Date: 20070516

Docket: T-1044-05

Citation: 2007 FC 516

Ottawa, Ontario, the 16th day of May 2007

Present: The Honourable Madam Justice Gauthier

BETWEEN:

JANIE BÉDARD

Applicant

and

KELLOGG CANADA INC.

Respondent

and

ATTORNEY GENERAL OF CANADA

Intervener

REASONS FOR JUDGMENT AND JUDGMENT

[1] Ms. Bédard is asking the Court to authorize her action as a class action. This motion was heard concurrently with that of Kellogg Canada Inc., filed several months earlier and asking the Court to strike Ms. Bédard's statement of claim because it disclosed no reasonable cause of action

(paragraph 221(1)(*a*) of the *Federal Court Rules (1998)*, SOR/98-106) and the action is frivolous and vexatious (paragraph 221(1)(*c*) of the Rules).

[2] Alternatively, the respondent is asking the Court to strike over thirty paragraphs of the amended statement of claim because (i) they are contrary to the Rules; (ii) they are not relevant; (iii) they may prejudice the fair trial of the action and constitute an abuse of process; and (iv) the allegations they contain are scandalous, frivolous and vexatious (paragraphs 221(*b*), (*c*) and (*f*) of the Rules). At the hearing, however, the applicant obtained leave to amend her statement of claim again, leaving only a few paragraphs and two of the conclusions sought for consideration.

[3] Finally, Kellogg had filed a third motion[1] to strike the action based on an irregularity in the affidavit filed in support of the motion for leave. At the hearing, Kellogg indicated that the Court did not have to rule on this motion after it had been agreed that the Court would consider the facts in evidence in connection with the motion in its assessment of the criteria applicable to the motion for leave, especially regarding paragraph 299.18(1)(*e*) of the Rules.

[4] Despite the general rule that no costs are ordinarily awarded on a motion for leave, the two parties argued for an exception and sought such costs. Kellogg further sought costs on the motion to strike.

[1] Pursuant to an order by Michel Beaudry J. on June 16, 2006, the hearing of another motion by Kellogg challenging the constitutionality of section 36 was postponed [until] after the hearing of the motion for leave.

1. BACKGROUND

[5] The applicant Janie Bédard is the mother of four children aged 2 to 9 years old. She and her family had been eating Kellogg's Frosted Flakes and Froot Loops (among other cereals) for several years. In 2005, she tried Frosted Flakes and Froot Loops labelled "1/3 Less Sugar than Original". She said she bought eight boxes of each of these cereals[2] before learning from a nutritionist friend that the cereals in fact had no nutritional value.

[6] On June 16, 2005, she brought an action based on section 36 of the *Competition Act*, R.S.C. 1985, c. C-34 (the Act). Her statement of claim was marked [TRANSLATION] "class action contemplated", and she alleged that the label "1/3 Less Sugar" was false and misleading in several respects.

[7] Ms. Bédard's statement of claim was amended several times before the hearing and during the hearing, in response to Kellogg's motion to strike.

[8] However, as the parties had agreed at the outset to proceed concurrently with the examination before defence and examination on Ms. Bédard's affidavit, the affidavit in support of the motion for leave was not amended and contained the allegations of the original statement of claim rather than those of the amended statement. The Court has not considered the paragraphs of the affidavit dealing with withdrawn allegations, except in determining Ms. Bédard's ability to act as representative of the proposed class.

[9] The grounds of the motion for leave are described as follows in the amended notice of motion (in addition to the amendments before the hearing, the applicant verbally amended the notice to give effect to amendments made at the hearing in a conference call after the hearing):

> [TRANSLATION]
>
> 1. The applicant's pleading discloses a reasonable cause of action in that:
>
> (a) the applicant brought an action against the respondent for damages based on section 36(1) of the *Competition Act*, in which she claimed reimbursement of the purchase price of four boxes[3] of cereal of each of the following brands: Frosted Flakes 1/3 Less Sugar, and Froot Loops 1/3 Less Sugar;
>
> (b) the cause of action is the promotion of the respondent's business interests through the communication to the public of false or misleading statements in a material respect, namely the calorie content of the two aforementioned products, such conduct being prohibited by section 52 of the *Competition Act*;
>
> (c) the damage results directly from the respondent's actions: by its false or misleading representations the respondent led the consumer to purchase a product which, when compared with the original product, was supposed to have nutritional benefits in terms of its calorie content;
>
> (d) the harm to the consumer is thus having purchased and consumed a product which is the opposite of what he or she believed was being purchased and consumed; the consumer is accordingly entitled to claim reimbursement of the purchase price of each cereal so purchased, since it was the respondent's false or misleading

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[2] These boxes of cereal were eaten, and no proof of purchase was filed.
[3] It in fact appeared from Ms. Bédard's statement of claim and affidavit that eight boxes of each brand were involved.

representations which led the consumer to buy the said products;

(e) the respondent's statements are misleading with respect to Frosted Flakes 1/3 Less Sugar;

(f) the respondent's statements regarding the reduced quantity of sugar in Froot Loops cereal are not only misleading but false.[4]

2. There is an identifiable class of at least two persons:

(a) the purpose of the action is to compensate Canadian consumers who were led by the respondent's false or misleading statements to purchase products which are the opposite of what they thought they were purchasing in terms of calorie content.[5]

3. The claims of the class members raise points of law or fact in common:

(a) all facts and points of law are in common, namely:

(i) as to facts: the purchase by the class members of two cereals, Frosted Flakes 1/3 Less Sugar or Froot Loops 1/3 Less Sugar;

(ii) as to points of law: the false or misleading statements made to class members to promote the purchase of Frosted Flakes and Froot Loops with reduced sugar content.

4. A class action is the preferable procedure for the fair and efficient resolution of the common questions of law or fact, in view of:

(a) the large number of claims;

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[4] 30% less sugar rather than 33%

[5] However, the proposed class is described as follows: [TRANSLATION] "All persons who purchased Frosted Flakes 1/3 Less Sugar cereal and Froot Loops 1/3 Less Sugar cereal after their introduction to the Canadian market".

(b) the small amount of damages;
(c) the absence of individual questions.

5. The applicant may act as representative of the class, and as such:

(a) she brought the action;
(b) she is a member of the class described in this motion and has herself sustained damage;
(c) the applicant's individual action is closely bound up with that of the other class members;
(d) she has knowledge of all the facts pertaining to the action at bar;
(e) she is actively interested in this matter and is prepared to invest all the necessary time;
(f) she is willing to manage this class action in the interests of class members she intends to represent and is determined to proceed with the action at bar, for the benefit of all class members;
(g) she has the capacity and interest to represent all class members adequately;
(h) she will fairly and adequately represent the class's interests;
(i) she is acting in good faith and initiating a class action proceeding solely to gain recognition of the rights of class members and obtain redress for the harm each of them has suffered;
(j) she has prepared a plan that sets out a workable method of advancing the action on behalf of the class and notifying class members of how the proceeding is progressing, namely:

(i) the action will be publicized on her counsel's website;
(ii) she is prepared to contact members at the proper time by means of press releases sent to members through the media;

(k) she has provided a summary of agreements on fees and disbursements made between herself and her counsel.

[10] The amended conclusions, which were the subject of argument regarding striking in court, read as follows:

> [TRANSLATION]
>
> 1. MAKE any orders necessary to determine monetary relief;
>
> 2. order the respondent to pay the applicant damages equivalent to reimbursement of the amount paid by the applicant to purchase eight boxes of Frosted Flakes 1/3 Less Sugar cereal, and the box of Froot Loops 1/3 Less Sugar cereal, which she has purchased since they were introduced to the Canadian market;
>
> 3. order the respondent to pay class members damages equivalent to reimbursement of the amount paid by the applicant to purchase eight boxes of Frosted Flakes 1/3 Less Sugar and the box of Froot Loops 1/3 Less Sugar which they have purchased since their introduction to the Canadian market;
>
> 4. order that monies . . . paid by the respondent be paid to various charitable organizations approved by the Court and used for the protection of the health and welfare of children proportionately in each province and territory of Canada;
>
> 5. order the respondent to make the appropriate corrections to its packaging so that consumers will be given at least equal information on the higher "sugar" and calorie content as they are on the content of "1/3 less sugar".
>
> [Amendments underlined]

[11] However, to properly understand Kellogg's position, it is also worth noting the conclusions as they stood before the latest amendments:

> [TRANSLATION]
>
> 1. order the respondent to file all income and profits which it has derived from the sale of Frosted Flakes 1/3 Less Sugar Than Original and Froot Loops 1/3 Less Sugar cereal since their introduction to the Canadian market;
>
> 2. order the respondent to return to the applicant the value of eight boxes of Frosted Flakes 1/3 Less Sugar cereal and eight boxes of Froot Loops 1/3 Less Sugar cereal [and] to return all income and profits made by it on the sale of the said cereal throughout Canada

> since its introduction to the Canadian market, as well as interest at the legal rate . . .

