# SUPERIOR COURT

CANADA
PROVINCE OF QUEBEC
DISTRICT OF QUEBEC

No. 200-06-000117-096

DATE: July 8, 2011

**THE HONOURABLE ALICIA SOLDEVIDA, J.S.C., PRESIDING**

**COMITÉ SYDICAL NATIONAL DE RETRAITE BÂTIRENTE INC.**
and
**DANIEL SIMARD**, *as a designated person*
and
**LE MOUVEMENT D'ÉDUCATION ET DE DÉFENSE DES ACTIONNAIRES (MEDAC)**
and
**ROBERT LAMOUREUX**, *as a designated person*

*Petitioners*

v.

**SOCIÉTÉ FINANCIÈRE MANUVIE,**
**DOMINIC D'ALESSANDRO,**
**GAIL C.A. COOK-BENNETT,**
**ARTHUR R. SAWCHUCK**
and
**PETER RUBENOVITCH**

*Respondents*

JUDGMENT

on Motion for Authorization to Institute a Class Action

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[1] The Petitioners, Comité syndical national de retraite Bâtirente inc. ("Bâtirente") and Le Mouvement d'éducation et de défense des actionnaires ("MEDAC") as well as the persons that they have respectively designated, Daniel Simard and Marc Lamoureux, ask to be authorized to begin a class action[1] against Société financière Manuvie ("Manulife") and its officers and directors Dominic D'Alessandro ("D'Alessandro"), Gail C.A. Cook-Bennett ("Cook-Bennett"), Arthur R. Sawchuck ("Sawchuck") and Peter Rubenovitch ("Rubenovitch").

[2] The Petitioners maintain that the Respondents failed to fulfill their continuous disclosure obligations provided for in section 73 of the *Securities Act*[2] ("SA") and in *Regulation 51-102 respecting Continuous Disclosure Obligations*[3] ("*Regulation 51-102*"); moreover, they add that the Respondents D'Alessandro, Cook-Bennett, Sawchuck and Rubenovitch failed to fulfill their duty of diligence as directors and officers (article 1457 C.C.Q.).

[3] This is a recourse for damages against an authorized issuer and its directors and officers linked to the contravention of a statutory obligation, that is their failure to disclose material facts to the secondary market, combined with a civil law recourse for damages for false or misleading representations.

[4] The Petitioners blame the Respondents for having caused them losses due to the artificially high price that they paid for the shares acquired directly from Manulife or through investment funds during the period covered by the recourse, that is between January 26, 2004 and February 12, 2009 [RM 3].

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[1] Re-amended Motion for Authorization of October 5, 2010; in the judgment, the Court will refer to the paragraphs of that proceeding by using the abbreviation [RM] with the number of the paragraph

[2] S.R.Q. c. V-1.1

[3] c. V-1.1, r. 24

[5] The Petitioners suggest that during that period the Respondents failed to completely disclose the risks to which the guaranteed portfolios of variable annuities and segregated funds were exposed by not publicly disclosing that Manulife did not have adequate management practices relating to guaranteed products, that it did not use hedging [RM 48.10], that it did not diversify its investments [RM 24] or reinsure its risks, to compensate for market fluctuations [RM 2, 13, 14], unlike other financial companies.

[6] The Petitioners allegedly thus permitted inaccurate and misleading information and representations having an impact on the value of the securities to be publicly disseminated to the members of the group.

[7] The group covered by the recourse is described as follows in the Re-amended Motion, in paragraph 1:

> [Translation] All residents of Quebec other than persons who, under the Code of Civil Procedure, cannot be members of a group in Quebec who, in the period between January 26, 2004 and February 12, 2009, bought or otherwise acquired stocks, bonds or other securities from the Respondent Société Financière Manuvie, directly or indirectly, or through mutual funds or otherwise (the "Members of the Group").

[8] The Re-amended Motion from now on only covers residents of Quebec, an amendment having been agreed between the parties and then authorized by the Honourable Justice George Strathy in the Ontario class action[4] to exclude Quebec residents from it.

[9] At the time of the hearing on February 25 2011, the Petitioners suggested adding at the end of the description of the group: "[Translation] ...and who had not yet disposed thereof on or before February 12, 2009" and the Respondents, for their part, proposed the addition of the mention "[Translation] and still holding them on February 12, 2009" in order to exclude from the group those persons who, during that period, had bought and then resold shares before February 12, 2009.

[10] The allegedly incorrect or misleading information was corrected and the real situation revealed on February 12, 2009 by a press release disseminated by Manulife that resulted in a material fall in the quoted market price of the shares.

## 1.- THE RESPONDENTS' POSITION

[11] The Respondents vigorously contest the request for authorization of the class action. For them, none of the criteria of article 1003 is met. Their arguments are structured as follows.

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[4] *Dugal Murphy et al., as Trustees of the Iron Workers Ontario Pension Fund and Leonard Schwartz v. Manulife Financial Corporation, Dominique D'Alessandro, Gail C.A. Cook-Bennett, Arthur R. Sawchuck and Peter Rubenovitch,* CV-09-383998-00CP

[12] First, the planned class action is based on the principles of civil law, which require proof of a fault, a damage and a causal link peculiar to each investor, and no allegation in the motion supports the existence of such a causal link, rendering the criteria of articles 1003 (a) and 1003 (b) impossible to meet; to circumvent this difficulty, the Petitioners invoke legal theories imported from American law, "fraud on the market" or "efficient market", which are not related to Quebec and Canadian law and, therefore, inapplicable in this case.

[13] Even accepting this legal theory in Quebec law, it is still necessary that the omissions for which Manulife is blamed constitute, as the Petitioners assert, a contravention of the continuous disclosure obligation to which Manulife is subject, and/or that the information that it disseminated was false or misleading and could have had an effect on investors' decisions, which the Respondents dispute vigorously.

[14] The Petitioners not having availed themselves of the statutory regime provided for in sections 225.2 to 225.33 of the SA that establishes, subject to certain conditions, a presumption of causation against an authorized issuer that has contravened its continuous disclosure obligation, the Petitioners' legal syllogism cannot hold good. Moreover, recourse to the SA is available to a person who has acquired or transferred a security only with the permission of the Court, a permission that has not been asked for in the Re-amended Motion.

## 2.- THE FACTS

[15] Manulife is a holding company incorporated under the authority of the *Insurance Companies Act*[5] and the owner, among others, of all of the issued common shares of the Manufacturer life insurance company and of the John Hancook Life Insurance Company of New York. It is a public company listed on the stock exchanges in Toronto under the symbol MFC and in New York under the symbol NYCE, as well as on other stock exchanges elsewhere in the world.

[16] Manulife offers its customers a varied range of financial protection products and wealth management services. Through its subsidiaries, it has sold guaranteed products not offered by the banks, trust companies and investment companies [RM 6 and 7].

[17] Theses products offer as an advantage to purchasers the guarantee of a minimum yield or performance, and this independently of the performance for Manulife of the securities acquired with the investors' money. These products are managed in the same way as the other mutual funds by the investment of the money paid by Manulife's customers in certain securities. Between the years 2003 and

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[5] SC 1991, c. 47

2008, the sales of these kinds of products went from $71,464,000 to $164,755,000 [RM 12 and 21.5]:

**Guaranteed Product Guarantees**
(expressed in $ millions)

| Fiscal Year ended December 31 | Guaranteed Products Under Management | Fund Value | Amount at Risk (Guarantees less Related Fund Value) |
|---|---|---|---|
| 2003 | $71,464 | 16,117 | 2,596 |
| 2004 | 117,890 | 35,664 | 2,962 |
| 2005 | 139,695 | 49,096 | 2,191 |
| 2006 | 172,048 | 64,114 | 1,562 |
| 2007 | 174,977 | 71,800 | 2,093 |
| 2008 | 164,755 | 74,422 | 26,809 |

[18] Bâtirente is a non-profit corporation [RM 5.2] created in accordance with Part III of the *Companies Act* having as its mission to promote and manage collective pension and saving plans for the members of unions affiliated with the Confédération des syndications nationaux (CSN).

