

COUR SUPÉRIEURE
(Action collective)

CANADA
PROVINCE DE QUÉBEC
DISTRICT DE MONTRÉAL

No : 500-06-001142-211

DATE : 30 mai 2022

SOUS LA PRÉSIDENTE DE L'HONORABLE CHRISTIAN IMMER, J.C.S.

DOMINIQUE LAVOIE

Demandeur

c.

WAL-MART CANADA CORP.

Défenderesse

JUGEMENT RECTIFICATIF

- [1] **CONSIDÉRANT** le jugement du 30 mars 2022, autorisant l'exercice d'une action collective dans le présent dossier;¹
- [2] **CONSIDÉRANT** que par inadvertance, des erreurs se sont glissées aux paragraphes 87 à 89 de la version française des conclusions dans ledit jugement;
- [3] **CONSIDÉRANT** l'article 338 du *Code de procédure civile*, il y a lieu de rectifier le jugement du 30 mars 2022.

¹ *Lavoie c. Wal Mart Canada Corp.*, 2022 QCCS 1060.

PAR CES MOTIFS, LE TRIBUNAL :

- [4] **RECTIFIE** le jugement prononcé le 30 mars 2022 afin que les paragraphes 87 à 89 du jugement se lisent comme suit :

<p>[87] APPOINTS the Applicant, Dominique Lavoie, as representative plaintiff of the persons included in following class:</p> <p>All consumers domiciled or residing in Québec who, on April 4th or 5th, 2021, placed an order for an item priced at \$3.49 from the www.walmart.ca website and who, after receiving a purchase confirmation from Wal-Mart at the price initially advertised, subsequently had their purchase cancelled by Wal-Mart.</p>	<p>ATTRIBUE au demandeur, Dominique Lavoie, le statut de représentant des personnes comprises dans le groupe ci-après décrit :</p> <p>Tout consommateur, domicilié ou résidant au Québec, qui le 4 ou 5 avril 2021, a placé une commande sur le site internet www.walmart.ca pour un item (...) <u>affiché au prix de 3,49 \$</u> et qui, après avoir reçu une confirmation de Wal-Mart au prix initialement annoncé, a ensuite vu son achat annulé par Wal-Mart.</p>
<p>[88] IDENTIFIES the principal question of fact and law to be treated collectively as the following:</p> <p>a) By cancelling consumers' orders of April 4 and 5, 2021, did Wal-Mart violate s. 16, 231 and 224c) of Québec's Consumer Protection Act?</p> <p>b) If so, are Class members entitled to compensation and in what amount?</p> <p>c) Are the Class members entitled to punitive damages and, if so, in what amount?</p>	<p>IDENTIFE les questions principales de faits et de droit à être traitées collectivement comme suit :</p> <p>a) En annulant les commandes de consommateurs les 4 et 5 avril 2021, Wal-Mart viole-t-elle les articles 16, 231 et 224c) de la Loi sur la protection du consommateur?</p> <p>b) Si oui, les membres du groupe ont-ils droit à des dommages compensatoires et, le cas échéant, à la hauteur de quel montant?</p> <p>c) Les membres du groupe ont-ils droit à des dommages (...) <u>punitifs</u> et si oui, à la hauteur de quel montant?</p>
<p>[89] IDENTIFIES the conclusions sought by the class action to be instituted as being the following:</p> <p>GRANT the Plaintiff's action against Defendant for all class members;</p> <p>CONDEMN the Defendant to pay to the members of the Class an amount to be determined in compensatory</p>	<p>IDENTIFIE les conclusions recherchées par l'action collective à tenter comme étant les suivantes :</p> <p>ACCUEILLIR l'action collective contre la défenderesse pour tous les membres du groupe;</p> <p>CONDAMNER la défenderesse à verser aux membres du groupe un montant à être déterminé à tire de</p>

<p>damages, and ORDER collective recovery of these sums;</p> <p>CONDEMN the Defendant to pay to the members of the Class \$500 each in punitive damages, and ORDER collective recovery of these sums;</p> <p>CONDEMN the Defendant to pay interest at the legal rate and the additional indemnity provided for in art. 1619 C.C.Q. on the above sums from the date of service of the Application to Authorize the Bringing of a Class Action and to Appoint the Status of Representative Plaintiff;</p> <p>ORDER the Defendant to deposit in the office of this Court the totality of the sums which forms part of the collective recovery, with interest and costs;</p> <p>ORDER that the claims of individual Class members be the object of collective liquidation if the proof permits and alternately, by individual liquidation;</p> <p>CONDEMN the Defendant to bear the costs of the present action including the cost of notices, the cost of management of claims and the costs of experts, if any, including the costs of experts required to establish the amount of the collective recovery orders;</p>	<p>dommages compensatoire et ORDONNER le recouvrement collectif de ceux-ci;</p> <p>CONDAMNER la défenderesse à payer à chaque membre du groupe la somme de 500\$ à titre de dommages punitifs et ORDONNER le recouvrement collectif de ces montants;</p> <p>CONDAMNER la défenderesse à verser aux membres du groupe des intérêts au taux légal plus l'indemnité additionnelle prévue à l'article 1619 C.c.Q . à partir de la date du Application to Authorize the Bringing of a Class Action and to Appoint the Status of Representative Plaintiff;</p> <p>ORDONNE (...) <u>à la défenderesse</u> de déposer auprès de la Cour le montant intégral des sommes au titre du recouvrement collectif, avec intérêts et frais;</p> <p>ORDONNER que les réclamations des membres soient liquidées au stade collectif si la preuve le permet ou alternativement, par voie de liquidation individuelle;</p> <p>LE TOUT avec frais de justice incluant les frais liés aux avis, les frais de gestion des réclamations, le cas échéant, incluant les frais d'expert requis pour établir les sommes à verser pour les fins du recouvrement collectif;</p>
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Me Joey Zukran
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LPC AVOCAT INC.
Avocats du demandeur

Me Christopher Richter
Me Mathew Angelus

TORYS
Avocats de la défenderesse

SUPERIOR COURT
(Class Action)

CANADA
PROVINCE OF QUEBEC
DISTRICT OF MONTREAL

No.: 500-06-001142-211

DATE: March 30, 2022

BY THE HONOURABLE CHRISTIAN IMMER, J.S.C.

DOMINIQUE LAVOIE
Plaintiff

v.

WAL-MART CANADA CORP.
Defendant

JUDGMENT

on the Amended Application to authorize the bringing of a class action
and to appoint the status of representative plaintiff

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Overview

[1] On the evening of April 4, 2021, over a two-hour span, Dominic Lavoie placed six distinct orders for 22 different items for a total of 49 units which were being offered for sale on Wal-Mart’s Web site. All the items he purchased were priced at \$3.49. He received purchase confirmations specifying delivery dates and his bank account was debited. Two days later, Wal-Mart progressively cancelled all his confirmed orders. A customer relations representative explained to Lavoie that his orders as well as those of other clients were cancelled due to a pricing error. The day following the cancellations, all the items were offered for sale by Wal-Mart on its Web site at a significantly higher price.

[2] Lavoie is asking for the Court’s authorization to institute a class action on behalf of the following class:

All consumers who, from April 4th-5th, 2021, purchased an item from the www.walmart.ca website and who, after receiving a purchase confirmation from Wal-Mart at the price initially advertised, subsequently had their purchase cancelled by Wal-Mart.

or any other class to be determined by the Court.

[3] He claims that in cancelling what he qualifies as distance contracts,

[4] ¹ Wal-Mart refused to honour its contractual obligations thereby violating s. 16 of the *Consumer Protection Act* (“CPA”). Furthermore, he alleges that Wal-Mart carried out two prohibited business practices by charging, for goods or services, a higher price than that advertised² and by advertising goods or services of which Wal-Mart has an insufficient quantity to meet public demand. He claims compensatory damages on his behalf and on behalf of all class members equivalent the “Lost Value”, which he calculates as the difference between the higher price advertised for an item on April 7 and the price at which this item was initially advertised at, namely \$3.49. He also invokes the CPA to claim punitive damages³ of \$500 for each member of the class.