[12] Kellogg filed its defence on September 1, 2006. As mentioned below, the defence referred at length to Ms. Bédard's testimony in her examination (see paragraphs 59, 63, 65, 104 and 107 to 109).

[13] Under sections 174 and 175 of the Rules, every pleading shall contain a concise statement of the material facts (and may include points of law). However, it should not include evidence in support of those facts.

2. LEGISLATION

[14] At this stage, it is worth setting out the wording of sections 36 and 52 of the Act :

***Competition Act*, R.S.C. 1985, c. C-34**	***Loi sur la concurrence*, L.R.C. 1985, ch. C-34**
Recovery of damages	Recouvrement de dommages-intérêts
36. (1) Any person who has suffered loss or damage as a result of	36. (1) Toute personne qui a subi une perte ou des dommages par suite :
(a) conduct that is contrary to any provision of Part VI, or	a) soit d'un comportement allant à l'encontre d'une disposition de la partie VI;
(b) the failure of any person to comply with an order of the Tribunal or another court under this Act,	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,
may, in any court of competent jurisdiction, sue for and recover from the person who engaged in the conduct or	peut, devant tout tribunal compétent, réclamer et recouvrer de la personne qui a eu un tel

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.

...

Jurisdiction of Federal Court

(3) For the purposes of any action under subsection (1), the Federal Court is a court of competent jurisdiction.

False or misleading representations

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.

Proof of deception not required

(1.1) For greater certainty, in establishing that subsection (1) was contravened, it is not necessary to prove that any person was deceived or misled.

Representations accompanying products

(2) For the purposes of this section, a representation that is

(a) expressed on an article offered or displayed for sale or its wrapper or

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.

...

Compétence de la Cour fédérale

(3) La Cour fédérale a compétence sur les actions prévues au paragraphe (1).

Indications fausses ou trompeuses

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.

Preuve non nécessaire

(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 que quelqu'un a été trompé ou induit en erreur.

Indications accompagnant un produit

(2) Pour l'application du présent article, sauf le paragraphe (2.1), sont réputées n'être données au public que par la personne de qui elles proviennent les indications qui, selon le cas :

container,

(b) expressed on anything attached to, inserted in or accompanying an article offered or displayed for sale, its wrapper or container, or anything on which the article is mounted for display or sale,

(c) expressed on an in-store or other point-of-purchase display,

(d) made in the course of in-store, door-to-door or telephone selling to a person as ultimate user, or

(e) contained in or on anything that is sold, sent, delivered, transmitted or made available in any other manner to a member of the public,

is deemed to be made to the public by and only by the person who causes the representation to be so expressed, made or contained, subject to subsection (2.1).

…

General impression to be considered

(4) In a prosecution for a contravention of this section, the general impression conveyed by a representation as well as its literal meaning shall be taken into account in determining whether or not the representation is false or misleading in a material respect.

Offence and punishment

(5) Any person who contravenes subsection (1) is guilty of an offence and liable

(a) on conviction on indictment, to a fine in the discretion of the court or to imprisonment for a term not exceeding five years or to both; or

a) apparaissent sur un article mis en vente ou exposé pour la vente, ou sur son emballage;

b) apparaissent soit sur quelque chose qui est fixé à un article mis en vente ou exposé pour la vente ou à son emballage ou qui y est inséré ou joint, soit sur quelque chose qui sert de support à l'article pour l'étalage ou la vente;

c) apparaissent à un étalage d'un magasin ou d'un autre point de vente;

d) sont données, au cours d'opérations de vente en magasin, par démarchage ou par téléphone, à un utilisateur éventuel;

e) se trouvent dans ou sur quelque chose qui est vendu, envoyé, livré ou transmis au public ou mis à sa disposition de quelque manière que ce soit.

[…]

Il faut tenir compte de l'impression générale

(4) Dans toute poursuite intentée en vertu du présent article, pour déterminer si les indications sont fausses ou trompeuses sur un point important il faut tenir compte de l'impression générale qu'elles donnent ainsi que de leur sens littéral.

Infraction et peine

(5) Quiconque contrevient au paragraphe (1) commet une infraction et encourt, sur déclaration de culpabilité :

a) par mise en accusation, une amende à la discrétion du tribunal et un emprisonnement maximal de cinq ans, ou l'une de ces peines;

(b) on summary conviction, to a fine not exceeding $200,000 or to imprisonment for a term not exceeding one year, or to both.

b) par procédure sommaire, une amende maximale de 200 000 $ et un emprisonnement maximal d'un an, ou l'une de ces peines.

[Mon souligné]

[Emphasis added]

3. MOTION TO STRIKE

(a) Principal application

[15] The test applicable to a motion based on the absence of a reasonable cause of action is well settled. As the Supreme Court of Canada noted in *Hunt v. Carey Canada Inc.*, [1990] 2 S.C.R. 959, [1990] S.C.J. No. 93, the question is whether the outcome of the case is plain and obvious "beyond reasonable doubt" (see also *Le Corre v. Canada*, 2005 FCA 127, [2005] F.C.J. No. 590 (QL), at paragraph 9).

[16] As the Supreme Court indicated in *Hunt*, *supra*, "neither the length and complexity of the issues, the novelty of the cause of action nor the potential for the defendant to present a strong defence should prevent the plaintiff from proceeding with his or her case. Only if the action is certain to fail because it contains a radical defect" should the statement of claim be struck out in whole or in part.

[17] This test applies even when a party raises the Court's lack of jurisdiction (*Hodgson v. Ermineskin Indian Band No. 942*, [2000] F.C.J. No. 2042 (F.C.A.) (QL), leave denied by Supreme Court of Canada, [2001] S.C.C.A. No. 67).

[18] Further, for analytical purposes, the Court must take the allegations of fact in the statement of claim as proven. Accordingly, the applicant has the burden of establishing that there is no cause of action without reference to any evidence (subsection 221(2)).

[19] However, there is an exception to this general rule when a party raises the Court's lack of jurisdiction. In such a case, the Court may consider evidence by affidavit to establish certain jurisdictional facts (*MIL Davie Inc. v. Hibernia Management and Development Company Ltd.*, [1998] F.C.J. No. 614 (F.C.A.) (QL), paragraph 8).

[20] Although at first sight it may seem more flexible, the test applicable to a motion to strike pursuant to paragraph 221(1)(*c*) of the Rules (scandalous, frivolous or vexatious pleading) is not really less strict than that applicable to motions made pursuant to paragraph 221(1)(*a*).

[21] Just recently, in *Sanofi-Aventis Canada Inc*., 2007 FCA 163, [2007] F.C.J. No. 548 (QL), the Federal Court of Appeal had to review the test applicable under subsection 6(5) of the *Pharmaceutical Regulations*, SOR/93-133. The Court indicated that the language of the section was identical to that of the old Rule 419, now section 221 of the Rules (since the 1998 amendments). This is the reason that the Federal Court applied, to the motions made pursuant to subsection 6(5), the principles developed under the old Rule 419. In this regard, Edgar Sexton J. followed the test developed by François Lemieux J. as follows:

> **33**. Paragraph 6(5)(*b*) was added to the NOC Regulations in 1998 bearing similar language to that employed in the former Rule 419 of

> the Federal Court Rules and that in Rule 221 of the current *Federal Courts Rules*, SOR/98-106. Accordingly, the Federal Court adopted the principles that had been developed under Rule 419 for striking out pleadings in an action, as explained by Lemieux J. in *Pfizer Canada Inc. v. Apotex Inc*. (1999), 1 C.P.R. (4th) 358 at paragraphs 29-30 (F.C.T.D.).
>
> [28] Paragraph 6(5)(*b*) of the Regulations has its source in paragraphs (*b*), (*c*) and (*f*) of Rule 221 of the *Federal Court Rules*, 1998, SOR/98-106, which themselves were based on similar paragraphs of Rule 419 of the old *Federal Court Rules*, C.R.C. 1978, c. 663, which concerned actions rather than applications.
>
> [29] Counsel for Apotex argued Pfizer's application was scandalous, frivolous and vexatious within the meaning of those words in paragraph 6(5)(b) of the Regulations. The test Apotex had to meet has been set out in a consistent line of cases interpreting former rule 419(1)(c).
>
> [30] In *R. v. Creaghan*, [1972] F.C. 732 (T.D.), Pratte J. (as he then was), said this about that aspect of Rule 419 (page 736):
>
> Finally, in my view, a statement of claim should not be ordered to be struck out on the ground that it is vexatious, frivolous or an abuse of the process of the Court, for the sole reason that in the opinion of the presiding judge, plaintiff's action should be dismissed. In my opinion, a presiding judge should not make such an order unless it be obvious that the plaintiff's action is so clearly futile that it has not the slightest chance of succeeding, whoever the judge may be before whom the case could be tried. It is only in such a situation that the plaintiff should be deprived of the opportunity of having "his day in Court".
>
> [Emphasis in original.]