[19] Bâtirente promoted and managed three funds that held Manulife shares during the period of the recourse:

- Canadian shares fund LODH;
- Bâtirente Canadian shares fund PMB;
- Bâtirente Multi Canadian shares fund, which held the LODH and PMB funds as well as the Hexavest Canadian shares fund [RM 5.5].
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[20] The Groupe financier SSQ acts as trustee and manager of these funds [RM 5.6.

[21] Bâtirente or its agents gave the orders to carry out transactions relating to Manulife shares during the period of the recourse, such shares being held until September 2006 in the Bâtirente Multi Canadian shares fund through Optimum Gestion d'actifs [RM 5.7 and 5.8].

[22] In September 2006, all of those shares were transferred to a transition manager in the Bâtirente Multi Canadian shares fund LODH and Hexavest [RM 5.9].

[23] The details of the transactions after September 2006 in the Bâtirente Canadian shares fund PMB, the Bâtirente Canadian shares fund LODH and Hexavest's portfolio in the Bâtirente Multi Canadian shares fund are described in the

form of tables in paragraph 5.10 of the Re-amended Motion. Those tables reveal purchase and sale transactions and the prices paid. At the dates toward the end of the period of the recourse, one notes purchases of Manulife securities in September, October and November 2008, as well as on February 12, 2009, and then subsequently to the period of the recourse, on May 12 and June 16, 2009.

[24] In 2008, the stock markets started to come under pressure [RM 46].

[25] On October 13, 2008, Manulife issued a press release (R-9) from which it is appropriate to reproduce the extract cited in paragraph 47 of the Re-amended Motion:

> At September 30, 2008, notwithstanding the steep decline of equity markets, Manulife fully expects the fees collected on these contracts will exceed the benefits payable over their lifetime. Despite this, at the end of the third quarter, Manulife held an actuarially determined reserve of $1.4 billion in respect of any potential future shortfall. This reserve is recalculated every quarter to reflect the passage of time and any change in the market value of assets that may have occurred. Manulife reserves for these guarantees at a high confidence level which, at the end of the third quarter, is expected to be at a level exceeding 90%. To the extent that any increase in reserve is required in any period, this would decrease the earnings for that period. In periods of rising market values, the converse would be the case.
>
> (The Court's underlining)

[26] On October 14, 2008, during telephone conference call with analysts, the Respondent D'Alessandro said that he wished to respond to the concerns raised by the market with respect to guaranteed products. He then reiterated his confidence in Manulife's capitalization [RM 48.1].

[27] On December 2, 2008, Manulife announced that it foresaw increasing its reserves for the guaranteed variable annuities to $5,000,000 on December 31, 2008 [RM 48.3].

[28] On February 12, 2009, Manulife issued a press release in which it announced its annual results for the year 2008 as well as its fourth quarter results[6] (R-10). The extract from the press release reproduced in paragraph 48.12 of the Re-amended Motion reads as follows:

> "TORONTO – Manulife Financial Corporation ("MFC") today reported shareholders' net income of $517 million for the year ended December 31, 2008, compared to net income of $4,302 million in 2007. Fully diluted earnings per share were $0.32 compared to $2.78 in 2007. The Manufacturers Life Insurance Company ("MLI")

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[6] Paragraphs 48.12 to 56.11 form part of Chapter C of the Re-amended Motion: "[Translation] The real and revealed situation"; this chapter covers events during the period between February 12, 2009 and August 5, 2010

> reported an MCCSR ratio of 233 per cent as at December 31, 2008, up from 221 per cent last year.
>
> "As previously disclosed, our results have been negatively impacted by the downturn in global equity markets, particularly in the fourth quarter", said Dominic D'Alessandro, President and Chief Executive Officer. "We have reacted quickly by strengthening our capital base and ensuring that our product strategies remain appropriate for the long term. Despite these very challenging conditions, our core businesses continue to maintain or increase market share and generated record levels of life insurance sales and new business embedded value in 2008."
>
> As a result of the sharp declines in equity markets, balance sheet reserves for segregated fund guarantees were increased to $5,783 million as at December 31, 2008 compared with $526 million at the prior year end. The Company's obligations under its segregated fund guarantees are substantially payable over a thirty year period beginning in seven years. Over the long term, should equity markets recover, portions of theses reserves may reverse into net income.
>
> The loss in the fourth quarter of 2008 amounted to $1,870 million or $1.24 per share on a fully diluted basis and differed by $370 million from the estimate of $1,500 million announced on December 2, 2008. A sharp drop in swap interest rates which are used to value segregated fund guarantee liabilities was the major reason for the higher reported loss. The fourth quarter results include a number of non cash items totaling $2,727 million after tax, including $2,407 million for segregated fund guarantees, other equity related losses of $513 million, accruals for credit impairments and downgrades of $128 million, partially offset by changes in actuarial methods and assumptions.
>
> "Unfavourable movements in interest rates late in the quarter exacerbated the impact of unprecedented declines in equity markets," noted Peter Rubenovitch, Senior Executive Vice President and Chief Financial Officer. "Even after this quarter's very sharp drops in equity markets and interest rates, our balance sheet remains strong and our capital levels are amongst the highest we have ever enjoyed."
>
> (The Court's underlining)

[29] Still on February 12, 2009, Moodys Investor Service announced that Manulife's rating was under review for a possible downgrade [RM 48.13].

[30] At the closing of the markets on February 12, 2009, the price of Manulife's shares fell from $19.36 at the closing of the markets on February 11th to $18.20 [RM 48.14].

[31] On February 24, 2009, the price of the shares fell to $12.25 [RM 48.14].

[32] On March 26, 2009, Manulife published its annual report for the year 2008. The Court believes that it is useful to cite the extract from the message of the chairman of the board, the Respondent Cook-Bennett, in the French version rather than the English [RM 52], since the latter is available in Exhibit R-3:

> [Translation]

> "Maintaining financial stability in a crisis period
>
> In terms of operations, Manulife had a very good year in 2008. However, the Company did not escape the mass selloffs that occurred on the public equity markets on a worldwide scale. Being dependent on the equity markets due to the guarantees offered by our segregated fund products and our variable annuities, we had to increase the reserves on the balance sheet.
>
> As stated elsewhere in the present report, Manulife's guarantee obligations are mainly payable over a thirty-year period beginning in seven years. If the equity markets recover over the long term, part of these reserves may be returned to net income. Be that as it may, in order to take account of the impact of future volatility of financial markets and to give itself the necessary flexibility to take advantage of the current situation, the Company has raised 4.3 billion dollars by issuing shares and borrowing in the fourth quarter of 2008.[7]

[33] On June 19, 2009, Manulife issued a press release in which it emphasized that it had received a notice from the Ontario Securities Commission ("OSC"). The notice from the OSC stated that according to the preliminary conclusion of its staff, the Company (Manulife) had not complied with its continuous disclosure obligations as regards its exposure to the risk of market prices in the context of its guaranteed segregated fund and variable annuity products [RM 55].

[34] On June 19, 2009, Manulife announced the departure of its vice-president, main manager and chief financial officer, the Respondent Rubenovitch, who was retiring [RM 56].

[35] The price of Manulife's shares fell from $23.25, the price at the closing of the markets on June 19, 2009, to $20.42 on June 22nd, the next working day[8] [RM 56.1].

[36] On August 5, 2010, Manulife published a press release to disclose its results for the second quarter of 2010 (R-33) and declared a loss of 2.4 billion dollars "[Translation] attributable to the impact on the market value of the fall in the equity market and interest rates."[9] [RM 56.5 and 56.6].

[37] Manulife's securities went from $16.00 at the close of the stock markets on August 4, 2010, to $14.20 at the close of the stock markets on August 5, 2010 [RM 56.11].

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[7] Annual Report 2008, Manulife Financial, Exhibit R-3, page 1; extract in the English version [RM 52]; the wording of paragraphs 49 to 53 indicates that the Petitioners attribute a corrective value to the content of the Annual Report for 2008 in relation to the previous faulty representations

[8] The Petitioners add in paragraph 56.2 that the disclosures on June 19th constitute a correction of the faulty representation

[9] The Petitioners maintain that these results constitute a correction flowing from the faulty representation during the period of the recourse [RM 56.10]

[38] To this chronology, taken essentially from the Re-amended Motion, two new facts, which were brought to the Court's attention by the Respondents after the hearing of the present matter, must be added by the Court[10].