[5] In order to succeed in his application, Lavoie must convince the Court that his application meets the criteria set out at art. 575 CCP, namely 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;

¹ As per s. 54.1 of the *Consumer Protection Act*, CLRQ c. P-40.1.
² S. 224 c) of the CPA.
³ S. 272 of the CPA, *in fine*.

- (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.

[6] Wal-Mart contests that Lavoie meets the requirements of criteria 1), 2) and 4). As a subsidiary argument, it asks that the proposed definition of the class be changed. For the reasons set out hereafter, the Court will grant the Application but will slightly modify the class definition and will bring minor adjustments to the common questions.

Analysis

1. Do the facts alleged appear to justify the conclusions sought (Art. 575(2) CCP)

[7] The Court begins its analysis with the criteria set out in par. 575(2) CCP, following the same logic set out by the honourable Martin F. Sheehan⁴ citing the honourable Christine Baudouin,⁵ who observes that « avant de se demander si les recours individuels des membres ont un caractère collectif, il faut d’abord en analyser les fondements apparents ou le syllogisme juridique, sans lequel la demande serait de toute façon vouée à l’échec ».

1.1 Legal principles

[8] It is the appearance of right of Plaintiff’s individual claim which must be analyzed. The fact that another member could be successful is not relevant at this stage.⁶

[9] In *Oratoire Saint-Joseph*,⁷ the Supreme Court explains how a motion’s judge must apply par. 575(2) CCP. The applicant’s burden must establish an “arguable case” in light of the facts and the applicable law. This threshold is one of “demonstration”: the applicant must demonstrate that the proposed “legal syllogism” is “tenable”. This is a low threshold. The applicant must establish “a mere “possibility” of succeeding on the merits”, “*not even a “realistic” or “reasonable” possibility*”.⁸

[10] Still in *Oratoire Saint-Joseph*, the Supreme Court explains that the evidentiary threshold for establishing an arguable case falls “comfortably below” the burden of balance of probabilities. “Bare allegations”, although insufficient to meet this threshold, can “be supplemented by “some evidence” that — “limited though it may be” — must

⁴ *Lehouillier-Dumas c. Facebook inc.*, 2021 QCCS 2074 [« **Facebook** »].

⁵ *D’Amico c. Procureure générale du Québec*, 2018 QCCS 4830 (constat de caducité (C.A., 2019-03-28), 500-09-027981-182).

⁶ *L’Oratoire Saint-Joseph du Mont-Royal v. J.J.*, 2019 SCC 35, [2019] 2 S.C.R. 831, par. 82 [« **Oratoire** »] citing, amongst others, *Sofio c. Organisme canadien de réglementation du commerce des valeurs mobilières (OCRCVM)*, 2015 QCCA 1820, par. 10.

⁷ *Oratoire*, préc., note 6.

⁸ *Id.*, par. 58.

accompany the application in order “to form an arguable case”⁹. In *Asselin*, the Supreme Court further explains that “applicant[s] must present facts that are specific enough to allow the legal syllogism to be considered but that it is not necessary to provide step-by-step details of the legal argument to be made in the submissions on the merits of the case”. Hence, the Applicant need not lay out the entire legal argument “in minute detail”¹⁰.

[11] The authorization judge can deal with pure questions of law and dismiss applications on this basis. However, he or she must be mindful that “it is in principle not appropriate at the authorization stage for the court to make any determination as to the merits in law of the conclusions in light of the facts being alleged”. It suffices that the application not be “frivolous” or “clearly wrong” in law. In other words, the applicant must establish “a good colour of right”¹¹.

[12] The Court of Appeal in *Pilon* has provided the following additional direction on how courts are to deal with claims which defendants plead are clearly wrong or untenable in law:¹²

[12] Le juge peut, à l'étape de l'autorisation, statuer sur une question d'interprétation statutaire à la condition que l'analyse ne requière pas l'administration d'une preuve, étant entendu qu'il doit se garder de statuer ou d'évaluer la preuve présentée puisque cette analyse doit plutôt se faire sur le fond. Il peut cependant, lorsque cela est nécessaire pour trancher la question de droit et décider si les faits allégués paraissent justifier les conclusions recherchées, considérer ceux qui sont allégués par le requérant, lesquels sont alors tenus pour avéré. Le choix de statuer ou de plutôt déferer au juge du fond relève alors de la discrétion du juge.

(...)

[17] J'estime que le juge pouvait répondre à la question posée par l'appelante. Il n'aurait pas été dans une meilleure position après la présentation d'une preuve additionnelle puisque la demande pour autorisation comportait déjà et à elle seule toutes les propositions et allégations des faits utiles (alors tenus pour avérés). Bien que les contrats intervenus entre chacune des intimées et leurs clients pouvaient ne pas avoir été identiques, la faute qui leur est reprochée par l'appelante est la même pour toutes et le syllogisme juridique, identique à l'égard de toutes les intimées, repose sur une seule question de droit.

[The Court's underlinings; References omitted]

1.2 The allegations of fact raised by Lavoie

[13] The facts on which Lavoie relies are set out in his *Amended application to authorize the bringing of a class action and to appoint the status of representative plaintiff*. The Court must also review the 22 exhibits he has filed in support thereof.¹³

⁹ *Id.*, par. 58 and 59.

¹⁰ *Desjardins Financial Services Firm Inc. v. Asselin*, 2020 SCC 30, par. 17 [“*Asselin*”].

¹¹ *Oratoire*, par. 58.

¹² *Pilon c. Banque Amex du Canada*, 2021 QCCA 414.

¹³ Dated April 8, 2021.

[14] In a prior judgment, the Court authorized Wal-Mart to file the Terms of sale¹⁴ to which the order confirmations filed as exhibits¹⁵ refer by way of hyperlink as well as a succinct affidavit that confirms that the version which is filed is the version which appeared on Wal-Mart's website on April 4 and 5, 2021.¹⁶

[15] The review of this record shows that on April 4, 2021, Lavoie visited the www.walmart.ca website because he was shopping household items. He files a screen capture which shows how numerous items are offered for sale on the website. He made six distinct orders:

- 15.1. Order 6592169000379 ("1st Order"): On April 4, 2021, Lavoie ordered 12 units of artificial grass, each priced at \$3.49, via the Wal-Mart website www.walmart.ca. At 8:01 p.m., Wal-Mart confirmed that it was "processing the order" and that he would "receive [his] official receipt and tracking information".¹⁷ Given that the order exceeded \$35 before taxes,¹⁸ no shipping fees were billed as appears from the indicating "Walmart Shipping: FREE". An estimated delivery date was provided: April 19 2021. His checking account was debited via his visa debit card for an amount of \$48.15 on April 5, 2021.¹⁹
- 15.2. Order 6602148000305 ("2nd Order"): On April 4, 2021, Lavoie ordered 12 units of artificial hedge, each unit priced at \$3.49, via the Wal-Mart website www.walmart.ca. At 8:15 p.m., Wal-Mart confirmed that it was "processing the order" and that he would "receive [his] official receipt and tracking information".²⁰ Given that the order exceeded \$35 before taxes, the confirmation indicates again "Walmart Shipping: FREE". An estimated delivery date was provided: April 19, 2021. His checking account was debited via his visa debit card for an amount of \$48.15 on April 5, 2021.²¹
- 15.3. Order 293214400540 ("3rd Order"): On April 4, 2021, Lavoie ordered 8 rugs (5 identical rugs and one unit each of three other distinct models) each priced at \$3.49, via the Wal-Mart website www.walmart.ca. At 8:51 p.m., Wal-Mart confirmed that it was "processing the order" and that he would "receive [his] official receipt and tracking information".²² "Shipping charges" of \$5.99 were charged.²³ His checking account was debited via his visa debit card for an amount of 48.15\$ on April 5, 2021.²⁴

¹⁴ Exhibit D-1.