[22] The essential difference thus lies in the fact that, in the case of a motion made pursuant to Rule 221(1)(*b*), (*c*) and (*f*), the Court may consider evidence submitted by the parties in addition to the statement of claim.[6]

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[6] In *Dene Tsaa First Nation v. Canada*, [2001] F.C.J. No. 1177 (QL), paras. 3 and 4 (Trial Division), varied but not on this point, at 2002 F.C.A. 117, [2002] F.C.J. No. 427 (F.C.A.) (QL), the Court had noted that ordinarily pleadings should not be struck out when the opposing party has presented argument on the point. In the instant

[23] In its motion record of March 24, 2006, the respondent had filed an affidavit by Karine Joizil (counsel with the firm representing Kellogg), the purpose of which was essentially to enter in evidence a copy of the transcript of the examination of Janie Bédard on August 31, 2006. However, in its amended motion record of September 25, 2006, the respondent did not include this affidavit or the transcript. However, the respondent referred to the transcript in its written submissions, citing several passages from the examination.

[24] When the Court noted this situation at the hearing, the applicant objected to the Court consulting the transcript. At the respondent's request, the Court exercised its discretion under the Rules and relieved Kellogg of its failure to include Ms. Joizil's affidavit and the transcript again in its amended motion record. The Court is satisfied that the applicant suffered no detriment in this regard and that the respondent believed in good faith that it did not have to reproduce, in its amended record, documents which were already in the Court record.

[25] In Kellogg's submission, the applicant indicated no loss or damage in her statement of claim. The only allegation which refers to any detriment was in paragraph 64, which reads as follows:

> [TRANSLATION]
>
> On account of its misleading nature, moreover, the advertising which accompanied the respondent's product caused certain harm by

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case, the respondent had filed a motion to strike well before filing the defence. The motion to strike was heard concurrently with the motion for leave at the Court's request. The Court therefore will not take this into account.

> inducing children and adults who consumed the product to consume a greater quantity of sugar[7] and calories without their knowledge...

[26] The statement of claim contains no details of the type of loss or damage suffered. There is no indication as to whether this loss was financial, psychological, physical or of some other nature. Kellogg submitted that the applicant admitted in her examination that neither she nor her family suffered any physical or psychological damage. Ms. Bédard stated only that she would not have bought the cereals if she had known they contained more calories than the original cereals.

[27] At the hearing, the respondent argued that even this statement carried no weight, considering that Ms. Bédard made it on the basis of information that she later admitted was misunderstood. In particular, Ms. Bédard admitted that she thought there were more calories per bowl of 1/3 Less Sugar cereal than in a bowl of original cereal. That is what prompted her to bring her action.[8]

[28] The Court understands from the respondent's submissions that, even if in fact the Court assumed that the allegation that the cereals had more calories by weight was proven, there was no causal link between such a fact and the alleged harm. What concerned the applicant, and what she said she understood from the representation on the 1/3 Less Sugar cereal box, was that there were fewer calories (by volume) per bowl.

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[7] In view of the most recent amendments, this allegation applies only to Froot Loops, which in the applicant's submission contained 30% less sugar rather than the 33% advertised.

[8] The argument described in paragraphs 27 and 28 above was not mentioned in Kellogg's written submissions and will not be considered in connection with the motion to strike.

[29] The respondent also said that the description of the increased consumption of calories in the statement of claim did not allow the Court to conclude that there was any actual harm.

[30] The amended statement of claim only indicated in paragraph 21 that Frosted Flakes 1/3 Less Sugar contained 69 one-thousandths of a calorie per gram more than the original Frosted Flakes, while Froot Loops 1/3 Less Sugar contained 63 one-thousandths of a calorie per gram more than the original cereal (paragraph 23 of amended statement of claim).

[31] The respondent submitted that even if this additional amount of calories was regarded as damage, it would be harm *de minimis*, which cannot be the basis for a court action (*Bouchard v. Agropur Coopérative*, 2006 QCCA 1342, [2006] J.Q. No. 11396 (Q.C.A.)).[9]

[32] On the question of relief, Kellogg submitted that, in civil law, restitution or reimbursement of the price paid is a separate and distinct concept from that of damages (see articles 1699 to 1707, 1607 to 1625 and 1728 C.C.Q.). The Court should take this distinction into account, since Janie Bédard's cause of action, if any, arose in Quebec (section 8.1 of *Interpretation Act*, R.S.C. 1985, c. I-21).

[33] The respondent noted that the definition of relief in section 2 of the *Federal Courts Act*, R.S.C. 1985, c. F-7, also distinguishes damages from restitution.

[9] The statement of claim contains no other details on the quantities that the applicant actually consumed. Although it indicates that she bought 16 boxes of cereal in all, there is no indication of the weight (number of grams) per box.

[34] In Kellogg's submission, in the second amended conclusion (see paragraph 10 above) the applicant sought to create a connection between the alleged harm (increased consumption of calories and sugar) and the purchase price, whereas in fact no connection exists, nor was any alleged. This distorts the remedy mentioned in section 36, which requires that the damages awarded be equal to the loss or damage actually suffered.

[35] It further appeared that Ms. Bédard and her family continue to eat the original Frosted Flakes and Froot Loops. There was no allegation that there was any difference in price between these cereals and the 1/3 Less Sugar cereals.

[36] Finally, the respondent noted that, in 2004, Bill C-19 provided for an amendment to the Act to add an additional remedy to section 74.1, allowing persons who had bought products on the basis of false or misleading representations to recover an amount not exceeding the total they had paid. In Kellogg's submission, this was designed, not to add a kind of relief to section 36, but rather to create a new remedy pursuant to an action brought by the Competition Commissioner under section 74.1 of the Act. The working paper published by the Competition Bureau prior to this Bill referred to the remedy as an action in restitution, [10] as opposed to an action for damages under section 36 of the Act.

[37] The Court notes that these amendments also provided for the power to indicate how the monies were to be paid and setting out the criteria of eligibility for claimants. Additionally, an

[10] It would appear that other legislation enacted to protect consumers in Ontario and British Columbia also makes a distinction between the right to be made whole (restitution) and the right to damages.

unclaimed or undistributed amount could on certain specific conditions be paid, in whole or in part, to a non-profit organization in Canada.

[38] However, this bill died on the Order Paper.

[39] The applicant did not deny that it was difficult to define the damages in cash or to quantify them. However, she said that the Court should give a broad and liberal interpretation to section 36 of the Act, especially to the words "loss or damage" (or "perte et dommage"), to enable the section to attain its object and create an effective remedy against the conduct prohibited here, namely false and misleading advertising (section 12 of *Interpretation Act*).

[40] Janie Bédard maintained that the word "damage" [11] has an elastic definition. In *Black's Law Dictionary* , for example, it is defined as "compensation for loss or injury". According to *Black's*, "injury" includes "the violation of a legal right". In the case at bar, the "injury" would be the violation of the applicant's right not to be misled when she is purchasing a product.

[41] The applicant further relied on the Federal Court of Appeal's judgment in *Apotex Inc. v. Eli Lilly and Company*, 2005 FCA 261, [2005] F.C.J. No. 1818 (QL), which in her submission confirmed that the idea of "damage" in section 36 must be broadly construed. Even new positions, which may seem surprising, should not be dismissed at the stage of a summary judgment on simply an interpretation of the provision. In the applicant's submission, this is especially true in connection with a motion under paragraphs 221(1)(*a*) or (*c*).

[11] This definition appears to apply to this word when it is used in the sense of damages. However, "damage" is also defined as "loss or injury to person or property".