[39] The first was the subject of an exchange between the lawyers, to which the Court responded by sending them a letter emphasizing that this fact would not have any impact on its decision greater than any other element of the motion depending on inferences[11].

[40] On April 21, 2011, Manulife published a press release relating to the notice received from the OSC on June 19, 2009, stating that the OSC would not take further steps with regard to that notice given to Manulife concerning the fact that it had been preliminarily concluded that Manulife had not complied with its continuous disclosure obligations as regards its exposure to the risk of market prices in the context of its guaranteed segregated fund and variable annuity products.

[41] On May 23, 2011, Judge John F. Keenan granted the motion to dismiss by Manulife against the amended motion to institute a class action against it based on a cause of action related to the *Securities Exchanged Act of 1934* [sic], 15 USC (para 78 g) (b) and Rule 10 B-5 of the *Secuties and Exchange Commission Rule* [sic], 17 C.F.R., para 240.10 b-5) as well as against the directors and officers of Manulife due to a contravention of the provisions of section 20 (a) of the same law[12]. It should be noted that Judge Keenan granted the motion to dismiss and gave the petitioners 60 days to amend their motion.

## 3.- THE ADDITIONAL EVIDENCE

[42] The Petitioners have filed Exhibits R-1 to R-35 in the Court's file as well as three expert's reports as follows:

- R-27: An expert's report by Mr. Robert Chambers on the misleading nature of the representations made by Manulife;

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[10] Yves Lauzon, *Le recours collectif*, coll. Points de droit, Cowansville, Éditions Yvon Blais, 2001, p. 15. See also: Pierre-Claude Lafond, *Le recours collectif, le role du juge et sa conception de la justice – Impact et évolution*, Cowansville, Éditions Yvon Blais, 2006, p. 121; *Mouvement laique québécois* v. *Commission des écoles catholiques de Montréal*, J.E. 95-1636 (C.S.); *Lasalle* v. *Kaplan*, J.E. 84-882 (C.S.); *Bélanger* v. *Association de la construction du Québec*, J.E. 94-623 (C.S.)

[11] Letter from the Court to the parties on May 11, 2011; *Option Consommateur* v. *Bell Mobilité*, 2008 QCCA 2201, para 37-38

[12] *In re: Manulife Financial Corporation Securities Litigation*, 09CIV.6185, decision on May 23, 2011

- R-28: An expert's report by Mr. Paul Winokur on the role of a Manulife actuary and on certain disclosures made by that actuary about the information communicated to Manulife's management;

- R-29: An expert's report by Mr. Gregg Jarrell on the fact that the market for Manulife's shares was efficient and influenced by the false or misleading disclosures made by Manulife.

[43] As for the Respondents, they have filed Exhibits I-1 to I-161 in the Court's file, which may be classified under five categories:

- Analysts' reports concerning Manulife's situation;

- Transcripts of telephone conference calls between Manulife and the analysts;

- Standard & Poor's reports on Manulife's risk management;

- Press releases disseminated by Manulife (years 2004, 2005, 2006, 2007, 2008 and 2009);

- Various documents emanating from Manulife (years 2004, 2005, 2006, 2007, 2008 and 2009), to counter the Petitioners' allegations on the issue of inaccurate or false representations by Manulife.

[44] The Respondents also filed in the Court's file the affidavit of Robert Veloso dated December 24, 2010 (Exhibit I-1) and that of William J. Braithwaite dated February 2, 2011 (expert's report, Exhibit I-159) in order to establish that the documents filed in the Court's file by the Respondents as additional documentary evidence were available and formed part of the public domain.

[45] The expert's report by Mukesh Bajaj dated February 4, 2011 was added to these exhibits.

[46] An agreement ended the debate between the parties concerning the filing at this stage of the proceedings of the Petitioners' experts' reports and the Respondents' documentary evidence, as well as the Respondents' experts' reports[13]. All of the experts' reports filed in the file, both by the Petitioners and the Respondents, are filed as ordinary exhibits in order to allow the lawyers to make representations concerning their relevance and probative value. However, it was decided that the Court will not give its opinion on the opinions of these experts and that the appreciation of the probative value of these reports will be referred to the

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[13] Letter by Mtre Sébastien Richemont dated October 1, 2010

judge of the merits of this case, in the event that the motion for authorization is granted[14].

## 4.- THE GENERAL PRINCIPLES OF CLASS ACTIONS AT THE AUTHORIZATION STAGE

[47] Article 1003 of the *Code of Civil Procedure* provides the conditions for the authorization of a class action:

> 1003. The court authorizes the bringing of the class action and ascribes the status of representative to the member it designates if of opinion that:
>
> *(a)* the recourses of the members raise identical, similar or related questions of law or fact;
>
> *(b)* the facts alleged seem to justify the conclusions sought;
>
> *(c)* the composition of the group makes the application of article 59 or 67 difficult or impracticable; and
>
> *(d)* the member to whom the court intends to ascribe the status of representative is in a position to represent the members adequately.

[48] Judge Gascon, in *Adams* v. *Banque Amex du Canada*[15], correctly summarized the principles that should guide the Court in the context of such a recourse; it is appropriate to cite at length the general principles brought out by him:

> [Translation]
>
> [23] At the authorization stage, the parameters that frame the role of the Court are known and, for the most part, well defined. They may be summarized as follows:
>
> 1. The class action is a simple procedural method. It is not a special regime. It is a social measure that promotes access to justice by allowing for comparable and equitable compensation for all the members without there being a multiplicity of similar recourses, within a framework that ensures an equilibrium of strengths between the parties;
>
> 2. The authorization procedure is a cursory and preparatory step that is meant to be a filtering and checking mechanism, not more;
>
> 3. At this stage, there is no decision on the merits of the litigation since the respondents retain the right to assert all their means of defence during the progress of the recourse, once the authorization has been granted. Therefore, it is not about assessing the legitimacy of the action on the merits. The motion for authorization is not the trial, nor does it form part of it. It does not decide on the fundamental issues of the debate;
>
> 4. At authorization, the judge only checks whether the conditions of article 1003 C.C.P. are met, that is the aptitude of the representative, the similarity or relatedness of the issues of fact and/or of law, and the legal relationship between the allegations and the

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[14] Transcript of the hearing on September 23, 2010 and October 4, 2010
[15] EYB 2006-111023 (C.S.), para 23

conclusions sought. In the latter case, the burden is one of demonstration, not of proof;

5. A liberal approach rather than a restrictive one must prevail and any doubt must be resolved to the benefit of the petitioners, that is to say in favour of authorizing the recourse;

6. At this stage, discretion is limited. If the four conditions of article 1003 C.C.P. are satisfied, normally the Court should authorize the recourse.

[49] There is cause for adding an additional parameter that should guide the Court in the present case, since numerous exhibits have been filed.

[50] In the judgment in *Hotte* v. *Servier Canada inc.*, the Court of Appeal established that at the authorization stage the exhibits filed by a petitioner should be considered as having been admitted and they form part of the file[16].

## 5.- ANALYSIS AND DISCUSSION

[51] There is cause to tackle the criterion of 1003 (b) first, in view the Respondents' cut-and-dried position to the effect that the Petitioners do not meet that criterion.

### 5.1 The condition set out in article 1003 (b) C.C.P.: Do the facts alleged seem to justify the conclusions sought?

> 1003. The Court authorizes the bringing of the class action and ascribes the status of representative to the member it designates if of opinion that:
>
> [...]
>
> (b) the facts alleged seem to justify the conclusions sought;
>
> [...]

[52] The Petitioners ask that the Court authorize the exercise of a class action for damages under the regime of the common law of civil liability and allege that the Respondents contravened a statutory obligation set out in the SA and that they made false or inaccurate representations relating to the risk to which certain guaranteed products were exposed, that is to say the portfolios of variable annuities and the segregated funds with added guarantees.

[53] The Court will tackle the legal syllogism proposed by the Petitioners by first analyzing the facts alleged in the motion, the additional evidence, when appropriate, and the law regarding the nature of the alleged faults and the causal link with the

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[16] AZ-50067546 (C.A.); *Dallaire* v. *Eli Lilly Canada inc.*, 2006 QCCS 4233, para 27-29; *Option Consommateurs* v. *Bell Mobilité*, 2008 QCCA 2201, para 30

damages that are sought.