¹⁵ Exhibits P-5 to P-10.

¹⁶ *Lavoie c. Wal-Mart Canada Corp.*, 2021 QCCS 4629.

¹⁷ Exhibit P-5.

¹⁸ Exhibit P-11: Wal-Mart policy.

¹⁹ Exhibit P-12.

²⁰ Exhibit P-6.

²¹ Exhibit P-12.

²² Exhibit P-7.

²³ It is to be noted that the shipping policy P-11 states that the shipping fee is \$5.97 as opposed to the \$5.99 fee that was charged in P-8.

²⁴ Exhibit P-12.

- 15.4. Order 6592166001549 (“4th Order”): On April 4, 2021, Lavoie ordered 11 rugs²⁵ each priced at \$3.49, via the Wal-Mart website www.walmart.ca. At 9.04 p.m., Wal-Mart confirmed that it was “processing the order” and that he would “receive [his] official receipt and tracking information”.²⁶ Given that the order exceeded \$35 before taxes, the confirmation indicates again “Walmart Shipping: FREE”. An estimated delivery date was provided for all rugs: April 8, 2021. His checking account was debited via his visa debit card for an amount of \$44.14 on April 5, 2021.²⁷
- 15.5. Order 2932147000541 (“5th Order”): On April 4, 2021, Lavoie ordered a set of two oven mits, eight 12-pack sets of handpainted knobs for cabinets and furniture²⁸ and a cushion at \$3.49 each via the Wal-Mart website www.walmart.ca.²⁹ At 8:15 p.m., Wal-Mart confirmed that it was “processing the order” and that he would “receive [his] official receipt and tracking information”. Given that the order exceeded \$35 before taxes, the confirmation indicates again “Walmart Shipping: FREE”. His checking account was debited via his visa debit card for an amount of \$52.17 on April 5, 2021.³⁰
- 15.6. Order 659213000794 (“6th Order”): On April 4, 2021, Lavoie ordered three more cushions³¹ and ten rugs all of the same model at \$3.49 each via the Wal-Mart website www.walmart.ca. At 8:15 p.m., Wal-Mart confirmed that it was “processing the order” and that he would “receive [his] official receipt and tracking information”.³² Given that the order exceeded \$35 before taxes, the confirmation indicates again “Walmart Shipping: FREE”. His checking account was debited via his visa debit card for an amount of \$52.17 on April 5, 2021.³³

[16] During the morning of April 5th, Wal-Mart wrote to Lajoie to “hang tight” as the ten rugs part of the 6th order were currently backorder and the shipment has been delayed but not to worry, he would “never be charged for items that are not delivered”.³⁴

[17] On April 6th, he received a number of emails advising him of delays or cancellations. The following sets out chronologically what emails were received:

- 17.1. 10:05 a.m.: Wal-Mart writes that “some items” in 4th Order have been cancelled. Lavoie would not be charged and authorizations on Lavoie’s card would “automatically expire”.³⁵

²⁵ Five identical rugs and one unit each of six other distinct models.

²⁶ Exhibit P-8.

²⁷ Exhibit P-12.

²⁸ They were of three different models. As appears from exhibit P-16, each pack contains twelve knobs.

²⁹ Exhibit P-9.

³⁰ Exhibit P-12.

³¹ Three different models.

³² Exhibit P-10.

³³ Exhibit P-12.

³⁴ Exhibit P-13.

³⁵ Exhibit P-15.

- 17.2. 12:51 p.m.: Wal-Mart writes that “some items” in his 6th Order have been cancelled. Lavoie would not be charged and authorizations on Lavoie’s card would “automatically expire”.³⁶
- 17.3. 2:35 p.m.: Wal-Mart writes that due to increased volume, it may take longer to ship the 5th Order and that the Wal-Mart is “working to get [his] order to [him] as quickly as possible”.³⁷
- 17.4. 6:49 p.m.: Wal-Mart writes that his “recent order”, the 2nd Order, has been cancelled. Lavoie would not be charged and authorizations on Lavoie’s card would “automatically expire”.

[18] Lavoie alleges when Wal-Mart “started unilaterally cancelling” his orders, he “then immediately contacted Wal-Mart” via its online chat customer service. Given that the cancellation orders were received over a nine hour period on April 6, this time line is imprecise. That being said, he did receive the following response in a dismayingly poor French:

“En faite M. Dominic on avez reçu une mise a jour quoi il avais plusieurs articles sur le site au mauvais prix donc tous les commande comme cela ont été annulé de plus d’un mail de confirmation ont ete envoyer au clients pour mentioner ce qui s’est passé”.

[As in the original]

[19] No specific allegations are made with regard to the 1st and 3rd Orders, nor when the 5th and the rest of the 6th Order were eventually cancelled. Given the claim for Lost Value which will be discussed hereafter, the Court assumes that they were cancelled as well. Furthermore, it is not alleged, but the Court presumes, that Lavoie’s bank account was eventually credited for identical amounts that were initially withdrawn.

[20] Lavoie then explains that for a certain period, the price on the website was posted as “unavailable” for the 22 different items that he bought in or one many units. However, at around 9:00 p.m. on April 7, 2021, he noticed that Wal-Mart had updated its website and that all 22 items he purchased were now being advertised by Wal-Mart and offered for sale at a higher price.³⁸

[21] Lavoie claims that he is entitled to compensatory and punitive damages. By way of compensatory damages, he seeks only the award of material damages. He asserts that he is entitled to the Lost Value, which he estimates as the difference between the \$3.49 he would have paid had Wal-Mart honoured its obligations and the eventual price each item was posted at after 9:00 p.m. on April 7, 2021. He provides the following table details the Lost Value for each of the 22 items:

Item #	Description	Price Paid (April 4)	Price Advertised (April 7)	Lost Value
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³⁶ *Id.*

³⁷ Exhibit P-14.

³⁸ Exhibit P-21.

6000201723542	AllGreen Landscape Large Artificial Grass	\$3.49	\$279.97	\$276.48
6000202196291	UltraHedge Privet Artificial Hedge 20" x 20" Panel	\$3.49	\$199.97	\$196.48
6000200802909	ECARPETGALLERY Silk Touch Wool/Silk Rug 5'7" x 8'8"	\$3.49	\$759.00	\$755.51
6000201694392	ECARPETGALLERY Gaia dhurrie Dhurrie 5'4" x 8'1"	\$3.49	\$279.97	\$276.48
6000202984937	ECARPETGALLERY Finest Khal Mohammadi Copper Rug 3'2" x 4'8"	\$3.49	\$439.97	\$436.48
6000202986851	ECARPETGALLERY Teimani Red Rug 3'5" x 6'2"	\$3.49	\$387.97	\$386.48
6000198998469	Guns N Roses 4X6 Plush Rug-23 oz on latex-GUN-ROSE RUG	\$3.49	\$199.97	\$196.48
6000202611381	ECARPETGALLERY Qashqai Teal Rug 5'3" x 7'3"	\$3.49	\$253.75	\$250.26
6000202825272	ECARPETGALLERY La Seda Dark Brown Rug 3'11" x 5'11"	\$3.49	\$359.97	\$356.48
6000202986248	ECARPETGALLERY Finest Peshawar Ziegler Purple Rug 5'4" x 7'11"	\$3.49	\$969.97	\$966.48
6000202986644	ECARPETGALLERY Teimani Red Rug 3'10" x 6'3"	\$3.49	\$439.97	\$436.48
6000202986653	ECARPETGALLERY Finest Khal Mohammadi Red Rug 3'2" x 4'10"	\$3.49	\$459.97	\$456.48
6000202988998	ECARPETGALLERY Finest Kargahi Red Rug 2'8" x 9'9"	\$3.49	\$639.97	\$636.48
6000200182910	Solo Waffle Oven Mitt (7"x12") Set of 2 & Pot Holder Set (8"x8") Set of 2	\$3.49	\$14.97	\$11.48
6000200690303	KNOB-IT VINTAGE HANDPAINTED CERAMIC KNOBS (12-Pack) KI1224	\$3.49	\$49.97	\$46.48
6000200691215	KNOB-IT VINTAGE HANDPAINTED CERAMIC KNOBS (12-Pack) KI1199	\$3.49	\$49.97	\$46.48
6000200695341	KNOB-IT VINTAGE HANDPAINTED CERAMIC KNOBS (12-Pack) KI1220	\$3.49	\$49.97	\$46.48
6000202521100	Sabar Aqua Luxury Feather Filled Cushion	\$3.49	\$39.97	\$36.48
6000202336540	Homeport Woven Harbour Stripe Decorative Pillow	\$3.49	\$24.97	\$21.48
6000202420320	Safavieh Natural Fiber Geraldine Geometric Area Rug	\$3.49	\$497.97	\$494.48
6000202523524	Franklin Brass Luxury Cushion Cover (no insert included)	\$3.49	\$29.97	\$26.48
6000202524001	Aura Wine Luxury Cushion	\$3.49	\$39.97	\$36.48

