

CANADA

SUPERIOR COURT
(Class Action)

PROVINCE OF QUEBEC
DISTRICT OF MONTREAL

N^o : 500-06-000623-120

J. [REDACTED] BOHBOT, residing and domiciled at
[REDACTED]
[REDACTED]
[REDACTED];

Petitioner

-vs-

LAKESHORE GENERAL HOSPITAL /
HÔPITAL GÉNÉRAL DU LAKESHORE, a
hospital located at 160 Stillview Avenue, in the
City of Pointe-Claire, Judicial District of
Montreal, Province of Quebec, H9R 2Y2;

-and-

GILLES BOURDON, a medical doctor
practicing medicine at *inter alia* 175 Stillview
Avenue, in the City of Pointe-Claire, Judicial
District of Montreal, Province of Quebec, H9R
4S3;

Respondents

**MOTION TO AUTHORIZE THE BRINGING OF A CLASS ACTION AND
TO ASCRIBE THE STATUS OF REPRESENTATIVE**
(Art. 1002 C.C.P. and following)

TO ONE OF THE HONOURABLE JUDGES OF THE SUPERIOR COURT OF QUEBEC, SITTING IN AND FOR THE DISTRICT OF MONTREAL, THE PETITIONER STATES THE FOLLOWING:

GENERAL PRESENTATION

1. Petitioner wishes to institute a class action on behalf of the following group, of which Petitioner is a member, namely:
 - All persons (including their estates, executors, or personal representatives), who underwent a colonoscopy between 2009 and 2012 at the Lakeshore General Hospital (hereinafter the "LGH") and who were sent a letter from the LGH in September 2012 informing them that certain tests conducted during the said colonoscopy may have been incomplete and/or a part of the intestine (colon) may not have been adequately visualized, or any other Group or Sub-Groups to be determined by the Court;

(hereinafter Class Members are collectively referred to as "Class Member(s)", "Group Member(s)", the "Group", the "Class" or "Patients");
2. At all relevant times Respondent the Lakeshore General Hospital / *Hôpital Général du Lakeshore* (hereinafter the "LGH") operated a hospital in the City of Pointe-Claire, Quebec;
3. Respondent Dr. Gilles Bourdon is a medical doctor and surgeon who treated some if not all of the Patients (Class Members) at both the LGH premises and at his clinic located across the street from the LGH (or elsewhere). Among other procedures, Dr. Bourdon conducted colonoscopies of his patients;
4. Petitioner is 70 years old and was a patient of Dr. Bourdon at the LGH. Petitioner was recently diagnosed with, and is being treated for, colon cancer, as more fully detailed hereinbelow;

FACTS GIVING RISE TO AN INDIVIDUAL ACTION BY THE PETITIONER

5. On September 11, 2012, Petitioner received the following letter dated September 10, 2012 from the LGH, a copy of which is filed herewith as **Exhibit R-1**:

Centre de santé et de services sociaux
de l'Ouest-de-l'Île
West Island
Health and Social Services Centre

September 10, 2012

J. BOHBOT
[REDACTED]
[REDACTED]
QUÉBEC H. [REDACTED]

Subject : Repeat of an examination carried out at the West Island Health and Social Services Centre

Sir,

In reviewing our endoscopy files, we noted that you underwent a colonoscopy between 2009 and 2012 at the Lakeshore General Hospital.


The review of the files shows that some tests carried out by a physician may have been incomplete. It is possible that a part of your intestine (colon) may not have been adequately visualized. This can occur on occasion, and is not itself an exceptional situation, but follow-up is required. There is, therefore, no reason for you to be concerned. However, in order to provide the optimal quality of service to which you are entitled, we would like to offer you the opportunity to repeat this examination. A new colonoscopy will allow you, as well as us, to dispel any concerns or questions.

We ask that you contact us by calling 514-630-2105, indicating that you have received this letter. We will make arrangements with you, if necessary, for an appointment as soon as possible. If you have any questions, we will do our best to answer them in a satisfactory manner. This special telephone line is available Monday to Friday, from 8:30 a.m. to 4:30 p.m. If you call outside of these hours, you can leave a message with your phone number and a team member will call you back.

We strive to provide you with the best possible care.

Yours truly,

The President of the Council of Physicians, Dentists and Pharmacists



Dr Richard D. Germain, MD

Attached, you will find a colonoscopy preparation document. Please read it carefully and bring it to your pharmacist so he/she can help you choose the right preparation formula.

