	Metadol	pms-Hydromorphone	pms-Oxycodone-Acetaminophen
Acet-Codeine 30	pms-Acetaminophen With Codeine Elixir	pms-Morphine Sulfate SR	pms-Tramadol-Acet
11) PRO DOC LTÉE			
Fentanyl Patch	Procet-30	Tramadol-Acet	Oxycodone (tablets)
Oxycodone-Acet	Pronal-C 1/2	Pronal-C 1/4	
12) PURDUE PHARMA AND PURDUE FREDERICK INC.			
Belbuca	Codeine Contin	Oxy.IR	
BuTrans 5	Hydromorph Contin	Palladone XL	
BuTrans 10	Hydromorph.IR	Targin	
BuTrans 15	MS Contin	Zytram XL	
BuTrans 20	MS.IR	Dilaudid (tablets)	
13) SANDOZ CANADA INC.			
HYDROmorphone Hydrochloride Suppositories	Sandoz Morphine SR	Sandoz Oxycodone/Acetaminophen	
Sandoz Fentanyl Patch	Sandoz Opium & Belladonna [also: as Sab-Opium & Belladonna]	Supeudol	
14) SANOFI-AVENTIS CANADA INC.			
Demerol (tablets)	M-Eslon	Talwin (tablets)	

Defendants' Opioids (updated as at February 26, 2024)

15) SUN PHARMA CANADA INC.			
RAN-Fentanyl Matrix Patch	RAN-Fentanyl Transdermal System	RAN-Tramadol/Acet	
16) TEVA CANADA LIMITED			
Act Oxycodone CR	Methoxisal-C 1/2	ratio-Lenoltec No. 2	Teva-Lenoltec No. 2
ACT Tramadol/Acet	Methoxisal-C 1/4	ratio-Lenoltec No. 3	Teva-Lenoltec No. 3
CO Fentanyl	Novo-gesic C15	ratio-Lenoltec No. 4	Teva-Lenoltec No. 4
Codeine Tab 15MG	Novo-gesic C30	ratio-Morphine SR	Teva-Morphine SR
Coryphen Codeine	Oxycocet	ratio-Oxycocet	Teva-Oxycocet
Emtec-30	Oxycodan	ratio-Oxycodan	Teva-Oxycodan
Fentora	Paveral	Teva-Codeine	Teva-Tramadol/ Acetaminophen
Lenoltec with Codeine No. 2	ratio-Codeine	Teva-Emtec-30	
Lenoltec with Codeine No. 3	ratio-Emtec-30	Teva-Fentanyl	
Lenoltec with Codeine No. 4	ratio-Fentanyl	Teva-HYDROmorphone	