[42] Janie Bédard further argued that the relief which she sought under section 36 was consistent with the purpose of the Act, namely to give consumers a real choice among products at competitive prices. In her submission, the Act sought to prevent merchants, such as the respondent, from deriving income and profits by marketing products sold through misleading representations. She submitted that, at common law and by virtue of its equity jurisdiction, the Court may grant relief appropriate to the conduct alleged against the respondent. The action for breach of trust and unjust enrichment was created in similar circumstances. In this regard, she cited a number of passages from various judgments: *Her Majesty's Attorney General v. Blake and Another*, 2004 UKHL 43, C*anson Enterprises Ltd. v. Boughton & Co.*, [1991] 3 S.C.R. 534, *Cadbury Schweppes Inc. v. FBI Foods*, [1999] 1 S.C.R. 142, paras. 20, 50 to 53, *Soulos v. Korkontzilas*, [1997] 2 S.C.R. 217, para. 27, *Garland v. Consumers Gas Co*., 2004 SCC 25, [2004] 1 S.C.R. 629, paras. 65-66.

[43] The Court has carefully examined the arguments submitted by the parties.

[44] It is true that the Court is a court of equity (section 3 of the *Federal Courts Act*). Although this allows the Court to apply the rules of equity in cases in which it otherwise has jurisdiction (as, for example, in admiralty matters), that does not give it a general jurisdiction in a civil action.

[45] The chief argument put forward by the applicant was recently discussed in an appeal from an Ontario decision authorizing a class action (the Sure Step System) in *Serhan Estate v. Johnson & Johnson*, [2006] O.J. No. 2421,[12] in which the Court concluded that the law in Canada was not

[12] See also the trial judgment, [2004] O.J. No. 2904, at paras. 22 to 49.

clear. It appeared from that case that the various theories to which the applicant referred were either separate causes of action or a particular type of remedy.

[46] In both cases, it is quite clear that the Court does not have jurisdiction to consider them. If this is a separate cause of action from that set out in section 36, it is within provincial jurisdiction.

[47] If instead it is a type of remedy, it goes beyond what is set out in section 36, which clearly provides that the amount awarded is as compensation, that is, it is determined in accordance with the loss or damage suffered. On the contrary, the remedy in the decisions cited by the applicant is decided on in accordance with the benefit received by the respondent. Moreover, this is the basis on which, in *Wong v. Sony of Canada Ltd.*, [2001] O.J. No. 1707 paras. 16-18, the Ontario Court concluded that it did not have jurisdiction to award punitive damages in an action pursuant to section 36.

[48] That said, however, there is still some doubt as to the interpretation of "loss or damage", and whether those words may include the purchase of a product that does not meet the expectations created by false or misleading advertising. Further, the fact that evidence is difficult to quantify does not mean that it should be ignored.

[49] Apart from *Apotex*, *supra*, the parties did not refer the Court to any precedents in which the phrase "loss or damage", as used in section 36, has been considered.

[50] This question has been discussed several times in motions for leave to bring class actions, but in none of these cases did the courts consider the question on the merits. They simply certified certain questions in this regard.

[51] As to the question of harm *de minimis*, the Court cannot decide the point at this stage without knowing the quantities actually involved.

[52] If the test applicable to the Kellogg motion were that which appears to be applied in Quebec (a reasonable chance of success), the answer might be quite different. However, that is not the case, and the Court is not satisfied that the action has no chance of success.

(b) Alternative application

[53] The Court will now consider Kellogg's alternative application.

[54] The principle or test applicable to the striking of particular allegations, because they are frivolous, vexatious, irrelevant or otherwise, is as high as that applicable to striking out an entire statement of claim (see *Copperhead Brewing Co. v. John Labbatt*, [1995] F.C.J. No. 668 (QL), para. 13, *Apotex Inc. v. Glaxo Group*, 2001 FCTD 1351, [2001] F.C.J. 1863 (QL), para. 6, *Premakumaran v. Canada*, 2003 FCTD 635, [2003] F.C.J. No. 816 (QL)).

[55] The test is almost stricter, for as my colleague Michael A. Kelen J. indicated in *Apotex v. Glaxo, supra*, as a general rule the Court refuses to strike out the "surplus statements" in a statement

of claim which are not prejudicial, and in case of doubt the pleading should be authorized, so that the judge of the merits may consider all relevant evidence in support of the pleading.

[56] The Court again notes that, under sections 174 and 175 of the Rules, a pleading does not have to refer to the evidence, only to the facts and points of law at issue. Contrary to what Kellogg argued, therefore, the applicant does not have to produce with her statement of claim the studies to which she referred.

[57] That said, and after examining the respondent's arguments in detail in terms of the statement of claim as it read after the amendments made at the hearing, the Court concludes that there is no basis for striking paragraph 7, paragraph 10 as amended, paragraph 41, paragraph 60 as amended and paragraph 77 as amended.

[58] It thus remains to be seen whether, as Kellogg argued, it is clear that the Court does not have jurisdiction here to grant the following conclusions which, in the respondent's submission, are inconsistent with the remedy provided in section 36: (i) an injunction to make corrections to packaging to inform the consumer about the sugar and calorie contents, and (ii) an order that all monies owed by the respondent be paid to certain charitable organizations.

[59] As long ago as 1986, Frank U. Collier J. of the Federal Court concluded in *Aca Joe International v. 147255 Canada Inc.*, 10 C.P.R. (3d) 301, [1986] F.C.J. No. 427, that in an action under sections 31.1(1) and 36(1)(*a*) of the *Combines Investigation Act*, R.S.C. 1970 (the old version of sections 36 and 52 of the Act, whose wording was essentially the same), the Court did not have

the power to grant a permanent injunction, as the legislature had chosen to expressly limit the relief applicable to an amount equal to the loss proven. In his analysis, Collier J. specifically considered the impact of section 44 of the *Federal Courts Act* as it stood at that time and concluded that it did not as such authorize the Court to expand the statutory jurisdiction conferred by the Act.

[60] This position was later adopted in *947101 Ontario Ltd. (c.o.b. Throop Drug Mart) v. Barrhaven Town Centre Inc.*, [1995] O.J. No. 15, in *U.L. Canada Inc. v. Proctor & Gamble Inc.*, [1996] O.J. No. 624 (paras. 32 and 33), and in *Price v. Panasonic Canada Inc.*, [2000] O.J. No. 3123, at para. 10.

[61] Despite these precedents, the legislature has not seen fit to change the wording of section 36. As the content of information on packaging is a complex area, which is closely regulated, the legislature has understandably decided to limit the Court's powers in connection with the civil action mentioned in section 36.

[62] In light of this case law and analysis of the present provision, the Court concludes that it is plain and obvious that this remedy cannot be granted to Janie Bédard. This conclusion will therefore be struck out.

[63] On the second conclusion sought, the argument submitted by Kellogg has never been decided in connection with an action pursuant to section 36. However, in *Dubé v. Cogéco Radio-Télévision*, [1998] Q.J. No. 668 (QL), at paras. 9 to 13, in an action in defamation, Denis J. of the

Quebec Superior Court struck out a similar conclusion, noting that there was no connection with the issue and no relevance to the proceeding before him.

[64] The applicant argued that the situation in the case at bar is quite different and that, in matters involving class actions, subsection 299.3(2) of the Rules gives the Court broad discretion. That provision reads as follows:

Rule 299.3(2)	Règle 299.3(2)
(2) A judge may make any order in respect of the distribution of monetary relief, including regarding an undistributed portion of an award due to a class or subclass or its members.	2) Le juge peut rendre toute ordonnance relativement à la distribution d'une réparation pécuniaire, notamment en ce qui concerne toute portion non distribuée d'une réparation qui est due au groupe, au sous-groupe ou à leurs membres.

[65] There does not appear to be any judgment in which a Court has used such a power to pay in full all the amounts awarded by the Court[13] to charitable organizations without first trying to distribute them to the victims or persons to be compensated. As the rules on class actions are procedural in nature and do not create any substantive rights, it seems once again that Kellogg's argument depends *inter alia* on interpretation of section 36 of the Act.

[66] As the Court indicated, arguments of new law and even surprising positions rarely lend themselves to a final decision on a motion pursuant to section 221.

[13] As opposed to a judgment approving a settlement agreed upon between the parties.

4. MOTION FOR LEAVE

(a) General principles

[67] Though there is little case law in this Court on class actions, the principles applicable at the certification stage are clear. They were summarized by my colleague Anne L. McTavish J. in *Tihomirovs v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 197, [2006] 4 F.C.R. 341, as follows:

> General Principles Governing Class Actions
>
> 32 Class actions allow for improved access to justice for those who might otherwise be unable to seek vindication of their rights through the traditional litigation process. Class actions also enhance judicial economy, allowing a single action to decide large numbers of claims involving similar issues. Finally, class actions encourage behaviour modification by those who cause harm: *Western Canadian Shopping Centres Inc. v. Bennett Jones Verchere*, [2001] 2 S.C.R. 534, 2001 SCC 46; *Hollick v. Toronto (City)*, [2001] 3 S.C.R. 158, 2001 SCC 68; and *Rumley v. British Columbia*, [2001] 3 S.C.R. 184, 2001 SCC 69.
>
> 33 In the above trilogy of cases, the Supreme Court of Canada also held that an overly restrictive approach to the application of class action certification legislation must be avoided, so that the benefits of class actions can be fully realized.
>
> 34 Moreover, as the Supreme Court noted in the *Hollick* case:
>
> > ... the certification stage focuses on the form of the action. The question at the certification stage is not whether the claim is likely to succeed, but whether the suit is appropriately prosecuted as a class action. [at para. 16]
> >
> > [Emphasis in original.]