6. Petitioner's wife also received an identical letter addressed to her the same day, a copy of which is filed herewith as **Exhibit R-2**;
7. As appears from various media reports on the issue which followed the LGH's September 12, 2012 news conference, which media reports or articles are filed herewith as though recited at length, *en liasse*, as **Exhibit R-3**, the LGH confirmed that a total of 684 Patients (Class Members) were involved and had been sent the same notification letter as received by the Petitioner, informing them of the botched colonoscopy;
8. The LGH refused to name the specific doctor involved who had apparently conducted all the colonoscopies in question but it confirmed that he had left the LGH in January 2012 for unrelated reasons. In fact, Dr. Richard G. Germain, M.D., the President of the Lakeshore's Council of Physicians, Dentists and Pharmacists (who signed the R-1 letter) indicated during the LGH's news conference that the LGH's legal counsel advised it not to release the name of the physician in order to "avoid litigation";
9. The R-3 media reports indicate that the unnamed doctor in question might not have examined the colon all the way to its upper end and therefore missed possible problems, such as precancerous or malignant lesions;
10. As reported by the media reports (see R-3), the LGH had apparently discovered evidence of incomplete colonoscopies in April 2012 following "routine quality-control review". As mentioned above, the LGH only proceeded to inform the public and the Class Members in September 2012, which Petitioner holds to be an unreasonable delay which put the Class Members' health at risk;
11. The LGH further confirmed that normally, a physician who conducts a colonoscopy must probe to the end of the colon and take pictures as proof of having completed the procedure. However, the review found that the general surgeon in question did not take pictures showing the "landmarks" at the end of the colon and he did not provide additional documentation. The absence of pictures raised doubts that the physician might have missed so-called flat lesions along the right end of the colon;
12. All that being said, both the Petitioner and his wife were patients of Respondent Dr. Gilles Bourdon, who conducted their colonoscopies at the LGH (Petitioner cannot confirm whether or not Dr. Bourdon is in fact the doctor that conducted all

of the colonoscopies in issue in these proceedings but the LGH can surely confirm this);

13. In the time period covered by the R-1 notification letter, Petitioner had underwent a colonoscopy but was not made aware by any of the Respondents of any problems which would cause concern or which would require further testing;
14. However, in and around February 2012, Petitioner noticed blood in his bowls and he called to schedule an immediate colonoscopy, which was only conducted on May 14, 2012;
15. Further to that colonoscopy, Petitioner was diagnosed with colon cancer;
16. Shocked by the fact that he now had colon cancer whereas his previous colonoscopy at the LGH had apparently not shown any problems only approximately 2 years earlier, Petitioner decided to move his future treatments to the Jewish General Hospital;
17. Petitioner therefore underwent surgery at the Jewish General Hospital on June 28, 2012 to remove the cancerous tumor in his colon;
18. After spending over 2 weeks in the hospital recovering, Petitioner was discharged on July 15, 2012;
19. Thereafter, Petitioner's surgeon referred him to an oncologist at the Jewish General Hospital for further treatments;
20. Petitioner met the oncologist on August 22, 2012. The oncologist suggested and prescribed 6 cycles of chemotherapy;
21. The first cycle began on September 10, 2012. Petitioner received intravenous chemotherapy treatment for 5 days, namely from September 10 to 14, 2012. He then has 3 weeks off to rest and gain his strength and will begin the cycle again, for a total of 6 cycles (unless other complications occur of course);
22. As mentioned above, Petitioner and his wife received the R-1 and R-2 letters on September 12, 2012;
23. That day, Petitioner's wife called the telephone number mentioned in the R-1 letter. She was asked about her medical history and was told that she would

require a letter from her family doctor approving a further colonoscopy. When she mentioned that her husband, the Petitioner, had been diagnosed with colon cancer just recently, she was told to mention that the next time she called in, namely after receiving the authorization letter from her family doctor;