### *5.1.1 Fault*

[54] The Petitioners allege that Manulife, as a reporting issuer, did not comply with its continuous disclosure obligation set out in section 73 of the SA, an obligation also regulated by *Regulation 51-102.*

[55] As regards the directors and officers of Manuvie, the Petitioners denounce the Respondents D'Alessandro, Cook-Bennett, Sawchuck and Rubenovitch for having failed to discharge their general duty to not cause harm to others, set out in article 1457 C.C.Q., as well as for their knowledge of Manulife's omissions with respect to its continuous disclosure obligation. It is appropriate to recall the provisions invoked:

> ***Securities Act***
>
> 73. A reporting issuer shall provide periodic disclosure about its business and internal affairs, including its governance practices, timely disclosure of a material change and any other disclosure prescribed by regulation in accordance with the conditions determined by regulation.
>
> Reporting issuer.
>
> 73.1. A reporting issuer must organize its affairs in accordance with the governance rules prescribed by regulation.
>
> ***Civil Code of Québec***
>
> 1457. Every person has a duty to abide by the rules of conduct which lie upon him, according to the circumstances, usage or law, so as not to cause injury to another.
>
> Where he is endowed with reason and fails in this duty, he is responsible for any injury he causes to another person by such fault and is liable to reparation for the injury, whether it be bodily, moral or material in nature.
>
> He is also liable, in certain cases, to reparation for injury caused to another by the act or fault of another person or by the act of things in his custody.

[56] The first issue that the Court must deal with in relation to the reproaches formulated by the Petitioners against the Respondents is to determine whether the facts alleged by the Petitioners seem to justify their conclusion that they might constitute faults.

[57] The allegations will be analyzed by category. Let us recall that the Petitioners contend that these faults were committed by the Respondents by way of Manulife's Annual Information Forms for 2003 to 2008, as well as by the dissemination of certain press releases and by telephone conference calls between the officers and the market analysts.

**Contravention of the statutory continuous disclosure obligation set out in section 73 of the SA and *Regulation 51-102* and/or false or inaccurate representations[17]**

[58] This first general category is defined as follows: during the five-year period covered by the recourse, that is between January 26, 2004 and February 12, 2009, the Respondents breached their continuous disclosure obligation by not revealing the true risks to which the portfolios of variable annuities and segregated funds with added guarantees of the Respondent Manulife were exposed and by allowing inaccurate information to be disseminated [RM 2, 19 and 20]. This general category includes subcategories that there is reason to identify.

**Failure to disclose the substantial reduction or the elimination of risk management in relation to guaranteed products**

[59] In paragraph 42 of the Re-amended Motion, there is a reference to a period covering the years 2003 to 2008, when the sales of guaranteed products increased substantially [RM 21.5] and the Petitioners note, in paragraph 22:

> [Translation] 22.- At the same time (2004-2008), MFC decides to reduce, or to completely eliminate, its risk management in respect of its guaranteed products, but does not disclose this fact, or at least does not disclose it adequately. This decision, taken in part by the Respondents, being known by the members of MFC's board of directors and this, at all times relevant to these presents.
>
> (The Court's underlining)

[60] In paragraphs 29 and 43 of the Re-amended Motion, which refer to the annual report for the year 2003 published in 2004, the Respondents are blamed for not having disclosed that Manulife "[Translation] ceased its practices of effective risk management in respect of guaranteed products."

[61] The Petitioners, here targeting the entire period covered by the recourse, blame the Respondents [RM 23.1 and 23.2], for having failed to adequately reveal the effects of these management practices on Manulife's financial health. The

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[17] The Court must emphasize that the Petitioners sometimes describe the Respondents' omissions as constituting failures to respect their continuous disclosure obligations and sometimes as constituting in certain cases false representations or inaccurate representations, without specifying whether it is the continuous disclosure obligation set out in the SA that is in issue or the general disclosure obligation to which they would be held (*Bank of Montreal* v. *Bail ltée,* [1992] 2 S.C.R. 554, pp. 43-44; art. 1457 C.C.Q. or 1407 C.C.Q.; in this respect, the allegations of the motion are imprecise

Respondents are specifically blamed for not having revealed the effect of these management practices in the event of a decline in interest rates.

[62] The Petitioners also describe these omissions as false representations, Manulife having affirmed in its annual report for the year 2003 that it had an effective, rigorous, disciplined and prudent risk management system.

[63] The Petitioners also identify other false representations linked to the nature of management practices that were either absent or insufficient:

- Absence of hedging [RM 13, 23.2, 41, 48.7, 48.10].

- Diversification of investments [RM 24, 31, 35, 38, 41]. The Petitioners maintain that Manulife falsely represented that its investments were diversified, while they were rather closely connected.

- Non-existent or ineffective reinsurance as a risk management tool [RM 34, 37, 38.1, 39 and 41]. The Petitioners maintain that the Respondents did not disclose the risk associated with the fact that the yield of the invested capital of the guaranteed products was not reduced or offset by the use of reinsurance.

**Flaw in the design of guaranteed products and lack of disclosure of that fact**

[64] Paragraph 37 is worth reproducing for a better understanding of the alleged faults that it contains:

> [Translation] [37] However, the Respondents did not disclose that the risk associated with the invested capital was not reduced, that the reinsurance was insufficient (...), and <u>that the guaranteed products were not designed to face a situation such as that which existed during the Period of the recourse, the Respondents were aware of the material risk that arises from extreme events</u>, but MFC did not have effective risk management to cope with those events;
>
> (The Court's underlining)

[65] According to the Petitioners, Manulife and its officers knew or ought to have known that "extreme" events could occur, and that Manulife could not cope with them in view of its ineffective management of guaranteed products [RM 37 and 42]; because of this, those products were badly designed.

**False representations in relation to shareholders' economic value** [RM 48.4, 48.5 and 48.6]

[66] The Petitioners maintain that Manulife made false representations when it wrote, in its annual reports from 2003 to 2008, that shareholder value would experience an immediate impact, which Manulife described between 2003 and 2007 as varying from $99,000,000 to $209,000,000, if there was a 10% decline in the market value of the equity funds supporting Manulife's guarantees on its products.

[67] The Petitioners maintain that Manulife underestimated the impact of the decline in the market value of the equity funds supporting Manulife's guarantees because in 2008 the impact felt, as established in the annual report published on March 26, 2009, was $800,000,000, that is, an increase of 382% compared with the anticipated impact [RM 48.5].

[68] According to the Petitioners, Manulife revealed the impact of a change in interest rates on shareholders' economic value for the first time in its annual report for the year 2008. The Petitioners maintain that that is a "[Translation] material omission".

**False representations in 2008 during the decline of the markets**

[69] In a press release dated October 13, 2008, and while the financial markets were under pressure, Manulife maintained that its risk management was adequate [RM 46 and 47].

[70] On October 14, 2008, D'Alessandro allegedly made false representations during a telephone conference call with analysts in relation to Manulife's need to proceed with an issue of additional shares because Manulife, contrary to what he had announced, proceeded to issue additional shares on December 2, 2008 [RM 48.3].

[71] Can these facts constitute faults? First, let us examine the statutory obligation invoked by the Petitioners.

**Nature and scope of the continuous disclosure obligation within the meaning of the SA and *Regulation 51-102***

[72] Do the facts alleged, considered as admitted, seem to justify the conclusion that the reporting issuer, Manulife, breached its obligation to disclose any material change likely to appreciably influence the value or the price of its securities? Because that is the essence of the obligation set out in section 73 of the SA when that obligation is not otherwise regulated. Here is how *Regulation 51-102 respecting continuous disclosure obligations*[18] defines the "material change" mentioned in section 73 of the Act:

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[18] R.S.Q. c. V-1.1, s. 331.1

**1.1 Definitions and interpretation**

[...]

"material change" means

(a) a change in the business, operations or capital of the reporting issuer that would reasonably be expected to have a significant effect on the market price or value of any of the securities of the reporting issuer; or

(b) a decision to implement a change referred to in paragraph (a) made by the board of directors or other persons acting in a similar capacity or by senior management of the reporting issuer who believe that confirmation of the decision by the board of directors or any other persons acting in a similar capacity is probable;

[73] The legislation and regulations in securities matters are aimed at protecting investors, ensuring the performance of the capital markets and guaranteeing public confidence in the system. The information disclosure regime imposed on reporting issuers is aimed at maintaining equal access by investors to complete and up-to-date information concerning the issuers whose securities are traded on the secondary market[19].