37 Motions for the certification of class actions are governed by Rule 299.18, which states that:

299.18 (1) Subject to subsection (3), a judge shall certify an action as a class action if:

(*a*) the pleadings disclose a reasonable cause of action;

(*b*) there is an identifiable class of two or more persons;

(*c*) the claims of the class members raise common questions of law or fact, whether or not those common questions predominate over questions affecting only individual members;

(*d*) a class action is the preferable procedure for the fair and efficient resolution of the common questions of law or fact; and

(*e*) there is a representative plaintiff who

(i) would fairly and adequately represent the interests of the class,

(ii) has prepared a plan for the action that sets out a workable method of advancing the action on behalf of the class and of notifying class members how the proceeding is progressing,

(iii) does not have, on the common questions of law or fact, an interest that is in conflict with the interests of other class members, and

(iv) provides a summary of any agreements respecting fees and disbursements between the representative plaintiff and the representative plaintiff's solicitor.

* * *

299.18 (1) Sous réserve du paragraphe (3), le juge autorise une action comme recours collectif si les conditions suivantes sont réunies :

a) les actes de procédure révèlent une cause d'action valable;

> *b*) il existe un groupe identifiable formé d'au moins deux personnes;
>
> *c*) les réclamations des membres du groupe soulèvent des points de droit ou de fait collectifs, qu'ils prédominent ou non sur ceux qui ne concernent qu'un membre;
>
> *d*) le recours collectif est le meilleur moyen de régler de façon équitable et efficace les points de droit ou de fait collectifs;
>
> *e*) un des membres du groupe peut agir comme représentant demandeur et, à ce titre : (e) there is a representative plaintiff who
>
> > (i) représenterait de façon équitable et appropriée les intérêts de la catégorie,
> >
> > (ii) a élaboré un plan qui propose une méthode efficace pour poursuivre l'action au nom du groupe et tenir les membres de la catégorie informés du déroulement de l'instance,
> >
> > (iii) n'a pas de conflit d'intérêts avec d'autres membres du groupe en ce qui concerne les points de droit ou de fait collectifs,
> >
> > (iv) communique un sommaire des ententes relatives aux honoraires et débours qui sont intervenues entre lui et son avocat.

38 It should be noted that Rule 299.18(1) uses mandatory language, providing that a court shall grant certification, where all five elements of the test are satisfied.

39 By the same token, it must also be noted that the list contained in Rule 299.18(1) is conjunctive. As a consequence, if an applicant fails to meet one of the five listed criteria, the certification motion must fail: *Auton v. BC (Minister of Health)*, [1999] B.C.J. No. 718, at para. 40.

40 Also relevant is Rule 299.2, which states that:

> 299.2 A judge shall not refuse to certify an action as a class action solely on one or more of the following grounds:

> (*a*) the relief claimed includes a claim for damages that would require an individual assessment after a determination of the common questions of law or fact;
>
> (*b*) the relief claimed relates to separate contracts involving different class members;
>
> (*c*) different remedies are sought for different class members;
>
> (*d*) the number of class members or the identity of each class member is not known; or
>
> (e) the class includes a subclass whose members have claims that raise common questions of law or fact not shared by all class members. SOR/2002-417, s. 17. [emphasis added]

* * *

299.2 Le juge ne peut refuser d'autoriser une action comme recours collectif en se fondant uniquement sur l'un ou plusieurs des motifs suivants :

> *a*) les réparations demandées comprennent une réclamation de dommages-intérêts qui exigerait, une fois les points de droit ou de fait collectifs tranchés, une évaluation individuelle;
>
> *b*) les réparations demandées portent sur des contrats distincts concernant différents membres de la catégorie;
>
> *c*) les réparations demandées ne sont pas les mêmes pour tous les membres de la catégorie;
>
> *d*) le nombre de membres de la catégorie ou l'identité de chacun des membres est inconnu;
>
> *e*) il existe au sein de la catégorie un sous-groupe dont les réclamations soulèvent des

> points de droit ou de fait collectifs que ne partagent pas tous les membres de la catégorie. DORS/2002-417, art. 17. [Non souligné dans l'original.]
>
> * * *
>
> 41 As I read this provision, the use of the word "solely" or "uniquement" means that, while the enumerated factors may indeed be relevant considerations on a motion for certification, none of these factors, either singly, or combined with other factors listed in the provision, will, by themselves, provide a sufficient basis to decline certification.
>
> 42 This conclusion is confirmed by the wording of Rule 299.18, which requires the judge hearing the certification motion to consider all relevant matters, including, but presumably not limited to, the five factors listed in the Rule.
>
> ...
>
> 45 The Federal Courts Rules regarding the certification of class actions are, however, essentially the same as the corresponding British Columbia rules: *Sylvain v. Canada (Agriculture and Agri-Food)*, [2004] F.C.J. No. 1955, 2004 FC 1610, at para. 26; *Rasolzadeh*, at para. 23. The Rules are also very similar to those in Ontario: *Le Corre v. Canada (Attorney General)*, 2004 FC 155, at para. 17. As a consequence, the jurisprudence that has developed in those jurisdictions is of considerable assistance in determining whether or not certification is appropriate in this case.

[68] To determine whether the proposed class action is the best means of determining common questions, Rule 299.18(2) provides:

299.18 (1) Subject to subsection (3), a judge shall certify an action as a class action if	299.18 (1) Sous réserve du paragraphe (3), le juge autorise une action comme recours collectif si les conditions suivantes sont réunies :
(a) the pleadings disclose a reasonable cause of action;	a) les actes de procédure révèlent une cause d’action valable;

(b) there is an identifiable class of two or more persons;	b) il existe un groupe identifiable formé d'au moins deux personnes;
(c) the claims of the class members raise common questions of law or fact, whether or not those common questions predominate over questions affecting only individual members;	c) les réclamations des membres du groupe soulèvent des points de droit ou de fait collectifs, qu'ils prédominent ou non sur ceux qui ne concernent qu'un membre;
(d) a class action is the preferable procedure for the fair and efficient resolution of the common questions of law or fact; and	d) le recours collectif est le meilleur moyen de régler de façon équitable et efficace les points de droit ou de fait collectifs;
(e) there is a representative plaintiff who	e) un des membres du groupe peut agir comme représentant demandeur et, à ce titre :
(i) would fairly and adequately represent the interests of the class,	(i) représenterait de façon équitable et appropriée les intérêts du groupe,
(ii) has prepared a plan for the action that sets out a workable method of advancing the action on behalf of the class and of notifying class members how the proceeding is progressing,	(ii) a élaboré un plan qui propose une méthode efficace pour poursuivre l'action au nom du groupe et tenir les membres du groupe informés du déroulement de l'instance,
(iii) does not have, on the common questions of law or fact, an interest that is in conflict with the interests of other class members, and	(iii) n'a pas de conflit d'intérêts avec d'autres membres du groupe en ce qui concerne les points de droit ou de fait collectifs,
(iv) provides a summary of any agreements respecting fees and disbursements between the representative plaintiff and the representative plaintiff's solicitor.	(iv) communique un sommaire des ententes relatives aux honoraires et débours qui sont intervenues entre lui et son avocat.

[69] As to the evidence that should be submitted by the person seeking leave, Rule 299.17(4) states:

Content of affidavit	**Contenu de l'affidavit**
299.17 (4) A person filing an affidavit under subsection (1) or (3) shall	**299.17** (4) La personne qui dépose un affidavit aux termes des paragraphes (1) ou (3) est tenue d'y inclure les éléments suivants :
(*a*) set out in the affidavit the material facts on which the person intends to rely at the hearing of the motion;	*a*) les faits substantiels sur lesquels elle entend se fonder à l'audition de la requête;
(*b*) swear that the person knows of no fact material to the motion that has not been disclosed in the person's affidavit; and	*b*) une affirmation selon laquelle il n'existe pas à sa connaissance de faits substantiels autres que ceux qui sont mentionnés dans son affidavit;
(*c*) provide, to the best of the person's knowledge, the number of members in the proposed class.	*c*) le nombre de membres du groupe, pour autant qu'elle sache.