[22] Wal-Mart has calculated that if one takes into account the number of units purchased, this Lost Value would total \$20,409.17.³⁹

[23] Finally, Lavoie notes that Wal-Mart has already been sanctioned for its failure to respect the *Consumer Protection Act* (“CPA”),⁴⁰ in 2019 and 2017.⁴¹

1.3 Lavoie’s legal syllogism

[24] Relying on these facts, Lavoie then presents the following syllogisms.

[25] Lavoie placed his orders using the www.walmart.ca website. By placing the orders, a consumer contract, and more specifically a distance contract as contemplated by article 54.1 of the *CPA*, was entered into. S. 54.1 of the *CPA*, which reads as follows:

54.1 A distance contract is a contract entered into without the merchant and the consumer being in one another’s presence and preceded by an offer by the merchant to enter into such a contract.

A merchant is deemed to have made an offer to enter into a distance contract if the merchant’s proposal comprises all the essential elements of the intended contract, regardless of whether there is an indication of the merchant’s willingness to be bound in the event the proposal is accepted and even if there is an indication to the contrary.

[The Court’s underlinings]

[26] Indeed, he alleges that products posted on www.walmart.ca constitute an “offer” which comprises all the “essential elements”, namely a precise description of the item and its price. It is an offer within the meaning of art. 54.1 *CPA*. By placing his order, Lavoie accepted this offer and therefore an exchange of consent ensued. Wal-Mart recognized this by sending Lavoie six distinct confirmations where it refers to a “purchase” and as a result of which it debited his visa debit card and as a result his bank account.

[27] This distance contract having intervened, it creates obligations as per article 1433 CCQ and s. 16 of the *CPA* which reads as follows:

16. The principal obligation of the merchant is to deliver the goods or to perform the service stipulated in the contract.

In a contract involving sequential fulfilment, the merchant is presumed to be performing his principal obligation when he begins to perform it in accordance with the contract.

[28] Lavoie argues that Wal-Mart must honour its contracts flowing from the Orders and by failing to do so, it must pay damages.

[29] Lavoie also claims that Wal-Mart has carried out two prohibited business practices. Firstly, by removing the price from the website on April 6, 2021 and by indicating that it did not have the items in stock, Wal-Mart violated art. 231 *CPA*:

³⁹ Annex A to Wal-Mart’s argument outline.

⁴⁰ CLRQ c. P-40.1.

⁴¹ Exhibits P-19 and P-20.

231. No merchant, manufacturer or advertiser may, by any means whatever, advertise goods or services of which he has an insufficient quantity to meet public demand unless mention is made in his advertisement that only a limited quantity of the goods or services is available and such quantity is indicated.

The merchant, manufacturer or advertiser who establishes to the satisfaction of the court that he had reasonable cause to believe that he could meet public demand or who offered the consumer, for the same price, other goods of the same nature and of an equal or greater cost price is not guilty of any infraction of this section.

[30] Secondly, by refusing to sell the products at \$3.49 and demanding a higher price by reposting them on April 7, 2021 at 9:00 p.m., Wal-Mart has also infringed s. 224 c) of the *CPA*:

No merchant, manufacturer or advertiser may, by any means whatever,

(...)

(c) charge, for goods or services, a higher price than that advertised.

[31] Turning to the remedies sought, Lavoie contends that given that Wal-Mart has failed to deliver the items purchased, it must pay compensatory damages.

[32] Although he does not mention it explicitly, art. 1590 CCQ is the general provision of the *Civil Code of Quebec* setting out a parties right to enforce performance of another's party's obligations:

1590. An obligation confers on the creditor the right to demand that the obligation be performed in full, properly and without delay.

Where the debtor fails to perform his obligation without justification on his part and he is in default, the creditor may, without prejudice to his right to the performance of the obligation in whole or in part by equivalence,

- (1) force specific performance of the obligation;
- (2) obtain, in the case of a contractual obligation, the resolution or resiliation of the contract or the reduction of his own correlative obligation;
- (3) take any other measure provided by law to enforce his right to the performance of the obligation.

[33] Even though he does not spell this out as precisely, it is clear that Lavoie is not asking for specific performance, but rather performance by equivalence. Even though he once again does not refer to them expressly, obviously, articles 1607 CCQ and following are relevant. In particular, arts. 1607 and 1611 CCQ provide:

1607. The creditor is entitled to damages for bodily, moral or material injury which is an immediate and direct consequence of the debtor's default.

1611. The damages due to the creditor compensate for the amount of the loss he has sustained and the profit of which he has been deprived.

Future injury which is certain and assessable is taken into account in awarding damages.

[34] Lavoie claims "Lost Value". This is necessarily what he would claim to be the loss he has sustained and the profit of which he has been deprived.

[35] He further contends that Wal-Mart's violation of sections 16, 224 c) and 231 of the *CPA*, give rise to an award for punitive damages as per the second paragraph of s. 272 of the *CPA* which reads:

272. If the merchant or the manufacturer fails to fulfil an obligation imposed on him by this Act, by the regulations or by a voluntary undertaking made under section 314 or whose application has been extended by an order under section 315.1, the consumer may demand, as the case may be, subject to the other recourses provided by this Act,

- (a) the specific performance of the obligation;
- (b) the authorization to execute it at the merchant's or manufacturer's expense;
- (c) that his obligations be reduced;
- (d) that the contract be rescinded;
- (e) that the contract be set aside; or
- (f) that the contract be annulled,

without prejudice to his claim in damages, in all cases. He may also claim punitive damages.

[The Court's underlinings]

[36] More specifically, Lavoie contends that Wal-Mart having repeatedly "refused to honour the advertised price despite [his] multiple requests and then simply removed all of the items in question from its website as they never existed". He also alleges that Wal-Mart has already twice been sanctioned for violations of the *CPA*. Hence, this warrants the award of punitive damages in the amount of \$500 per member.

[37] Finally, Lavoie argues that if the prices posted, namely \$3.49, were the result of an error committed by Wal-Mart, this error is inexcusable and cannot vitiate Wal-Mart's consent as per the second paragraph of art. 1400 CCQ which reads as follows:

Error vitiates the consent of the parties or of one of them where the error relates to the nature of the contract, to the object of the prestation or to any essential element that determined the consent.

An inexcusable error does not constitute a defect of consent.

[The Court's underlinings]

[38] Lavoie argues that any "pricing errors" which would have been committed by Wal-Mart "can only be qualified as inexcusable, especially by a multinational such as Wal-Mart who should have systems in place to ensure that the prices it advertises on its website to the public are correct".

1.4 The facts alleged appear to justify the conclusions sought

[39] Wal-Mart, states that "having not yet had the opportunity to put forward a defence on the merits, its contestation of the appearance of right is limited to seeking the refusal of punitive damages".⁴²

⁴² Wal-Mart's argument outline, par. 29.