[74] The information regime imposed on reporting issuers by the law includes two elements: (1) periodic information obligations and (2) occasional information obligations, specified in *Regulation 51-102*. Essentially, the reporting issuer must disclose without delay any material change in its affairs[20].

[75] The "material change" as defined by *Regulation 51-102* refers to an internal change when one can reasonably measure its effect on the price or the value of one of the reporting issuer's securities and conclude that it may be significant:

> "[Translation] External events, which generally depend on the economic, political or social situation, will not be considered as being material changes[21].

[76] However, it is not impossible that an external event may be considered as a material change if its effects on the activities and affairs of the reporting issuer are

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[19] Stéphane ROUSSEAU, "Étude du recours statutaire en responsabilité civile pour le marché secondaire des valeurs mobilières au Québec", (2009) 43 R.J.T. 709. See also Daniel YELIN, "Naviguer dans les eaux troublés des changements importants: divulguer ou ne pas divulguer, telle est la question", in Service de la formation continue , Barreau du Québec, *Développements récents en valeurs mobilières 2007*, Cowansville, Éditions Yvon Blais, 2007, p. 71, at page 74. See also: *Kerr* v.*Daniel Leather inc.*, 2007 SCC 44, para 32

[20] See in particular Schedule 51-102A1 to *Regulation 51-102* on continuous disclosure obligations, part 1, (e) and (f); part 2, section 1, 1.4(g); Schedule 51-102A2, part 1, (a) and (d); Schedule 51-102A3, part 1, section 5, 5.1

[21] D.YELIN, *op. cit.*, note 19, at pages 76-77

at the same time material, direct and different from those felt by the other reporting issuers in the same sector of activities[22].

[77] To constitute "a material change" within the meaning of *Regulation 51-102* and the SA, what matters is to examine the effect that the event (the change) may reasonably have on the securities of the issuer and not the effect that it may have on the decisions of reasonable investors[23].

[78] The text of section 73 of the SA requires the reporting issuer itself to determine whether it is in the presence of a material change: "[Translation] It is an exercise of judgment and common sense that involves issues of fact as much as of law. Reporting issuers must actually analyze the facts and assess whether they fulfill the two conditions of the definition of material change."[24]

[79] The standard of prudence at issue would be that of the ordinary standard of prudence, which requires proof that its contravention really constitutes a fault by demonstrating behaviour that contravenes the standard of a reasonably prudent and diligent person having regard to the particular circumstances of the case[25].

[80] The Supreme Court, in a judgment written by the Honourable Rothstein, in the case of *Sharbern Holding Inc.*, dealing with the disclosure imposed by similar legislation in British Columbia, stated: "disclosure lies at the heart of an effective securities regime" and that its scope is a question of legislative policy requiring "[b]alancing the needs of the investor community against the burden imposed on issuers" (para. 5). The materiality standard for disclosure "supplants the 'buyer beware' mind set of the common law with compelled disclosure of relevant information" and this while "recogniz[ing] the burden that is placed on issuers to provide such disclosure"[26]

[81] In the opinion of the Court, the facts as presented in the Re-amended Motion make it unlikely that, during the period of the recourse, Manulife breached the statutory information obligation imposed on it by the SA. The numerous omissions or inaccurate representations constituting a "material change" in the Petitioners' eyes depend more on conclusions drawn *a posteriori*, obviously resulting from the stock market crash that began in 2008.

[82] The continuous disclosure obligation set out in the SA is correctly qualified as

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[22] *Id.*, at page 77
[23] *Id.*, at page 78
[24] *Id.*, at page 81
[25] Stéphane ROUSSEAU et Raymonde CRËTE, "L'environnement législatif québécois au regard du projet d'adoption d'un régime statutaire de responsabilité civile dans le contexte du marché secondaire des valeurs mobilières", 59 *R. du B.* 627, 643-644
[26] *Sharbern Holding Inc.* v. *Vancouver Airport Centre Ltd.* 2011 SCC 23, paras 40, 44, 61

"continuous" in order to allow the authorized issuer to review its situation over time and is not provided for in order to retroactively sanction its failure to have been "[Translation] right" if it acted in a reasonable and prudent manner.

[83] However, this debate raises mixed questions of fact and law and, at the authorization stage, the Court must not draw any conclusion on the merits, unless it is obvious that the recourse is doomed to failure, which is not the case.

[84] Again recently, the Honourable Justice Guy Gagnon, in his judgment in *Carrier* v. *Procureur général du Québec*[27], recalled this principle:

> [Translation] [37] [...] Unless I agree that the action, on its very face, is frivolous, manifestly doomed to failure or else that the allegations of fact are insufficient or that it is 'indisputable' that the right invoked is groundless, it appears to me, in addition to these circumstances, that it is not desirable, at the beginning of the analysis, to decide on the absolute value of such a means of defence.

[85] The Court should adopt the same reasoning as regards the facts invoked by the Petitioners in support of the allegations of false representations that may depend on, among others, the notion of fraud[28] (1407 C.C.Q.) or else constitute a fault within the meaning of article 1457 C.C.Q. Let us recall that the Petitioners claim that they acquired securities of Manulife, during the period of the recourse, at too high a price, set by the "[Translation] market's knowledge" and dependent on false information disseminated by Manulife.

[86] In conclusion, the Court, due to the principles that govern the assessment of the criterion in article 1003 (b), must conclude that the facts put forward by the Petitioners could justify a court finding the Respondents to be at fault. However, this is not sufficient in the context of the class action in civil law that the Petitioners wish to commence; they must also demonstrate the existence of a causal link.

### *5.1.2 The causal link*

[87] The Respondents maintain forcefully that the Petitioners, claiming a recourse under civil law, must demonstrate the causal link and that it is here that their legal syllogism is really faulty, to the point that the Court should conclude that the criterion of article 1003 (b) is not met.

[88] It is established that the class action is "nevertheless a procedural vehicle

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[27] C.A Québec no. 200-09-007063-107, July 4, 2011, para 37

[28] Jean-Louis BAUDOUIN and Pierre-Gabriel JOBIN, *Les obligations*, 6th edition, Cowansville, Éditions Yvon Blais, 2005, p. 302; Vincent KARIM, *Les obligations*, vol. 1, Montréal, Wilson & Lafleur, 2009, p. 375, 376

whose use neither modifies nor creates substantive rights"[29] and therefore the Respondents are right when they maintain that the Petitioners must force themselves to prove a causal link between the faults that they allege and the damages that they claim to have suffered. The Respondents point out that the allegations in the Re-amended Motion for authorization are silent as to the existence of the causal link that must be established between the Respondents' faults (false representations) and the decisions by the members of the group to acquire Manulife securities at the prices they paid.

[89] According to the Respondents, the Petitioners should have stated in their motion that each of the investors, members of the group, claiming to have suffered damages that resulted from the false representations:

(a) relied, at the time when he acquired Manulife securities, on the false representations or the inaccurate representations of the Respondents; and
(b) that the false representations on which he relied to acquire the Manulife securities actually inflated the price of the securities that he acquired.