24. The next day, on September 13, 2012, Petitioner's wife (in the presence of the Petitioner) called Dr.'s Bourdon's clinic and spoke to his assistant about the R-1 and R-2 letters received as well as the article published on the front page of the Montreal Gazette that same day (included in R-3);
25. When questioned, Dr. Bourdon's assistant confirmed that Dr. Bourdon was in fact the doctor that had left the LGH in January 2012, as reported by the media;
26. The assistant then quickly told Petitioner's wife to hold on since Dr. Bourdon wanted to speak to her;
27. Dr. Bourdon picked up the telephone almost immediately and indicated that the Petitioner himself did not have to do anything since he was already being followed by other doctors at the Jewish General Hospital;
28. That being said, Dr. Bourdon indicated to Petitioner's wife that she would have to call the number on the notification letter in order to book an appointment for another colonoscopy. Dr. Bourdon was clearly rushed and trying to end the call quickly;
29. Petitioner's wife ended the call by asking for a copy of her and her husband's complete files, in order to transfer them all to another hospital, and Dr. Bourdon confirmed her name and telephone number and confirmed that he would make sure that the copies are made and available by the following week;
30. Petitioner has obviously suffered damages in relation to his cancer diagnosis, surgery and on-going treatments;
31. He will also have to make sure that his wife is screened again, with a proper colonoscopy, since she too may still be at risk of, or already has, colon cancer herself;
32. Petitioner and his wife have suffered and will continue to suffer damages as a result of the botched colonoscopies conducted by Respondents;

FACTS GIVING RISE TO AN INDIVIDUAL ACTION BY EACH OF THE MEMBERS OF THE GROUP

33. Each of the 684 Class Members (including the Petitioner) underwent a colonoscopy at the LGH and received a similar R-1 notification letter;
34. Each Class Member and the Petitioner has and will suffer stress, fear and anxiety after receiving the notification letter (if they even received it all);
35. Each of the Class Members, including the Petitioner's wife, fear that they already have colon cancer which could have been caught earlier (and perhaps even caught in time to be prevented);
36. Most if not all of the Class Members (including the Petitioner's wife) will have to undergo a further colonoscopy, which in and of itself is an inconvenience, a loss of time and money (including wages) and is painful and uncomfortable;
37. Certain Class Members, such as the Petitioner, already developed colon cancer and have (or already had) to undergo surgery and/or other treatments;

CONDITIONS REQUIRED TO INSTITUTE A CLASS ACTION

38. The composition of the Group makes the application of Article 59 or 67 C.C.P. impractical for the following reasons:
 - a) the 684 Class Members are likely scattered across the City of Montreal, and possibly other cities;
 - b) the Class Members cannot be reached by the Petitioner or his attorneys since only the Respondents have the list of the Class Members;
 - c) all the facts alleged in the preceding paragraphs make the application of Articles 59 or 67 C.C.P. impossible;

39. The recourses of the members raise identical, similar or related questions of fact or law, namely:
- a) Did the Respondents negligently conduct improper or incomplete colonoscopies of the Class members between 2009 and 2012?
 - b) Where Respondents negligent in the manner in which they reviewed or controlled the colonoscopy files and/or the manner and delays in which they notified the Class Members?
 - c) Are Respondents liable to pay compensatory damages to the Class Members, and if so in which amounts?
 - d) Are Respondents liable to pay moral damages to the Class Members, and if so in which amounts?
 - e) Are Respondents liable to pay punitive or exemplary damages to the Class Members, and if so in which amounts?
40. The interests of justice favour that this motion be granted in accordance with its conclusions;

NATURE OF THE ACTION AND CONCLUSIONS SOUGHT

41. The action that Petitioner wishes to institute for the benefit of the Class Members is an action in damages and for medical malpractice;
42. The conclusions that Petitioner wishes to introduce by way of a motion to institute proceedings are:

GRANT Plaintiff's action against Defendants;

CONDEMN Defendants solidarily to pay to the Class Members compensatory damages in an amount to be determined by the Court;

CONDEMN Defendants solidarily to pay to the Class Members moral damages in an amount to be determined by the Court;

CONDEMN Defendants solidarily to pay an amount in punitive / exemplary damages to the Class Members, in an amount to be determined by the Court;

GRANT the class action of Petitioner on behalf of all the Class Members;

ORDER that the claims of individual Class Members be the object of collective liquidation if the proof permits and alternatively by individual liquidation, the whole in accordance with Articles 1031 and following of the C.P.C.;

RENDER any other order that this Honourable Court shall determine and that is in the interest of the Class Members;

THE WHOLE with interest and additional indemnity provided for in the Civil Code of Quebec and with full costs and expenses including expert's fees and publication fees to advise members;

43. Petitioner suggests that this class action be exercised before the Superior Court in the District of Montreal for the following reasons:

- a) the LGH is located in the judicial District of the Montreal and Dr. Bourdon practices in the judicial District of Montreal;
- b) the colonoscopies in question were all conducted at the LGH, in judicial District of Montreal;
- c) most if not all of the Class Members, including the Petitioner, reside in the judicial District of Montreal;
- d) the undersigned attorneys representing the Petitioner and the proposed Group practice law in the judicial District of Montreal;

44. Petitioner who is requesting to obtain the status of representative, will fairly and adequately protect and represent the interest of the members of the group for the following reason:

a) He and his wife underwent colonoscopies at the LGH and they received the R-1 and R-2 notification letter informing them of the botched colonoscopies;

b) He was diagnosed with colon cancer and underwent surgery and has started chemotherapy;

c) He has already and will continue to suffer anxiety, inconvenience, stress, loss of time, and out-of-pocket expenses as a result thereof;

d) He also fears for the health and wellbeing of his wife;

e) He understands the nature of the action and has the capacity and interest to fairly and adequately protect and represent the interest of the Members of the Group;

f) He is available to dedicate the time necessary for the present action before the Courts of Quebec and to collaborate with Class attorneys in this regard and Petitioner is ready and available to manage and direct the present action in the interest of the Members of the Group that Petitioner wishes to represent;

g) Petitioner is determined to lead the present file until a final resolution of the matter, the whole for the benefit of the Class;

h) His interests are not antagonistic to those of other members of the group;

i) He has given the mandate to the undersigned attorneys to obtain all relevant information to the present action and intends to keep informed of all developments;

j) He, with the assistance of the undersigned attorneys, is ready and available to dedicate the time necessary for this action and to collaborate with other Members of the Group and to keep them informed;

45. The present motion is well founded in fact and in law;

FOR THESE REASONS, MAY IT PLEASE THE COURT:

GRANT the present motion;

AUTHORIZE the bringing of a class action in the form of a motion to institute proceedings in damages and medical malpractice;

ASCRIBE the Petitioner the status of representative of the persons included in the group herein described as:

All persons (including their estates, executors, or personal representatives), who underwent a colonoscopy between 2009 and 2012 at the Lakeshore General Hospital (hereinafter the "LGH") and who were sent a letter from the LGH in September 2012 informing them that certain tests conducted during the said colonoscopy may have been incomplete and/or a part of the intestine (colon) may not have been adequately visualized, or any other Group or Sub-Groups to be determined by the Court;

IDENTIFY the principle questions of fact and law to be treated collectively as the following:

- a) Did the Respondents negligently conduct improper or incomplete colonoscopies of the Class members between 2009 and 2012?
- b) Where Respondents negligent in the manner in which they reviewed or controlled the colonoscopy files and/or the manner and delays in which they notified the Class Members?
- c) Are Respondents liable to pay compensatory damages to the Class Members, and if so in which amounts?
- d) Are Respondents liable to pay moral damages to the Class Members, and if so in which amounts?
- e) Are Respondents liable to pay punitive or exemplary damages to the Class Members, and if so in which amounts?

IDENTIFY the conclusions sought by the class action to be instituted as being the following:

GRANT Plaintiff's action against Defendants;

CONDEMN Defendants solidarily to pay to the Class Members compensatory damages in an amount to be determined by the Court;

CONDEMN Defendants solidarily to pay to the Class Members moral damages in an amount to be determined by the Court;

CONDEMN Defendants solidarily to pay an amount in punitive / exemplary damages to the Class Members, in an amount to be determined by the Court;

GRANT the class action of Petitioner on behalf of all the Class Members;

ORDER that the claims of individual Class Members be the object of collective liquidation if the proof permits and alternatively by individual liquidation, the whole in accordance with Articles 1031 and following of the C.P.C.;

RENDER any other order that this Honourable Court shall determine and that is in the interest of the Class Members;

THE WHOLE with interest and additional indemnity provided for in the Civil Code of Quebec and with full costs and expenses including expert's fees and publication fees to advise members;

DECLARE that all members of the group that have not requested their exclusion from the Group in the prescribed delay to be bound by any judgment to be rendered on the class action to be instituted;

FIX the delay of exclusion at 30 days from the date of the publication of the notice to the members;

ORDER the publication of a notice to the members of the Group in accordance with Article 1006 C.C.P. and convene the parties to a subsequent hearing in this regard;

THE WHOLE with costs against the Respondents on the present motion, including the costs related to preparation and publication of the notices to class members.

MONTREAL, SEPTEMBER 13, 2012

LEX GROUP INC.

(s) David Assor

Per: David Assor
Attorneys for Petitioner and the Class
Members