[70] This provision must be read bearing in mind the Supreme Court of Canada's comments in *Hollick, supra*, at paras. 23 to 25, that a representative seeking leave to bring a class action must submit sufficient evidence in support of his or her application. That evidence is not needed to determine the existence of a reasonable cause of action, but a minimum of persuasive evidence is essential, so that the other tests applicable to leave may be considered. The Court must be persuaded that certain basic facts exist. The Court must therefore have a sufficient record, whose content will vary with the circumstances of each case (see also a more recent judgment of Winkler J., cited by Beverley McLaughlin C.J. in *Hollick,* in *Caputo v. Imperial Tobacco Ltd*., 236 D.L.R. (4th) 566, [1997] O.J. No. 2576, at para. 44, and *Ernewein v. General Motors of Canada Ltd*., 2005 BCCA 540, [2005] B.C.J. No. 2370, at paras. 25 to 33).

(b) Application of principles

[71] The applicant filed an affidavit by Ms. Bédard dated June 15, 2005, which essentially restated the allegations contained in her original statement of claim. As well, the deponent added some details regarding her family, her purchases of Frosted Flakes and Froot Loops cereals, the context of her conversation with her friends regarding the content of 1/3 Less Sugar cereal, the Web search which led to the document filed as Exhibit P-1 in her affidavit and the fact that she would not have bought this cereal if she had known it contained more sugar and calories.

[72] In her affidavit, she also indicated that she received assistance from her counsel in collecting the information that led to the preparation of the affidavit and [TRANSLATION] "making the principal inferences". However, she did not deal in any way with the plan she proposed for effectively advancing the action on behalf of the class, she did not describe the class she wished to represent and why, and she did not deal with the other criteria described in section 299.18.

[73] As has been mentioned several times, Ms. Bédard was examined on August 31, 2005. That examination also served as an examination on her affidavit for the purposes of the motion at bar. Although once again it was not reproduced in the amended motion record for leave or in the respondent's reply record, it is clear that the examination must form part of the record before the Court. Ms. Bédard's examination on her affidavit takes the place of an examination in court. Without that examination and the documents filed in accordance with undertakings (such as the instruction to Ms. Bédard's counsel), the Court would have absolutely no factual background for determining some of the essential points before it.

[74] The respondent also filed an affidavit by Marco Di Buono, Ph.D. in nutrition and Kellogg's manager responsible for compliance with the regulations on labelling and for new product development. This evidence essentially served to confirm the allegations in the Kellogg defence. The deponent indicated *inter alia* that (i) the information on cereal boxes is the subject of complex and very strict regulation, (ii) the label "1/3 Less Sugar" complies with the stated standards, and (iii) according to very precise laboratory calculations, Frosted Flakes 1/3 Less Sugar contains 39% less sugar, while Froot Loops 1/3 Less Sugar contains 36% less than the original cereal. These calculations were made on the basis of the reference quantity set out in the regulations, namely 30 grams of cereal.

[75] On calories, Mr. Di Buono stated that Kellogg must comply with the standards set by regulation, which require that calories and other information described in the nutritional labelling found on the sides of cereal boxes be calculated on the basis of a serving size, a volumetric measure regularly used by consumers, such as a cup, half-cup, spoonful and so on. Under the regulations, the manufacturer must then include the weight of the serving size in parentheses beside the volumetric measure chosen.

[76] The deponent also stated that the regulations require Kellogg to use rounded figures: for example, in the nutritional table the number of calories is rounded to the closest multiple of ten (104.5 calories would thus be given as 100 calories). According to Mr. Di Buono, Frosted Flakes 1/3 Less Sugar contained 19% fewer calories than original cereal by serving size (volume), while Froot Loops 1/3 Less Sugar contained 14% fewer calories.

[77] The deponent further stated that Kellogg could not include any other information on the calorie content of its cereal on the box. In this connection, he noted that after the action was brought Kellogg asked the Canadian Food Inspection Agency for leave to label 1/3 Less Sugar cereal boxes "not a reduced calorie food", or "while that does not result in less calorie or carbohydrate" [*sic*]. The Agency confirmed in writing that making such representations regarding calorie content was not allowed under the regulations. This would be contrary to sections B.01.502 and B.01.511 of the applicable Regulations. The Agency's letter was attached to this affidavit as an exhibit.

[78] The applicant did not examine Mr. Di Buono on his affidavit. She did not file any affidavit in reply to this evidence.

(*i*) *Reasonable cause of action (paragraph 299.18 (1)(a))*

[79] As the Federal Court of Appeal indicated in *Le Corre*, *supra*, the Court must apply the same test as that which it applied to the Kellogg motion under paragraph 221(1)(*a*), except that here the burden is on the applicant.

[80] In *Le Corre*, the Federal Court of Appeal clearly indicated that this assessment must be made based on the pleadings only. The Court therefore cannot consider Ms. Bédard's examination or the affidavits filed by the parties.

[81] However, as mentioned in paragraph 12, *supra*, Kellogg's defence incorporated several passages from Ms. Bédard’s testimony. Although the applicant did not object to this approach, the Court cannot allow Kellogg to circumvent the rule by not complying with section 174 of the Rules, which clearly indicates that the pleading, including the defence, should not refer to evidence of the facts alleged.

[82] The Court accordingly did not consider allegations in the defence that referred to this evidence, including Ms. Bédard's [TRANSLATION] "admissions".

[83] The respondent argued that the action disclosed no reasonable cause of action because:

(i) section 36 is constitutionally inapplicable in the case at bar (notice of constitutional question);

(ii) the pleadings did not disclose any loss or damage by the applicant;

(iii) as part of a closely regulated industry as to the information which it puts on its cereal boxes, Kellogg cannot be the subject of any proceeding under the Act.

[84] On question two above, as mentioned in reviewing the Kellogg motion to strike, the Court is satisfied that it is not plain and obvious that the action based on section 36 is doomed to failure. Some doubt subsists as to the interpretation of this provision, especially the phrase "loss or damage", and whether awarding damages equivalent to the purchase price of the product can compensate for harm such as the purchase of a product that does not meet the consumer’s expectations because of a departure from section 52 of the Act. If that were the case, the right would clearly be subject to Kellogg’s right to argue that the amount claimed in the case at bar is too high,

as the products were consumed and, for example, the price paid was not greater than that of other cereals ordinarily consumed by consumers such as Ms. Bédard.

[85] The constitutional argument described in the Kellogg record, and in the notice of constitutional question filed on March 13, 2006, is a complex question of law that has never been considered from the standpoint suggested by the respondent.

[86] In *General Motors of Canada v. City National Leasing*, [1989] 1 S.C.R. 641, and *Rocois Construction Inc. v. Quebec Ready Mix Inc.*, [1990] 2 S.C.R. 440, the Supreme Court of Canada upheld the constitutionality of section 31.1 of the *Combines Investigation Act* (the old version of section 36 of the Act) in connection with monopolistic conduct by a business subject to the Act. The question there was not, as here, whether the federal legislature had jurisdiction to create a civil remedy that would compensate a consumer for loss or damage resulting from misleading advertising in a situation where no allegation linked the situation to monopolistic conduct.

[87] The respondent submitted that the personal remedy of a consumer who suffers by such tactics is a purely provincial area of jurisdiction, and all provinces have in fact exercised this jurisdiction by enacting legislation to protect consumers.

[88] Such a question clearly cannot be decided without reference to the factual background. The Court will need some evidence. Additionally, the answer to the question is not plain and obvious, and the applicant discharged her burden by relying on the Supreme Court of Canada judgments mentioned above.

[89] The regulated-industry defence is once again an extremely relevant and serious question that the Court must consider if the action continues individually or as a class action. If the action is a class action, it is also clear that the question would be a common one.

[90] So far, this defence has been used in criminal proceedings. As indicated by the analysis cited by Kellogg, in theory it should also apply in a civil action. However, the fact remains that it has never been considered in an action under section 36 based on a breach of section 52. Moreover, it is clear that, with respect to the allegation regarding Froot Loops (only 30% less sugar), the defence would not be valid, since nothing in the Regulations authorizes such a representation.

[91] The Court is satisfied that it is not clear the action is doomed to failure.

(i) Identifiable class of two or more persons (paragraph 299.18(1)(b))

[92] In her notice of motion, the applicant acknowledged that her action was intended to compensate purchasers who were led by Kellogg's false and misleading representations to purchase cereal that did not meet their expectations regarding calorie content.