**Constituent (b) of the causal link**

[90] The Court will analyze constituent (b) of the causal link first because only constituent (b) is addressed in the paragraphs of the Re-amended Motion that deal with causality. It is appropriate to reproduce them:

> [Translation]
>
> 48.11 Throughout the Period of the recourse, MFC failed to use effective and appropriate risk management and failed to disclose that situation. As a result, the price of MFC's shares was artificially high. When the real situation began to be known at the end of the Period of the recourse, the price of MFC's shares declined severely;
>
> 56.3 During the Period of the recourse, MFC therefore did not implement effective or appropriate risk management and did not properly disclose that omission or the risks resulting from that omission. As a result, the price of MFC's shares was artificially high. When the truth was disclosed to the public, the price of MFC's shares fell drastically, as appears from the table filed in support hereof as R-12;
>
> 58. The Respondents, by disseminating or allowing the Respondent MFC to disseminate, in Quebec, information in the said documents that was inaccurate, incomplete, false or misleading, should have all known that the price of MFC securities would be [*sic*] artificially high and that there would necessarily be harmful consequences for MFC's shareholders;
>
> 61. Due to the acts or omissions of the Respondents, the Petitioners suffered a monetary loss, on the one hand, having bought securities at an artificially high price and, on the other hand,

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[29] *Bisaillon* v. *Université Concordia*, [2006] 1 S.C.R. 666, para 17; *Québec (Curateur public)* v. *Syndicat national des employés de l'Hôpital Saint-Ferdinand*, [1996] 3 S.C.R. 211, para 33

> in that the Petitioners probably would not have acquired, in all cases, and certainly not at the same price, MFC securities if the market had not been led into error by the false, erroneous or misleading information in question above in this pleading;
>
> 62. Actually, the market price of the Respondent MFC's securities was influenced by the contents of the documents disseminated by it as well as the contents of the other documents issued and disseminated either via the news wire or via the electronic data, analysis and research system ("SEDAR") implemented by the *Regulation amending the Securities Regulations*, D. 1548-96, (1996) 12 8 O.G. II, 7873;
>
> (the Court's underlining)

[91] In order to make proof of this causality (constituent b), the Petitioners cannot seek to use the presumption of causality established in sections 225.2 to 225.33 of the SA because they have not chosen to institute a recourse under that regime, but that does not prevent them from exercising a recourse for damages under the common law rules:

> 213.1. This Title sets rules applicable to certain actions for rescission, for revision of the price or for damages. It also sets rules applicable when privileged information is used in contravention of certain provisions concerning insiders, and rules applicable when this Act or a regulation made under this Act is contravened in connection with a take-over bid or issuer bid.
>
> More particularly, Chapters I and II of this Title establish rules relating to actions for damages resulting from the subscription, acquisition or disposition of securities to which this Title applies. They do not prevent an action for damages from being brought under ordinary civil liability rules.
>
> 225.11. A person that acquires or disposes of an issuer's security during the period between the time when the issuer failed to make timely disclosure of a material change and the time when the material change was disclosed in the manner required under this Act or the regulations may bring an action against
>
> (1) the issuer and each director and officer of the issuer who authorized, permitted or acquiesced in the failure to make timely disclosure; and
>
> (2) each influential person, and each director and officer of an influential person, who knowingly influenced the issuer or a mandatary or other representative of the issuer in the failure to make timely disclosure or a director or officer of the issuer to authorize, permit or acquiesce in the failure to make timely disclosure.

[92] To establish this constituent of the causal link, the Petitioners invoke fraud on the market [RM 61]: "if the market had not been led into error by the false, erroneous or misleading information" the Petitioners would not have acquired Manulife securities at such a high price.

[93] The Respondents claim that this theory comes from interpretation of the American statutory regime[30], that the transposition of this theory to Quebec law

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[30] *Basic Inc.* v. *Levinson*, (1988) 485 U.S. 224

cannot create a presumption to establish this causal link and that, as a result, the recourse is unfounded in law.

[94] The Court does not believe that there is reason to give its opinion, at the authorization stage, on the presumption that might result from the application of this American theory in Quebec civil law. That is a basic issue that, moreover, in view of the arguments made by the Petitioners, would not put an end to the debate. It is therefore not useful to comment on the two Quebec decisions that have mentioned this theory, *Beaudouin* v. Avantage Link inc.[31] and *Nguyen* v. *C.P. Ships ltee*[32]. The Court believes that it is more appropriate, at this stage of the file, to examine whether any evidence could enable the Petitioners to demonstrate this causal link in accordance with the rules of civil law.

[95] Nothing rules out the Petitioners resorting to expert evidence and they have already filed an expert's report by Gregg Jarrell (R-29) in the Court's file for the purpose of making such a demonstration with the aid of his testimony. The Court remembers that this opinion exists, even though the Respondents may not agree with it.

[96] In addition, the presumption of causality that results, in certain circumstances, from the breach of a law or regulation, may be established in civil law. In this regard, the Court recalls Judge Beetz's comment in *Morin* v. *Blais*[33]:

> 22. The mere breach of a regulation does not give rise to the offender's civil liability if it does not cause injury to anyone. However, many traffic provisions lay down elementary standards of care and make them binding regulations at the same time. Breach of such regulations constitutes civil fault. In cases where such fault is immediately followed by an accident which the standard was expressly designed to prevent, it is reasonable to presume that there is a causal link between the fault and the accident, unless there is a demonstration or a strong indication to the contrary.

[97] As mentioned above, the Court cannot, at the authorization stage, conclude as to the non-existence of the alleged statutory breach, even if, upon examination of the faults for which the Respondents are blamed and the exhibits filed by the Respondents[34], this breach appears doubtful; in law, the presumption of causality that may result from the breach of an "elementary standard of care" that the legislative provision aims to impose may justify the conclusion sought. Only the

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[31] REJB 2002-34219 (S.C.)

[32] J.E. 2008-1783, (S.C.), application for extension of delay granted and motion for leave to appeal to the Supreme Court dismissed (S.C. Can., 2009-03-05), 32867

[33] [1977] 1 S.C.R. 570; *Boucher* v. *Rousseau*, [1984] C.A. 85, para 59 et seq

[34] Manulife filed in the Court's file 13 volumes containing Exhibits I-1 to I-161, with the aim of demonstrating *prima facie* that it had not made faulty representations as maintained by the Petitioners and that the information in question in the motion was accessible to the public. Without giving its opinion on their probative value, the Court took them into consideration when issuing this comment.

judge of the merits can decide the issue of whether the standard imposed is one of "elementary care" or whether it is rather a standard of "ordinary care" and if there is proof of its breach.

**Constituent (a) of the causal link**

[98] Secondly, the Petitioners must demonstrate that the investors relied on the Respondents' false representations when they acquired securities of Manulife. At the authorization stage, the Court should consider that a presumption of causality could be inferred by the judge of the merits if the threshold conditions for that presumption are demonstrated (article 2849 C.C.Q.). In the case of *Biondi* v. *Syndicat des cols bleus regroupés de Montréal (SCDP-301)*[35], Judge Danielle Grenier stated:

> [Translation]
>
> [136] From her side, the plaintiff asserts that in class actions a collective determination of causality is possible if the facts proved permit the establishment of a presumption of fact that can apply to all the members of the group.
>
> [137] The Court shares the plaintiff's opinion. The rules of evidence are not different due to the simple fact that the recourse is not an individual recourse, but a class action.
>
> [...]

[99] The Court repeats that, at the authorization stage, its role is not to give its opinion on the probative value of the evidence, but rather to check whether the Petitioners' recourse raises issues and facts that seem to justify the conclusions sought and that can be dealt with collectively. For the reasons stated above, the Court feels that the criterion of Article 1003 (b) is met.

**5.2 The condition set out in article 1003 (a) C.C.P.:**

> 1003. The court authorizes the bringing of the class action and ascribes the status of representative to the member it designates if of opinion that:
>
> *(a)* the recourses of the members raise identical, similar or related questions of law or fact;
>
> [...]

[100] The Respondents maintain that the recourse of the members of the group does not raise identical, similar or related questions of law or fact.

[101] Let us recall the principles brought out by the case law relating to the assessment of this criterion that are stated by the author Yves Lauzon in *Le recours*

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[35] 2010 QCCS 4073

*collectif*[36]:

> [Translation]
>
> This case law is now well established and it enables one to bring out the principles of interpretation unanimously accepted and applicable in this instance.
>
> These principles are as follows:
>
> - Article 1003 (a) does not require that all of the issues of law or fact be identical, similar or related;
>
> - Such article does not require either that the majority of such issues be identical, similar or related;
>
> - The presence of particular means of defence that can be used against a category of members and that do not apply to other members, such as res judicata, prescription or a settlement, are not an obstacle to a class action;
>
> - The same goes for differences or variations, even substantial ones, in the natures and amounts of damages or amounts claimed;
>
> - The impossibility of ordering the collective recovery of claims provided for in article 1031 C.C.P. does not prevent a class action, articles 1030 to 1040 being specifically applicable in such circumstances to deal with individual claims;
>
> - The court must take into account article 1005 C.C.P. that allows it to determine, on the basis of the evidence in the file, the issues to be dealt with collectively and those that should be the subject of methods particular to each member of the group;
>
> - The court must take into account article 1022 C.C.P. that allows the judge of the merits, even *ex officio*, to change or divide the group;
>
> - The presence of different categories and types of contracts is not a problem if each contract has a clause the essence of which is to the same effect.