[40] In this regard, Wal-Mart does not contest that violations of the *CPA* can give rise to punitive damages. However, it believes that the *CPA* sections invoked by Lavoie do not apply in the presence of a “simple pricing error committed in good faith by a merchant, even if it is in the context of a consumer contract”. Not only must Wal-Mart’s good faith be presumed (2805 CCQ), but Wal-Mart asserts that by cancelling the Orders, it did not attempt to charge higher consumers a higher price. Wal-Mart therefore claims that this is not a dispute about violations of the *CPA* but rather a question of pricing errors.

[41] As a general proposition, courts must be mindful of the fact that awards of punitive damages must be based on an analysis of Respondent’s overall conduct, an exercise which it is often premature to carry out at the authorization stage.⁴³

[42] The Court cannot agree that at present Lavoie’s position that punitive damages are due is frivolous, untenable or clearly wrong. There is a “mere possibility” that such a recourse could be successful. Indeed:

42.1. If the merit’s judge comes to the conclusion that a contract was entered into and dismisses any means of defense based on Wal-Mart’s alleged vitiated consent because the pricing error, then it is not clearly wrong to argue that s. 16 of the *CPA* is called into play and that failure to deliver the product is a failure to fulfil an obligation imposed on it by the *CPA* and that it therefore give rise to punitive damages as contemplated in s. 272 *CPA*.

42.2. If Wal-Mart cannot argue the contract’s nullity, then there is clearly an issue with regard to the availability of merchandise, as per s. 231. Why is it that on April 5 and 6th, Wal-Mart made assertions that certain items were backorder? If by violating s. 231, Wal-Mart has carried out a prohibited business practice, which at this stage cannot be said to be an untenable or frivolous claim, and it therefore failed to fulfil an obligation imposed on it by the *CPA*, this may give rise to punitive damages as contemplated in s. 272 *CPA*.

42.3. If the contract is not annulled, Lavoie cannot be “clearly wrong” to assert that s. 224c) is violated. If the Orders could not be cancelled, and the only way Lavoie could obtain the products was to pay a higher price, it is not untenable, clearly wrong or frivolous to claim that Wal-Mart charged, for goods or services, a higher price than that advertised. Also, the Court is from being convinced, presently, that Wal-Mart, as it argues, “promptly cancelled the orders”. Furthermore, it is not clearly wrong that cancelling the orders and then offering the products for sale entails that they are charging a higher price.

[43] Wal-Mart further argues that the threshold for awarding punitive damages under the *CPA* as set by the Supreme Court in *Time inc.* is very high and that no allegations warrant such a claim.⁴⁴

[44] The Supreme Court states that the “mere fact that a provision of the C.P.A. has been violated is not enough to justify an award of punitive damages”.⁴⁵ Nevertheless,

⁴³ *Levy c. Nissan Canada inc.*, 2021 QCCA 682, par. 37.

⁴⁴ *Richard v. Time Inc.*, 2012 SCC 8, [2012] 1 S.C.R. 265 [“*Time inc.*”]

⁴⁵ *Id.*, par. 178.

merchants “cannot be lax, passive or ignorant” with respect to consumers’ rights and to their own obligations under the *CPA* and they must be “highly diligent in fulfilling their obligations”.⁴⁶ The *CPA*’s purpose is to prevent merchants’ conduct as a result of which “they display ignorance, carelessness or serious negligence”.⁴⁷ Where the merchant “realizes that an error has been made and tries diligently to solve the problems caused to the consumer, this should be taken into account”.⁴⁸ Therefore, a Court should take into account how the “merchant’s attitude toward the consumer changed after the violation”.⁴⁹ The Supreme Court concludes: “the court must consider the whole of the merchant’s conduct at the time of and after the violation”.⁵⁰ An award for punitive damages is not dependent on an award for compensatory damages.⁵¹

[45] Wal-Mart’s various emails sent on April 5 and 6 referring to items which are “backorder”, “increased volume order” and “some items [which] have been cancelled” are perplexing and certainly do not lead the Court to the conclusion that it is untenable to contend that Wal-Mart has been careless, that they have not been highly diligent and that they have not diligently attempted to resolve the problems. There is an arguable case, a mere possibility, that Wal-Mart may be condemned to pay punitive damages. Necessarily, this is a mixed question of fact and law which cannot be decided at the authorization stage. The allegations raised are very different from those which the honourable Martin F. Sheehan deemed to be insufficient in *Mireault* to warrant a condemnation for the payment of punitive damages.⁵²

[46] Wal-Mart, even though not formally stating so, also seems to contest that the facts do not justify the conclusions on another front, namely the effect of the Terms of Sale. These Terms of Sale are referenced to in the order confirmations and could be accessed by Lavoie by hyperlink.⁵³ S. 2 thereof allows for unilateral cancellation by Wal-Mart: “Walmart Canada also reserves the right, at its sole discretion, to cancel any order (other than Marketplace Orders) after acceptance for any reason”. S. 4 provides that “in the event that an item is listed at an incorrect price due to an error in pricing, Walmart Canada will have the right, at Walmart Canada’s sole discretion to (...) cancel any orders placed for that item”. The Supreme Court has recognized in *Dell Computer Corp.*⁵⁴ that a binding arbitration clause which is contained in terms of sale accessible by way of hyperlink is not an external clause and is binding on the parties. Nevertheless, it is certainly arguable that these clauses run afoul s. 10 and 261 of the *CPA* which read as follows:

⁴⁶ *Id.*, par. 176.

⁴⁷ *Id.*, par. 177.

⁴⁸ *Id.*, par. 178.

⁴⁹ *Id.*

⁵⁰ *Id.*, par. 180.

⁵¹ *Id.*, par. 146, the Court citing an extract of *de Montigny v. Brossard (Succession)*, 2010 SCC 51, [2010] 3 S.C.R. 64, par. 40.

⁵² *Mireault v. Loblaws*, 2022 QCCS, par. 59 to 67.

⁵³ Exhibit D-1.

⁵⁴ *Dell Computer Corp. v. Union des consommateurs*, [2007] 2 S.C.R. 801, 2007 SCC 34, par. 91 to 101.

10. Any stipulation whereby a merchant is liberated from the consequences of his own act or the act of his representative is prohibited.

261. No person may derogate from this Act by private agreement.

[47] Taking into consideration all of the above, the criteria set out in 575 (2) is therefore met.

2. Do the class members' claims raise identical, similar or related issues of fact or law (art. 575(1) CCP)?

[48] Wal-Mart's main line of attack is that Lavoie cannot meet this criteria. It contends that this case is fundamentally a case about error. All alleged violations of the *CPA* are entirely dependent upon the assumption that the contracts of sale are valid. However, they are contingent on any ultimate ruling whether Wal-Mart's consent is vitiated by error. This in turn depends on the issue whether the error is inexcusable in light of the behaviour of the parties, including whether it was provoked by a *dol* from the party seeking to enforce the contract. This analysis must be carried out *in concreto*; in other words, the conduct of both parties to each contract must be assessed.

[49] In particular, Wal-Mart argues that Lavoie's and any other consumer's knowledge or imputed knowledge of the error and its good faith will be determinative of the issue whether the error is excusable or not. In particular, it will need to determine if Lavoie took advantage of this error by purchasing, via six different orders, 49 items, including an inordinate number of rugs, namely in one case 10 identical rugs and in another 5 identical rugs. Wal-Mart argues that therefore there is no common issue to be decided on a collective basis in a manner that would advance the resolution of every member's claims. Lavoie's claim rather leads to a plethora of individual trials in which the entire cause of action will be argued. Small claims procedures are the proper forum to debate such claims and that is where error pricing cases are debated.

2.1 Legal principles

[50] Courts must adopt a flexible approach when determining if there is a common interest among the group's members.⁵⁵ Just as is the case when analyzing par. 575(2) CCP, the threshold is low.⁵⁶ A single common question is sufficient as long as it advances the litigation in a not insignificant manner.⁵⁷ In other words, the resolution of the common question must not have an insignificant role in the outcome of the case. A common question may advance the litigation even if many individual questions remain.⁵⁸

2.2 Analysis

[51] Wal-Mart's argument is, at first blush, not without appeal, but it does not resist a more detailed analysis.