[93] Despite this, the class she suggested included all purchasers of the two cereals in question since they were introduced to the market, with no further distinction.

[94] In Kellogg's submission, the suggested class is too broad, as there is no evidence before the Court that other or all purchasers saw the label "1/3 Less Sugar" in the same way as Ms. Bédard, that they made their purchases on the basis of reduced calorie content and that they suffered identical harm.

[95] As mentioned, Ms. Bédard did not deal with this point in her affidavit at all. She did not even say whether, at this stage, it was impossible for her to determine the number of members in the class, or whether, as her counsel indicated, the class included a very large number of individuals, running into the millions.

[96] In Ms. Bédard's submission, such evidence is not necessary, since she is a typical consumer and her personal experience allows the Court to extrapolate and conclude on the basis of common sense that (i) all purchasers of these cereals believed that, in addition to reduced sugar, consumption of the cereal would reduce calorie intake, and (ii) they bought the products on that basis.

[97] In fact, the only evidence in the record that goes beyond Ms. Bédard's personal perception is Exhibit P-1, to which she referred in her affidavit. [14] This was a passage from a website discussing interviews with various (unidentified) U.S. nutritionists who allegedly examined the five major brands of cereal sold on the U.S. market and advertised as containing less sugar. Page 2 of this article states:

[14] It should be noted that the applicant did not refer to this evidence to support her position on this particular point.

> Researchers cited several concerns, however, including that consumers will mistakenly assume less sugar means fewer calories and that the new cereals can help them watch their weight.

[98] In its defence, Kellogg objected to this evidence, which it said was inadmissible *inter alia* on the ground of hearsay.

[99] In *Ernewein*, at paragraph 31, the British Columbia Court of Appeal clearly indicated that, despite the liberal approach taken by the Canadian courts on class actions, there is no authority to support an argument that the usual rules on admissibility of evidence do not apply for purposes of leave or certification.

[100] Clearly, it would have been easy for the applicant to file affidavit evidence from other purchasers or from a consumer expert. One might even imagine a poll being conducted in this connection. In any case, even in the absence of such evidence, the Court is prepared to assume that more than one cereal purchaser has been concerned in the matter since 2004. It is also probable that, as alleged, more than one purchaser deduced from the label "1/3 Less Sugar" that the calorie content of the cereal would be less than or [TRANSLATION] "at worst equal" to that of the original cereal. The Court is thus satisfied that, in terms of the existence of a class of more than two individuals, the applicant met her burden.

[101] However, the Court notes that the description of the class will have to be amended if the action is certified, as the proposed class is definitely too large.[15]

---

[15] It is not clear that Kellogg's suggestion of limiting the class to purchasers who suffered damage is acceptable (see *Chaudha v. Bayer Inc.* (2003), 63 O.R. (3d) 22, at para. 69, *Rumley v. British Columbia*, [2001] 3 S.C.R. 184, at para. 11,

(iii) Common questions (paragraph 299.18(1)(c))

[102] In her written argument, the applicant provided little support for the position described in her notice of motion. She submitted that the common points of law and fact were the following:

> [TRANSLATION]
>
> (1) Did the respondent give class members false or misleading information regarding Frosted Flakes 1/3 Less Sugar and Froot Loops 1/3 Less Sugar cereal?
>
> (2) Did the purchase of the said cereal cause class members damage equivalent to reimbursement of the price?
>
> (3) How is the damage to be qualified?
>
> (4) How is the damage to be quantified?
>
> (5) May the amounts awarded be paid to charitable organizations?

[103] At the hearing, the applicant agreed to the Court's suggestion that these questions might perhaps be reworded to indicate that Kellogg's representations were misleading, especially with regard to calorie content, and to make some connection between the representations and the alleged harm, namely purchase of a product not consistent with the expectations created by the label "1/3 Less Sugar".

Bouchanskaia v. Bayer Inc., [2003] B.C.J. No. 1969, paras. 125-139, and *Serhan*, *supra*, at para. 54 of the trial level judgment, affirmed on appeal).

[104] In this connection, the Court has only to determine whether at least one common question exists. The significance of common questions, as compared with individual questions, is more relevant to analysis of the next test (the preferable procedure mentioned in paragraph (*d*)).

[105] It may thus readily be concluded here that there is at least one common question of fact, namely to determine whether the respondent in fact provided misleading information on Froot Loops 1/3 Less Sugar (only 30% less sugar) and whether the calorie content of the two cereals in question by cup or ¾ cup is in fact less than that of the original cereal, as Kellogg maintained, and indicated in the nutritional labelling.[16]

(iv) *Whether class action preferable procedure for resolution of common questions (paragraph 299.18(1)(d))*

[106] In its analysis, the Court considered the various factors set out in subsection 299.18(2) of the Rules, as well as the three major aspects of a class action mentioned by the Supreme Court of Canada, namely access to justice, judicial economy and behaviour modification.

[16] At paragraph 21(a) of the amended statement of claim, the applicant stated only that the volumetric information was misleading, as it suggested there were in fact fewer calories. At paragraphs 88 to 92 of her written submissions, she indicated that, according to the information in the nutritional labelling on Frosted Flakes, a cup of original cereal weighed 41 grams, while the same cereal with 1/3 less sugar weighed only 33 grams. At paragraph 91, she said that [TRANSLATION] "it was established that in fact the said cereals had no significant weight difference". The respondent strenuously argued that the two cereals did not have the same density. Ultimately, it appears that the entire case turns on this statement by the applicant, which no evidence supports at this stage and which Mr. Di Buono's affidavit directly contradicts.

[107] In her pleadings and her memorandum, Janie Bédard submitted that there is no individual point of law or fact. She argued that the proposed action was efficient because it applied across Canada and because no class members really had an interest in conducting separate actions.

[108] In the applicant's submission, if the action is not certified, Kellogg may continue to enrich itself on the basis of false and misleading representations. Ms. Bédard stated that she could not continue her personal action in the Federal Court since it would involve staggering costs[17] to claim $250 in damages. She would therefore have to proceed in the Small Claims Division.[18]

[109] On individual questions, the applicant did not submit any explanation or evidence on how it would be possible to establish the causal link that the specific language of section 36 appears to require for her class action. After reviewing the precedents in this regard, the Court is not satisfied that the applicant has established this would not be a significant individual question involving a number of proceedings if, as the applicant indicated, there were in fact millions of purchasers included in the proposed class.

[110] Ms. Bédard also did not explain why an individual assessment of the damage sustained by the other purchasers would not be necessary. It appeared that she felt this question could be avoided by asking that the amounts awarded be paid directly to charitable organizations. Although this approach might in fact solve the question of distribution, she did not establish how the Court could determine the number of boxes sold by the many retailers in Canada and the prices at which those boxes were sold (special prices and so on). There was no evidence that Kellogg was in possession of

[17] Yet her counsel also argued that the case was straigntforward and probably did not require expert evidence.
[18] The applicant does not appear to have considered a simplified action as set out in the Rules of the Court.

such information.[19] Furthermore, what would be the position of cereal purchasers who followed a strict diet? Would their damages be different from Janie Bénard's?

[111] As to class members who might have an interest in filing separate actions, is the Court to assume that large institutions (such as hospitals, schools, campgrounds, hotels and so on) do not buy this cereal? If their purchasing volume is significant in view of the period of time covered, why would such purchasers not have an interest in filing individual actions? The Court is not in a position to make a conclusion on this point, as there was a total absence of evidence to support Ms. Bédard's arguments.

[112] As the applicant recognized, the most important aspect of this action is not to provide access to justice for purchasers to compensate them, since there is no intention here of reimbursing them. The purpose of the action is essentially to penalize and end the respondent's allegedly reprehensible conduct. The legislature has in fact provided specific machinery for this. Ms. Bédard need only file a complaint with the Canadian Food Inspection Agency or with the Competition Commissioner. They certainly have the expertise and authority to terminate the conduct of which Ms. Bédard complains. Moreover, the Act provides for severe fines.

[113] It is important to note that the applicant confirmed that neither she nor her counsel had contacted the Agency or the Commissioner, although the most essential common question here was whether Kellogg had misrepresented the percentage of sugar contained in Froot Loops 1/3 Less Sugar and the number of calories in the two cereals in question as compared with the original cereal.

[19] The information needed is not how many boxes were sold to retailers themselves, but how many of the boxes they purchased were in fact sold to the public.

There was no evidence or argument before the Court from which it could conclude that this question could not be readily determined by an investigation by those agencies, at no cost to consumers.