[102] From the outset, the Court rejects the Respondents' argument to the effect that the individualized character of the issue of the causal link between the allegedly false, inaccurate or misleading information disseminated by the Respondents and the harm alleged by the Petitioners does not raise identical, similar or related issues, for the reasons expressed in the analysis of the criterion in 1003 (b).

[103] It may be that the judge of the merits changes or divides the group, possibly by periods, because the allegedly false representations were made during a period spread over five years and are of different natures. It is also to be assumed that the

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[36] Yves LAUZON, *Le recours collectif*, Cowansville, Éditions Yvon Blais, 2001, p.30-31; *Huneault* v. *Fonds AGF inc.*, 2010 QCCS 4413; *Comité d'environnement de la Baie* v. *Alcan*, EYB 1990-63507 (C.A.); *Château* v. *Placement Germani C.H.*, EYB 1990-57403; *Carruthers* v. *Paquet*, EYB 1993-74127 (C.S.)

impact of each of these false representations on the price of Manulife's securities may not be identical and that depending on the economic context and the skills and expertise of the investors, they may have had different appreciations of the available information. That does not necessarily allow the Court to declare that there are no common or related issues of law or fact appropriate for the legal debate to move forward[37].

[104] Lastly, it should be emphasized that the Petitioners request that the claims of the members of the group be the subject of individual claims, which is in line with the logic of the issues addressed above.

**The composition of the group**

[105] The parties agree that there is cause to limit the group initially contemplated by the Petitioners so as to exclude the persons who, on February 12, 2009, no longer held shares, bonds or other securities of Manulife. The Court, preferring a description that is not negative, accepts the Petitioners' proposal to complete the description of the group as follows:

> [Translation] All residents of Quebec other than persons who, under the Code of Civil Procedure, cannot be members of a group in Quebec who, in the period between January 26, 2004 and February 12, 2009, bought or otherwise acquired stocks, bonds or other securities from the Respondent Société Financière Manuvie, directly or indirectly, or through mutual funds or otherwise and who still held them on February 12, 2009 (the "Members of the Group").

## 5.3 The condition set out in article 1003 (c) C.C.P.

> **1003.** The Court authorizes the bringing of the class action and ascribes the status of representative to the member it designates if of opinion that:
>
> [...]
>
> (c) the composition of the group makes the application of article 59 or 67 difficult or impracticable; and
>
> [...]

[106] Even if the composition of the group is not yet correctly identified, it is anticipated that it will include several thousand members[38]. The affidavit of Terri A. Neville, assistant vice-president of Manulife's shareholder services, states that the company has 1,766,000,000 shares outstanding, of which 8% are held by Quebec

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[37] *Collectif de défense des droits de la Montérégie (C.D.D.M.)* v. *Centre hospitalier régional du Suroît du Centre de santé et des services sociaux du Suroît*, 2011 QCCA 826, para 23-25

[38] *Château* v. *Placement Germari*, cited above, footnote 36; Yves LAUZON, *Le recours collectif*, cited above, footnote 36, p. 38-39

residents. There has been no debate on this criterion; The Court considers that it is met.

## 5.4 The condition set out in article 1003 (d) C.C.P.

> **1003.** The Court authorizes the bringing of the class action and ascribes the status of representative to the member it designates if of opinion that:
>
> [...]
>
> *(b)* the member to whom the court intends to ascribe the status of representative is in a position to represent the members adequately.

[107] On July 24, 2009, Bâtirente filed a motion for authorization to institute a class action. On April 30 2010, an amended motion was filed, in which Daniel Simard joined, as the *designated person* for Bâtirente, the MÉDAC joined, and Marc Lamoureux joined, as the *designated person* for the MÉDAC, to request the status of representatives.

[108] Article 1048 C.C.P. provides that:

> **1048.** A legal person established for a private interest, partnership or association defined in the second paragraph of article 999 may apply for the status of representative if
>
> *(a)* one of its members designated by it is a member of the group on behalf of which it intends to bring a class action; and
>
> *(b)* the interest of that member is linked to the objects for which the legal person or association has been constituted.
>
> [...]

[109] Adequate representation by the representative is examined in light of three factors[39]: interest to sue, ability and absence of a conflict of interest with the members of the group.

[110] Yves Lauzon, in *Le recours collectif*, describes the adequate representative as follows:

> [Translation]
>
> In light of the various lessons from the case law discussed above, it is possible to summarize the state of the law on this criterion for authorization.
>
> The adequate representative is essentially the average litigant, of good faith, who, to the best of his abilities, acts in the interest of the members in unison with his lawyers. Elitism is not called for in this matter and he who proposes that he act as representative need not be the best. At the authorization stage, the most important part of the work is yet to come and he

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[39] *Bouchard* v. *Agropur Coopérative*, [2006] R.J.Q. 2349 (C.A.)

> who makes sure that the motion for authorization has been heard, has, unless it is proved otherwise, adequately represented the members. He has worked with his lawyers, taken the oath, and been examined for discovery, thus fulfilling the formalities required for the exercise of the recourse.[40]

### 5.4.1 Bâtirente and Daniel Simard as a *designated person*:

[111] Daniel Simard is the general coordinator for Bâtirente and its main officer. His testimony reveals that Bâtirente controls the Bâtirente fund managers by the development of various investment policies and that it retains decision-making power over purchases and sales of the securities that make up the investment portfolios. Paragraph 5.7 of the Re-amended Motion states: "[Translation] Bâtirente or its agents gave the orders to carry out the transactions described below in relation to the Manulife shares during the period of the recourse."

[112] In fact, Bâtirente is registered as a financial services firm with the Autorité des marchés financiers ("AMF"). The 2009 global annual report of Bâtirente describes its profile as follows:

> [Translation] Bâtirente is mandated by the CSN to develop and promote quality retirement savings services offerings and to make sure that they are properly administered by the partners that it chooses. Bâtirente is registered as a financial services firm with the Autorité des marchés financiers[41]."

[113] Bâtirente's board of directors formed an investment committee made up of three members designated from among Bâtirente's directors. "Its mandate is to bring to completion work, studies and analyses on the funds' investment policies and to fulfill any other mandate relating to investments that Bâtirente's board of directors confers on it."[42]

[114] According to Daniel Simard's estimate, almost 80,000 persons entrust their retirement savings to Bâtirente.

[115] From this, the Court concludes that Bâtirente is an organization that is sophisticated in matters of financial investments and that managed, as of December 31, 2009, assets in the amount of $304.5 million. Daniel Simard is the general coordinator of a team of eight persons who carry out the development, monitoring and review of investment policies as well as the management of non-financial risks.[43]

[116] The tables detailing the transactions carried out by Bâtirente in its various funds between 2005 and 2009 relating to Manulife securities are reproduced in

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[40] Yves LAUZON, *Le recours collectif*, Cowansville, Éditions Yvon Blais, 2001, p. 49
[41] Exhibit I-160, p. 11
[42] Exhibit I-160, p. 15
[43] Exhibit I-160, p. 16

paragraph 5.10 of the Re-amended Motion. The purchase transactions by Bâtirente through its PMB Canadian shares fund and its Multi Canadian shares fund describe purchases of Manulife securities on October 14, 2008, October 21, 2008, November 26, 2008, February 12, 2009, March 11, 2009, May 12, 2009 and June 16, 2009, that is, at the very moment when Manulife, if one relies on the allegations in the Re-amended Motion [RM 47, 48.1 to 48.7, 48.10 to 55], made revelations concerning the effect of the market declines on the guaranteed products. The Court of Appeal, in the case of *Bouchard* v. *Agropur*[44], recalled the principles that should guide the Court in the determination of the choice of the representative:

> [Translation]
>
> Since the judgments in *Guilbert* and *Greene*, our Court tends to favour a liberal approach in the choice of the representative. "It is sufficient that a reasonable inquiry has taken place, that an assessment of the persons contemplated is furnished and that it is established that the status of representative is requested by a person capable of supervising the steps to be taken to exercise the recourse."
>
> Although the bar is not very high, the appellant must nevertheless get over it. The transparency of he who applies for the status of representative figures among the essential elements required in order to attain the social objective sought by the legislature in making available to litigants the powerful pressure tool that is the class action. Along with other requirements, the respect of this quality requirement enables the Court to make sure that the class action is really commenced in the interest of the group covered and not in the pursuit of some other accessory or secret objective. That is why the person who wishes to be recognized as the representative must show that he is acceptable and satisfy, at least at first view, the various criteria developed by the case law. It is part of the integrity of the process.
>
> (the Court's underlining)

[117] The analysis of the issues of fact and law raised by this recourse shows that, in order to succeed, the Petitioners will have a substantial burden of proof. They must demonstrate that they relied on the financial situation described by Manulife in relation to the guaranteed share portfolio and that this situation, which is said to have been falsely or incorrectly described, had an effect on the value of the securities.