⁵⁵ *Vivendi Canada Inc. v. Dell'Aniello*, 2014 SCC 1, [2014] 1 S.C.R. 3, par. 54 [*"Vivendi"*], cited in *Asselin*, par. 84.

⁵⁶ *Vivendi*, par. 72, cited favourably in *Asselin*, par. 84.

⁵⁷ *Asselin*, par. 85.

⁵⁸ *Asselin*, par. 87.

[52] As a starting point, it is tenable to argue that six contracts have been entered into for each of the six Orders. It is on the basis of these contract that Lavoie then makes the demonstration of his legal syllogism, as regards non-performance and prohibited business practices. The Court has found that Lavoie meets the criteria set out in s. 575(2) CCP for these claims. The six contracts would be valid until they are invalidated by a court. The Court reiterates that for the purposes of the authorization, it is clearly not convinced that Wal-Mart may invoke a unilateral unfettered power to cancel orders.

[53] A Court may annul these contracts either by way of direct action on the part of Wal-Mart or, more realistically, when presented as a means of defense in the course of a claim for breach of contract. Wal-Mart will most likely present such a defense once the introductory motion is served.

[54] It will be Wal-Mart's burden to establish the error. Error in the present case will be a means of defense. Not surprisingly, courts have stated that when there is an arguable case that there exists a contract, arguments relating to the "excusable" error are best left to the merits.⁵⁹

[55] If Wal-Mart were right in its assertions, this would potentially have far-reaching effects. Indeed, if the presence of facts whereby the merchant invokes error which may give rise to a debate as to whether this error is inexcusable would disqualify the matter for adjudication by way of class action, the class action procedural vehicle would lose much of its value in consumer matters.

[56] Plaintiff's counsel does concede in arguments that most likely there may have been some type of error involved when the various prices for the items bought by Lavoie were posted by Wal-Mart at \$3.49. The Court however has no explanation how this error occurred and how prevalent it may have been. Was one or several items purchased by Lavoie or other members indeed correctly priced at \$3.49? Proof is therefore required to get to the bottom of this. Assuming however, for argument's sake, that there is no debate as to the existence of the error, then the question will indeed be whether this error is inexcusable.

[57] As Wal-Mart rightfully points out, the Court of Appeal has stated that it is the party who seeks enforcement of the contract which must prove the inexcusable character thereof.⁶⁰ Nevertheless, as stated by professor Vincent Karim, error is a concept "qui doit être interprété de façon restrictive afin d'assurer une protection adéquate à la qualité du consentement".⁶¹ Plaintiff has pre-emptively raised certain arguments as to the inexcusable character of Wal-Mart's actions, but it is not in its conclusions seeking a declaration that the error is inexcusable. Strictly speaking, this is not what the authorization is seeking.

⁵⁹ *Hurst v. Air Canada*, 2017 QCCS 223, par. 17; the class action was settled: *Hurst v. Air Canada*, 2019 QCCS 4614.

⁶⁰ *Gestion Unipêche M.D.M. Ltée c. Société de Gestion George Clapperton Inc.*, 2003 CanLII 47459 (QC CA), par. 16.

⁶¹ Vincent KARIM, *Les obligations*, 5^{ième} éd., Montréal, Wilson & Lafleur, 2020, par. 1140, p. 487.

[58] This should put an end to the debate at the authorization stage.

[59] It is obvious that on the merits, error and its excusable or inexcusable character will very likely be a matter of heated debate. The merits judge may come to one of the four potential conclusions on the sale:

59.1. There is no error.

59.2. There is an error and it is excusable.

59.3. There is an error, but it is inexcusable.

59.4. There is an error, it is inexcusable, but in light of the fraudulent (dolosif) behaviour of Lavoie, it is excusable.

[60] Both parties refer to an impressive number cases, most rendered by the Cour du Québec, in the small claims division which adopt a variety of positions. This in of itself indicative in how far the matter is litigious.

[61] A first line of cases finds that there is an error and that it is excusable, relying on the *Faucher* decision.⁶² In this decision, a consumer ordered, via Costco's website, 10 computers for \$2 each and he received a confirmation from Costco. His credit card was not debited. The next day, the consumer received a notice from Costco stating that the orders had been cancelled. The learned judge concluded that there was no contract based seemingly on two intermingled lines of thought. First, in its terms of sale, Costco reserves its right to annul an order "si le prix ou toute autre information importante du site est inexact". Hence, there can be no contract if indeed Costco deems there to be a pricing error and invokes this clause. Second, the judge believes that it is the client who made the offer, not Costco. A Web site on which the client can place orders is not an "offer" according to the learned judge. It is a proposition. The client in placing an order makes the offer, which according to the judge, Costco refused. This reasoning is based on a very unconvincing analysis of s. 54.1 CPA and distance contracts and relies on a truncated extract of Nicole L'Heureux' s treatise which in its complete version says the opposite of the cited extract. Also, surprisingly, the judge who heard the *Faucher* matter in another decision rendered six months later once again comes to the conclusion that there was an error and no distance contract, but then concludes that Costco, by modifying the price for the item, committed a prohibited business practice as per s. 224 c) CPA and she then condemned the merchant to damages equivalent to the Lost Value.⁶³ The Court finds the reasoning adopted in *Magasin Latulippe inc.* far more convincing which concludes that this is a distance contract and that it is the merchant that makes an offer on its website that the consumer accepts.⁶⁴

[62] Another line of cases, without relying on the *Faucher* reasoning as to the existence of a distance contract and the lack of an accepted offer by the merchant, nevertheless concludes that the error is excusable. For example, in *Magasin La clé de sol inc.*, without

⁶² *Faucher c. Costco*, 2015 QCCQ 3666. This case is applied in: *Roy c. Groupe Sonxplus inc.*, 2018 QCCQ 3631, par. 22-34; *Dumont c. Sears Canada inc.*, 2015 QCCQ 13883.

⁶³ *Therrien c. Sears Canada Inc.*, 2015 QCCQ 13168.

⁶⁴ *Tardif-Audy c. Magasin Latulippe inc.*, 2021 QCCQ 6170, par. 23 to 40 [« *Magasin Latulippe inc.* »].

referring explicitly to the concept of inexcusable error, the judge finds that “l’écart entre la valeur des objets et le prix réclamé confirme qu’il s’agit bel et bien d’une erreur qui s’explique par la livraison du nouveau site Internet avec des éléments inexacts que Clé de Sol n’avait pas eu l’opportunité de corriger ». ⁶⁵ In, *Paul Albert Chevrolet Cadillac Ltée*, where a media outlet made an error in publishing the merchant’s advertisement indicating that a vehicle was being sold for \$19,995 as opposed to \$36,995, the judge concluded that “l’erreur est évidente et admise” and that the merchant’s consent had been vitiated by an error that could not be attributed to him. ⁶⁶

[63] Other cases have come to the opposite conclusion. In a case where the facts are not perfectly transferable to this case, the Court of Appeal nevertheless cites the honourable Jean-Louis Baudouin and professor Pierre-Gabriel Jobin, and summarizes their reasoning as follows: “si, compte tenu de son expérience de vendeur, son erreur est inexcusable, elle doit en supporter les conséquences”. ⁶⁷ In other judgment of the Cour du Québec, Small Claims Division, the judges found that the merchant’s pricing error was inexcusable, citing such reasons as the fact that the merchant is an “entreprise de grande envergure”, ⁶⁸ a “vendeur expérimenté” or un “vendeur professionnel”. ⁶⁹ One judge held that “il est difficile de qualifier cette erreur dans le coeur même des opérations de Sunwing à une étape cruciale de la relation contractuelle avec le consommateur, autrement qu’inexcusable”. ⁷⁰ Along the same lines, the honourable David L. Cameron held that “a business as large and sophisticated as British Airways (...) surely has the capacity to build into its booking system programming safeguards to protect the integrity of its on-line system from the type of human error that was allegedly made here”. He further stated that “the operation of a business as complex as a major international airline requires information systems that are complex and state of the art”. ⁷¹ In another case, the judge cites the following extract of a doctrinal writing by professor Nicolas Vermeys:

En effet, accepter que l’erreur sur le prix puisse vicier le consentement en vertu de l’article 1400 C.c.Q., c’est ouvrir une boîte de Pandore et permettre à tout contractant ayant fait une erreur économique d’invoquer qu’il s’agit plutôt d’une erreur sur le prix et ainsi d’ébranler considérablement la stabilité des contrats.