[114] It also did not appear that the applicant had taken any action whatsoever seeking review of, or changes in, the Regulations. According to Kellogg, the Regulations require manufacturers to describe calorie content by serving size (volume). In the case at bar, Ms. Bédard maintains that this is misleading.

[115] In the specific context of this action, and with reference to the evidence (or rather, the lack of evidence) in the record, the applicant simply did not discharge her burden of establishing that the proposed class action is the preferable procedure within the meaning of paragraph 299.18(1)(*d*) of the Rules. The Court is not persuaded that that is true in the case at bar.

(v) Whether representative meets criterion in 229.18 (1)(e)

[116] As the applicant indicated, in addition to the specific criteria described in subparagraphs 299.18(*e*)(i) to (iv), the Court must bear in mind the following comments by the Supreme Court of Canada in *Western Canadian Shopping Centres Inc. v. Dutton*, [2001] 2 S.C.R. 534, as follows:

> 41. Fourth, the class representative must adequately represent the class. In assessing whether the proposed representative is adequate, the court may look to the motivation of the representative, the competence of the representative's counsel, and the capacity of the representative to bear any costs that may be incurred by the representative in particular (as opposed to by counsel or by the class members generally). The proposed representative need not be "typical" of the class, nor the "best" possible representative. The court should be satisfied, however, that the proposed representative

> will vigorously and capably prosecute the interests of the class: see Branch, *supra*, at paras. 4.210-4.490; Friedenthal, Kane and Miller, *supra*, at pp. 729-32.

[117] In this regard, it will be recalled that the applicant submitted she was a mother who bought cereal, was concerned about her children's nutrition, had shown her concern by initiating the action, was a class member, knew all the relevant facts at issue, was actively concerned with the matter and was prepared to put in all the time needed to conduct the action in the interests of the members.

[118] She further stated in paragraph 154 of her written submissions that she prepared a plan setting out a workable method of advancing the action on behalf of the class, namely (i) the action had been advertised on her counsel's website, (ii) she was willing to contact members at the proper time by means of press releases, (iii) she already had an agreement with her counsel on fees and disbursements.

[119] The Court had very little evidence before it in support of these submissions. In her affidavit, Ms. Bédard did not indicate that she was prepared to invest all the time necessary to conduct the action. The Court notes that, based on the evidence in the record, Ms. Bédard has so far invested very little.[20]

[120] In its assessment, the Court took a liberal approach. The applicant did not have to undertake a painstaking and extensive investigation, but she did have to carry out a reasonable investigation before filing her motion for leave to represent the class she was suggesting.

[121] Although Ms. Bédard may legitimately rely largely on her counsel, there is nothing to indicate that they took any more action than she did.

[122] It is quite clear that neither Ms. Bédard nor her counsel[21] checked the accuracy of extremely relevant facts before filing the statement of claim and signing the affidavit of June 15, 2005. As the respondent noted, no one took the trouble to check that the portions and weights used to compare the calorie content of the cereal were the same on the boxes. Only at the examination of August 2005 did Ms. Bédard and her counsel notice that they had misread or misunderstood this information.

[123] Ms. Bédard also acknowledged that the alleged box of original Froot Loops, filed as an exhibit to her affidavit (the front and side of the box), was actually a box of Froot Loops (Extra Terrestrial), a promotional product whose nutritional labelling was not the same as the original Froot Loops.

[124] There was also nothing to indicate that the applicant or her counsel contacted other consumers. Apart from her conversation with a nutritionist friend, it also did not appear that the applicant consulted any experts. In response to a question from the Court, wondering among other things about the financing of the action, her counsel noted that the case was relatively

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[20] She attended the hearing only after Kellogg drew attention to the fact that she was absent and was able to be present for only a few hours.

[21] The Court is aware that Ms. Bédard has changed her counsel since the original statement of claim was filed.

straightforward and they did not think that expert opinions would be required at this stage. [22] Although most of the calculations used in the written argument were made on the basis of information contained in the nutritional labelling of the cereals concerned, the Court again notes that nothing in the record indicates the basis on which the applicant stated in her written submissions that the original cereals and the 1/3 Less Sugar cereals clearly had the same density.

[125] In any event, the many amendments, the complete absence of evidence regarding several of the tests applicable to consideration of a motion for leave and the episode of the affidavit described in the third motion by Kellogg leaves the Court in a quandary.

[126] With regard to the agreement on fees and disbursements, it is astonishing to find that, in her examination of August 2005, Ms. Bédard stated that she knew she would not be receiving any bill and would not have nothing to pay herself, but twice stated that she did not exactly know how her counsel were paid. She added [TRANSLATION] "it must be a percentage". Nevertheless, according to the document provided after the examination, Ms. Bédard signed this agreement on June 15, 2005. In the circumstances, the Court wonders whether Ms. Bédard took the trouble to check before signing whether it was in the interests of class members to pay 30% of all monies received (the money to be paid to charitable causes) to her counsel in addition to any court fees that the Court might award.[23]

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[22] Counsel for the applicant could give no particulars as to whether the cereal sold in the U.S., referred to in Exhibit P-1, was the same as that sold in Canada.

[23] The agreement did not seem to be quite clear on the question of who would pay the costs that might eventually be awarded to Kellogg if the action was dismissed. Would there be disbursements? Although costs are not generally awarded to parties on a class action, the Court has discretion to award them in certain cases (subsection 299.41(2)).

[127] As to the plan required pursuant to subparagraph 299.18(1)(*e*)(ii), Ms. Bédard indicated in her examination that she was not aware of it and did not participate in preparation of a plan. She noted [TRANSLATION] "I waited to see if it would be accepted as a motion first". It was at this point that her counsel had to indicate that a website had been set up. However, the Court has no particulars in this regard. We do not know if the site was bilingual, what information it contained, or whether it had been visited since it was created.

[128] On the question of press releases, the Court notes that the applicant also asked the Court to allow her to notify class members (as required by the Rules) through a press release, rather than by a notice published in the newspapers. In her memorandum, the applicant indicated that the cost of publication in newspapers amounted to at least $100,000, and the applicant had no source of financing other than her counsel. She said that publication through newspapers often is not noticed. A press release would be much more effective and cost only about $500. Once again, there is absolutely no evidence on this point before the Court. This is especially troubling when we consider that the class proposed is extremely large and that the applicant is in fact suggesting that all the alleged victims waive any compensation received on their behalf in favour of a gift to charitable organizations. It will be understood that it is important to ensure that class members have a genuine opportunity to opt out of this action (subsection 299.23(1)).

[129] Although a plan clearly changes with time, the creation of a site and signature of an agreement on fees does not constitute a plan as such, certainly not an adequate plan. The Court is not satisfied that the applicant established that she had met this test. In fact, failure to think the

matter through probably explains the many discrepancies in this case. The Court does not accept the applicant's propositions that the proposed class action is relatively straightforward.

[130] The Court is not satisfied that the applicant established she was in a position to represent the members of the proposed class adequately and could act as representative.

5. CONCLUSION

[131] In view of all the evidence before the Court and based on analysis of the applicable tests, the Court concludes that this class action should not be certified.

[132] On costs, the Court considered Kellogg's arguments to justify application of the exception mentioned in subsection 299.41(2), but the Court is not satisfied that the circumstances justify exercise of such discretion.

[133] On the motion to strike the individual action, the Court of course considered the fact that the applicant waited for the hearing to withdraw most of the disputed paragraphs. However, in view of the mixed success on the motion and the fact that Kellogg's main argument (lack of a reasonable cause of action) was dismissed, the Court concludes that each party should pay its own costs.

[134] In her individual action, Ms. Bédard should file a statement of claim consistent with these reasons before June 18, 2007, including the amendments made at the hearing.

JUDGMENT

THE COURT ORDERS that:

1. The motion to strike is allowed in part only. The following conclusion is struck out:

   > [TRANSLATION] Order the respondent to make the appropriate corrections to its packaging so that consumers will be given at least equal information on the higher "sugar" and calorie content as they are on the content of "1/3 less sugar".

2. A statement of claim giving effect to this judgment, and including the amendments made at the hearing, shall be filed on or before June 18, 2007.

3. The motion for leave is dismissed.

"Johanne Gauthier"
Judge

Certified true translation

Paul Leroux, Translator

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	**T-1044-05**
STYLE OF CAUSE:	**JANIE BÉDARD and KELLOGG CANADA INC. and ATTORNEY GENERAL OF CANADA**
PLACE OF HEARING:	Montréal, Quebec
DATE OF HEARING:	November 14, 15 and 16, 2006
REASONS FOR JUDGMENT AND JUDGMENT BY:	The Honourable Madam Justice Gauthier
DATED:	May 16, 2007

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