[118] In the analysis of the first constituent of this demonstration, the Court will have to consider the personal knowledge of the investors and/or of their intermediaries; a sophisticated investor, in the opinion of the Court, cannot be treated on the same footing as an average investor. It might even be an issue here, for Bâtirente and Daniel Simard, of their own fault in the appreciation that they may have made of the information that was available concerning the products guaranteed by Manulife and its risk management.

[119] There is an appearance of conflict of interest between Bâtirente and Daniel Simard and the members of the group who entrusted their savings to them and

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[44] Cited above, note 39

whom they intend to represent. The Court concludes that the role of representatives cannot be granted to them.

### 5.4.2 The MÉDAC and Marc Lamoureux as a *designated person*:

[120] The purposes for which the MÉDAC was formed are described in its letters patent (R-15) and reproduced in paragraph 5.20 of the Re-amended Motion:

- Defending the interests of Quebec savers and investors;
- Promoting better representation of small shareholders on the boards of directors of business corporations;
- Promoting greater democracy in the governance of businesses;
- Promoting greater transparency in the management of business corporations;
- Promoting better dissemination of information intended for savers and shareholders;
- Promoting greater accountability of officers of business corporations;
- Promoting the interests of shareholders and investors in the management of corporations and financial institutions;
- Assisting the members with their demands when facing financial institutions, brokerage firms and issuers of bonds and shares;
- Asserting the point of view of the members in public debates concerning the functioning of the financial markets and the other purposes of the association;
- Assisting the members with the interpretation of information disseminated by corporations (annual reports, prospectuses and other documents);
- Creating a forum to enable the members to discuss collective problems in their relations with corporations and financial institutions.

[121] Marc Lamoureux has been working for the MÉDAC for three years and is a member of it. On October 28, 2004, during the period of the recourse, he acquired 150 shares of Manulife that were the subject of a "two for one" stock split in May

2006. At that date, he held 300 shares with an adjusted base price of $27.75 (55.50/2). He disposed of his shares on June 9, 2009 for a price of $23.85 per share.

[122] The testimony of Marc Lamoureux demonstrates his personal and direct interest in the class action undertaken. The objectives pursued by the MÉDAC are in line with the framework of the remedies sought by the recourse[45].

[123] The conditions established by articles 1003 (d) and 1048 are met and there is cause to grant to the MÉDAC the status of representative and to designate Marc Lamoureux to act as *designated* person for the purposes of exercising the class action.

## 6.- CONCLUSION

[124] There is cause to authorize the class action; however, the Court feels that the issues of fact or of law common to the members of the group should be reformulated as follows:

- *Did the Respondents and Manulife, as a reporting issuer, breach the statutory obligations concerning information set out in article 73 of the Securities Act and in Regulation 51-102 concerning continuous disclosure?*

- *Did the Respondents authorize or issue public documents or make public comments containing inaccurate, incomplete, false or misleading information concerning products guaranteed by Manulife?*

- *Did the Respondents commit a fault?*

- *In the affirmative, did such fault have the effect of:*
  *(a) influencing or manipulating investors?*
  *and*
  *(b) influencing the value or the price of shares, bond or other securities of Manulife?*

- *What are the damages suffered by the Petitioners and the members of the group, due to the fault of the Respondents?*

- *Are the Respondents solidarily liable for the damages suffered by each of the members?*

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[45] *Option Consommateurs* v. *Services aux marchands détaillants ltée (Household Finance),* REJB 2001-24721; *Coalition pour la protection de l'environnement du Parc linéaire « Petit train deu Nord »* v. *La Municipalité régionale du comté des Laurentides,* 2002 CANLII 40858 QCCS, para 38-39

**FOR THESE REASONS, THE COURT:**

[125] **GRANTS** in part the Re-amended Motion;

[126] **AUTHORIZES** the exercise of a class action for damages;

[127] **GRANTS** the status of *representative* of the group to the Petitioner Le Mouvement d'éducation et de défense des actionnaires (MÉDAC) and the status of *designated person* to Mr. Marc Lamoureux for the purposes of exercising the said class action on behalf of the following group:

> [Translation] All residents of Quebec other than persons who, under the Code of Civil Procedure, cannot be members of a group in Quebec who, in the period between January 26, 2004 and February 12, 2009, bought or otherwise acquired stocks, bonds or other securities from the Respondent Société Financière Manuvie, directly or indirectly, or through mutual funds or otherwise and who still held them on February 12, 2009.

[128] **IDENTIFIES** the main questions of fact and of law to be dealt with collectively as being the following:

- *Did the Respondents and Manulife, as a reporting issuer, breach the statutory obligations concerning information set out in article 73 of the Securities Act and in Regulation 51-102 concerning continuous disclosure?*

- *Did the Respondents authorize or issue public documents or make public comments containing inaccurate, incomplete, false or misleading information concerning products guaranteed by Manulife?*

- *Did the Respondents commit a fault?*

- *In the affirmative, did such fault have the effect of:*
  *(c) influencing or manipulating investors?*
  *and*
  *(d) influencing the value or the price of shares, bond or other securities of Manulife?*

- *What are the damages suffered by the Petitioners and the members of the group, due to the fault of the Respondents?*

- *Are the Respondents solidarily liable for the damages suffered by each of the members?*

[129] **IDENTIFIES** as follows the related conclusions sought:

GRANT the Petitioners' motion;

ORDER the Respondents solidarily to pay to each of the Petitioners the sum that is due to him as damages and interest with interest at the legal rate as well as the additional indemnity provided for by law and calculated from the date of service of the present motion;

GRANT the class action of the Petitioners on behalf of all of the Members of the group and order collective recovery of the claims;

ORDER that the claims of all the Members of the group be the subject of individual claims in accordance with the provisions of articles 1037 to 1040 of the *Code of Civil Procedure*;

ORDER the Respondents solidarily to pay to each member of the group the amounts of their respective claims as damages with interest at the legal rate as well as the additional indemnity provided for by law from the service of the present motion;

THE WHOLE with costs, including all the costs of exhibits, expertise and the publication of notices;

[130] **DECLARE** that any member forming part of the group who is not excluded within the time period set out below shall be bound by any judgment that may be rendered on the class action;

[131] **FIXES** the delay for exclusion at thirty (30) days from the date of publication of the notice to members;

[132] **POSTPONES** the issue of the publication of the notice to members to the next management conference;

[133] **REFERS** the file to the Associate Chief Justice in order that he decide on the district in which the class action will be exercised;

[134] The whole with costs to follow.

(signed)

**ALICIA SOLDEVIDA, J.S.C.**

Mtre Simon Hébert

Mtre Claude Desmeules
Mtre Éric Lemay
Siskinds Desmeules - casier 15
*Attorneys for the Petitioners*

Mtre James A. Woods
Mtre Sébastien Richemont
Mtre Sarah Woods
Woods
2000, McGill College Avenue, suite 1700
Montreal, Quebec H3A 3H3
*Attorneys for Manulife Financial Corporation*

Mtre Katheryne Desfossés
Mtre Douglas Mitchell
Irving Mitchell Kalichman
2, Place Alexis-Nihon West, suite 1400
Westmount, Quebec H3Z 3C1
*Attorneys for Dominic D'Alessandro*

Mtre Michel Beaupré
Langlois Kronstrom Desjardins
Casier 115
*Attorneys for Gail C.A. Cook-Bennett*

Mtre Mason Poplaw
Mtre Céline Legendre
McCarthy Tétreault – casier 10
*Attorneys for Peter Rubenovitch*

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