[64] Finally, as Wal-Mart argues, the co-contractor’s behaviour can indeed be relevant when he does not act in good faith, for example when he contracts through fraudulent manoeuvres or omissions. The Court of Appeal explains in *Construction NRC inc.*: ⁷²

[27] L’erreur inexcusable peut devenir excusable lorsque l’autre contractant manque à son obligation de bonne foi.

⁶⁵ *Lelièvre c. Magasin La clé de sol inc.*, 2011 QCCQ 577.

⁶⁶ *Lamarre c. Paul Albert Chevrolet Cadillac Ltée*, 2011 QCCQ 8349, par. 57.

⁶⁷ *Ile Perrot Nissan c. Holcomb*, 2003 CanLII 39504 (QC CA), par. 24; cited in *Rocheffort c. Vacances Sunwing inc.*, 2015 QCCQ 3141, par. 20 et 21.

⁶⁸ *Comtois c. Vacances Sunwing inc.*, 2015 QCCQ 2684 [“*Comtois*”].

⁶⁹ *Boghgegian c. Voyages à rabais inc.*, 2017 QCCQ 2410, par. 13.

⁷⁰ *Comtois*, par. 58 to 61.

⁷¹ *Campbell c. British Airways*, 2020 QCCQ 10111, par. 55 [“*British Airways*”].

⁷² *Ville de Salaberry-de-Valleyfield c. Construction NRC inc.*, 2021 QCCA 844.

[28] Le cocontractant qui commet un dol manque à son obligation légale ou contractuelle de bonne foi. Le dol peut donc ainsi être négatif, ce qui sera le cas lorsqu'une personne laisse son cocontractant croire erronément une chose sans le détromper (réticence) ou lorsqu'elle s'abstient de révéler un fait important qui changerait la volonté de contracter (silence), comme le prévoit d'ailleurs l'alinéa 2 de l'article 1401 C.c.Q.

(...)

[29] Pour établir qu'elle a été victime de dol, NRC doit se décharger d'un fardeau assez lourd. Ces mêmes auteurs écrivent qu' « elle doit démontrer l'existence d'une erreur dont elle a été victime, son caractère déterminant, l'intention de tromper, et le fait que le dol a émané du cocontractant ou a été connu de lui ».

[30] Dans l'évaluation de cette preuve, le juge de première instance doit se placer au moment du contrat et déterminer si les faits pointent vers l'existence d'un dol. Il pourra aussi prendre en considération un élément postérieur à la formation du contrat si cet élément « est utilisé à titre d'élément additionnel, au chapitre de la crédibilité ».

[The Court's underlinings; References omitted]

[65] Hence, the question of error can obviously be a matter of great debate which cannot be carried out in abstraction of a factual record. The following remarks of the honourable David L. Cameron in *British Airways* show certain of the considerations that will need to be addressed by the merits judge:⁷³

British Airways makes much of the fact that Mr. Campbell knew that the posting of the low fare had been taken down when he called to obtain confirmation of the issue of the tickets and their validity. This may lead to the inference that he suspected the price might be an error when he booked, and that, after the price change was made, he had more reason to believe that this was the case, but it does not, with respect, show that, when he booked the flights and before the price was changed, he knew that the price he had obtained was an error. It is also not evidence, as British Airways alleges, that he never had the intention to travel and was simply engaging in an exercise to further a lawsuit against British Airways. Nor is there any suggestion that he caused British Airways to err in the contractual formation stage. He could not have done so as he was not dealing with a human contact, but with a computer algorithm when he booked on line. The human representative that he spoke to later ratified the contract.

[The Court's underlinings]

[66] In *Magasin Latulippe inc.*, the honourable Christian Brunelle refers to the criteria of the “consommateur crédule et inexpérimenté” set out in *Time Inc.* and concludes that it cannot be excluded that such a consumer could believe that a vendor would apply a significant discount. He also reasons that “si importante soit-elle, l'exigence de bonne foi en matière contractuelle ne va pas jusqu'à imposer au consommateur d'alerter le commerçant quand le prix d'un article convoité lui paraît anormalement bas”⁷⁴.

⁷³ *Id.*, par. 54.

⁷⁴ *Magasin Latulippe inc.*, par. 54 to 56.

[67] In conclusion, the question of error is a means of defense. It is not clear at this stage if the merits judge will consider whether an error has occurred for each of the purchases. If yes, he may then examine whether the error is excusable. In this regard, once he has understood how the pricing error has occurred, he may conclude that Wal-Mart's behaviour results in the error being inexcusable. He may, but will not necessarily have to examine Lavoie's and any other member's good faith. Perhaps, this may only be decided at the individual level. This will be for the merits judge to decide. Nevertheless, clearly, there are a number of collective questions that can be resolved at the collective level which will advance the file in a not insignificant manner.

[68] This criteria is therefore also met.

3. Does the composition of the class make 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 575(3) CCP?

[69] There is no true contestation of this element. The purchases having been made through the web service, it would be impossible for Lavoie to know which consumer purchased a product. It is clear from the Wal-Mart representative's response that several clients were in the same situation.

[70] This criteria is therefore met.

4. Is Lavoie in a position to properly represent the class members 575(4) CCP?

[71] In order to satisfy this requirement, Lavoie must show that he is i) interested in the suit, ii) that he is competent and iii) that he has no demonstrated conflict of interest with the group members.⁷⁵

[72] Lavoie shows that he is interested in the suit. He followed-up with Wal-Mart's customer service when they cancelled the Orders. He collected the necessary information and kept records of the cancellations and chat. He instituted this action.

[73] Wal-Mart's contestation touches upon the third element, namely the conflict of interest. It pleads that Lavoie, in placing the Orders and, potentially, in bad faith, taking advantage of a manifest pricing error in order to attempt to make a significant windfall, he is in a clear conflict. For the same reasons the Court has presented in examining criteria 575(1), the Court does not see a potential eventual debate on his good faith as being an obstacle to act as representative.

[74] This criteria is therefore also met.

5. The class definition

[75] Lavoie proposes the following class definition:

All consumers who, from April 4th-5th, 2021, purchased an item from the www.walmart.ca website and who, after receiving a purchase confirmation from

⁷⁵ *Oratoire*, par. 32.

Wal-Mart at the price initially advertised, subsequently had their purchase cancelled by Wal-Mart.

[76] Wal-Mart argues that this class is not appropriate. It rather proposes the following definition:

All consumers domiciled or residing in Québec who, on April 4th or 5th, 2021, placed an order for an item priced at \$3.49 from the www.walmart.ca website and who, after receiving a purchase confirmation from Walmart at the price initially advertised, subsequently had their purchase cancelled by Walmart because of a pricing error.

[The Court's underlinings]

[77] In *Sibiga*, the Court of Appeal stated that a class must meet the following requirements: the definition must be founded on objective criteria with a rational foundation; the definition of the class must not be circular or imprecise; and it cannot be based on criteria that are dependent on the outcome of the action on the merits.

[78] It is not incumbent on the motion judge to circumscribe the class so that the authorization may be granted.⁷⁶ It is possible however for a judge to redefine a class, “so that its dimensions are better aligned with the claim as framed by the applicant”.⁷⁷

[79] The Plaintiff does not contest these modifications save for the last one.

[80] Indeed, the Terms of Sale provide at s. 17 that the Courts of the Province of Ontario have “exclusive jurisdiction for any claim, action or dispute with Walmart Canada or relating in any way to the use of the Site or a purchase made on the Site”. Hence, the class must be restricted to consumers residing in the province of Québec.

[81] The Court is also of the opinion that the reference to April 4 or 5, to the placing of an order rather than the purchase and the reference to \$3.49 more properly delineate the recourse.

[82] However, the Court at this stage is not ready to restrict the class to “pricing errors”. The notion of pricing error will be decided at the merits. It is not appropriate at this stage to include wording that is dependent on the outcome of the action on the merits in the class definition.

6. The common questions

[83] Lavoie proposes the following principle questions of fact and law to be treated collectively:

- a) By cancelling consumers' orders of April 4 and 5, 2021, did Wal-Mart violate Quebec's Consumer Protection Act?
- b) If so, are Class members entitled to compensation and in what amount?
- c) Are the Class members entitled to punitive damages and, if so, in what amount?

⁷⁶ *Baratto c. Merck Canada inc.*, 2018 QCCA 1240, par. 79.

⁷⁷ *Sibiga c. Fido Solutions inc.*, 2016 QCCA 1299, par. 136, cited favourably in *Levy c. Nissan Canada inc.*, 2021 QCCA 682, par. 41.

[84] As the honourable Pierre C. Gagnon has explained, the Court may make slight cosmetic touch-ups when questions could be rendered more clear. However, the Court cannot “radically” redraft them.⁷⁸

[85] In this regard, the Court believes the questions need to be slightly tweaked as follows:

- a) By cancelling consumers’ orders of April 4 and 5, 2021, did Wal-Mart violate s. 16, 231 and 224c) of Québec’s *Consumer Protection Act*?
- b) If so, are Class members entitled to compensation and in what amount?
- c) Are the Class members entitled to punitive damages and, if so, in what amount?

FOR THESE REASONS, THE COURT:

[86] GRANTS the Re-modified application;	ACCORDE en partie la demande remodifiée;
[87] AUTHORIZES the bringing of a class action in the form of an originating application in damages;	AUTORISE l’introduction d’une action collective sous la forme d’une demande introductive en dommages-intérêts;
[88] APPOINTS the Applicant, Dominique Lavoie, as representative plaintiff of the persons included in following class: All consumers domiciled or residing in Québec who, on April 4th or 5th, 2021, placed an order for an item priced at \$3.49 from the www.walmart.ca website and who, after receiving a purchase confirmation from Wal-Mart at the price initially advertised, subsequently had their purchase cancelled by Wal-Mart.	ATTRIBUE au demandeur, Dominique Lavoie, le statut de représentant des personnes comprises dans le groupe ci-après décrit : Tout consommateur, domicilié ou résidant au Québec, qui le 4 ou 5 avril 2021, a placé une commande sur le site internet www.walmart.ca pour un item vendu à \$3,49 et qui, après avoir reçu une confirmation de Wal-Mart au prix initialement annoncé, a ensuite vu son achat annulé par Wal-Mart.
[89] IDENTIFIES the principal question of fact and law to be treated collectively as the following: a) By cancelling consumers’ orders of April 4 and 5, 2021, did Wal-Mart violate s. 16, 231 and	IDENTIFE les questions principaux de faits et de droit à être traitées collectivement comme suit : a) En annulant les commandes de consommateurs les 4 et 5 avril 2021, Wal-Mart viole-t-elle les articles 16, 231 et 224c) de la <i>Loi</i>

⁷⁸ *Barré c. CDPQ Infra inc.*, 2020 QCCS 1101, par. 128.

<p>224c) of Québec’s Consumer Protection Act?</p> <p>b) If so, are Class members entitled to compensation and in what amount?</p> <p>c) Are the Class members entitled to punitive damages and, if so, in what amount?</p>	<p><i>sur la protection du consommateur?</i></p> <p>b) Si oui, les membres du groupe ont-ils droit à des dommages compensatoires et, le cas échéant, à la hauteur de quel montant?</p> <p>c) Les membres du groupe ont-ils droit à des dommages moratoires et si oui, à la hauteur de quel montant?</p>
<p>[90] IDENTIFIES the conclusions sought by the class action to be instituted as being the following:</p> <p>GRANT the Plaintiff’s action against Defendant for all class members;</p> <p>CONDEMN the Defendant to pay to the members of the Class an amount to be determined in compensatory damages, and ORDER collective recovery of these sums;</p> <p>CONDEMN the Defendant to pay to the members of the Class \$500 each in punitive damages, and ORDER collective recovery of these sums;</p> <p>CONDEMN the Defendant to pay interest at the legal rate and the additional indemnity provided for in art. 1619 C.C.Q. on the above sums from the date of service of the Application to Authorize the Bringing of a Class Action and to Appoint the Status of Representative Plaintiff;</p> <p>ORDER the Defendant to deposit in the office of this Court the totality of the sums which forms part of the collective recovery, with interest and costs;</p>	<p>IDENTIFIE les conclusions recherchées par l’action collective à intenter comme étant les suivantes :</p> <p>ACCUEILLIR l’action collective contre la défenderesse pour tous les membres du groupe;</p> <p>CONDAMNER la défenderesse à verser aux membres du groupe un montant à être déterminé à titre de dommages compensatoire et ORDONNER le recouvrement collectif de ceux-ci;</p> <p>CONDAMNER la défenderesse à payer à chaque membre du groupe la somme de 500\$ à titre de dommages punitifs et ORDONNER le recouvrement collectif de ces montants;</p> <p>CONDAMNER la défenderesse à verser aux membres du groupe des intérêts au taux légal plus l’indemnité additionnelle prévue à l’article 1619 C.c.Q. à partir de la date du Application to Authorize the Bringing of a Class Action and to Appoint the Status of Representative Plaintiff;</p> <p>ORDONNE au défendeur de déposer auprès de la Cour le montant intégral des sommes au</p>

<p>ORDER that the claims of individual Class members be the object of collective liquidation if the proof permits and alternately, by individual liquidation;</p> <p>CONDEMN the Defendant to bear the costs of the present action including the cost of notices, the cost of management of claims and the costs of experts, if any, including the costs of experts required to establish the amount of the collective recovery orders;</p>	<p>titre du recouvrement collectif, avec intérêts et frais;</p> <p>ORDONNER que les réclamations des membres soient liquidées au stade collectif si la preuve le permet ou alternativement, par voie de liquidation individuelle;</p> <p>LE TOUT avec frais de justice incluant les frais liés aux avis, les frais de gestion des réclamations, le cas échéant, incluant les frais d'expert requis pour établir les sommes à verser pour les fins du recouvrement collectif;</p>
<p>[91] DECLARES that all members of the Class that have not requested their exclusion, be bound by any judgement to be rendered on the class action to be instituted in the manner provided for by the law;</p>	<p>DÉCLARE que tous les membres du groupe qui n'ont pas demandé leur exclusion son liés par tout jugement à rendre sur l'action collective à intenter de la manière prévue par la loi;</p>
<p>[92] CONVENES the parties to a further hearing to hear representations on the request for information, the content of the notices required under art. 579 of the <i>Code of Civil procedure</i>, the appropriate communication r publication of the said notice and the appropriate delay for a class member to request exclusion, such hearing to take place within 60 days of the present judgment, on a date to be determined between the parties and the Court;</p>	<p>CONVOQUE les parties à une audience afin d'entendre leurs représentations quant aux demandes de documents, le contenu de l'avis requis en vertu de l'article 579 du Code de procédure civile, la communication ou la publication appropriée dudit avis et le délai approprié pour qu'un membre demande l'exclusion, une telle audience doit avoir lieu dans les 60 jours du présent jugement, à une date à être déterminée entre les parties et le Tribunal;</p>
<p>[93] THE WHOLE with costs including publication fees.</p>	<p>AVEC FRAIS, incluant les frais de publication.</p>

CHRISTIAN IMMÉR, J.S.C.

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Me Se-Line Duong
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Hearing date: February 10, 2022