

CITATION: Gebien v. Apotex Inc., 2022 ONSC 4172

COURT FILE NO.: CV-19-00620048-00CP

CITATION: Gebien v. Kohl & Frisch Limited, 2022 ONSC 4173

COURT FILE NO.: CV-19-00630389-00CP

DATE: 20220705

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:

DARRYL GEBIEN

Plaintiff

- and -

APOTEX INC., APOTEX
PHARMACEUTICAL HOLDINGS,
INC., BRISTOL- MYERS SQUIBB
CANADA, BRISTOL-MYERS SQUIBB
COMPANY, PALADIN LABS, ENDO
PHARMACEUTICALS INC., ENDO
INTERNATIONAL PLC, JANSSEN
INC., JOHNSON & JOHNSON,
PHARMASCIENCE INC., JODDES
LIMITED, PRO DOC LIMITEE, THE
JEAN COUTU GROUP (PJC) INC.,
MYLAN PHARMACEUTICALS ULC,
MYLAN N.V., PURDUE PHARMA
INC., PURDUE PHARMA L.P., THE
PURDUE FREDERICK COMPANY
INC., PURDUE FREDERICK INC.,
RANBAXY PHARMACEUTICALS
CANADA INC., SUN
PHARMACEUTICAL INDUSTRIES
LTD., HIKMA LABS INC., HIKMA
PHARMACEUTICALS PLC, WEST-
WARD COLUMBUS INC., SANIS
HEALTH INC., SANDOZ CANADA
INC., SANDOZ INTERNATIONAL
GMBH, TEVA CANADA LIMITED,
TEVA PHARMACEUTICALS USA,
INC., TEVA PHARMACEUTICAL
INDUSTRIES LTD., ACTAVIS
PHARMA COMPANY, VALEANT
CANADA LP/ VALEANT CANADA
S.E.C, BAUSCH HEALTH

)
)
)
) *Kirk M. Baert and Adam Tanel for the
Plaintiff*

)
)
)
) *Laura Fric for Pharmascience Inc., Joddes
Limited, Ranbaxy, Pharmaceuticals Canada
Inc., Sun Pharmaceutical Industries Ltd, Teva
Canada Limited, Teva Pharmaceuticals USA,
Inc., Teva Pharmaceutical Industries Ltd.,
and Actavis Pharma Company*

)
) *H.B. Radomski, Nando De Luca, and Melanie
Ouanounou for Apotex Inc. and Apotex
Pharmaceutical Holdings Inc.*

)
) *David Neave and Rebecca von Rüti for
Bristol-Myers Squibb Canada and Bristol-
Myers Squibb Company*

)
) *Deborah Templer and Michael Feder, Q.C.
for Paladin Labs Inc., Endo Pharmaceuticals
Inc., Endo International PLC*

)
) *Jill Lawrie, Gordon McKee, and Robin
Reinertson for Janssen Inc. and Johnson &
Johnson*

)
) *Geoffrey B. Shaw, Derek Ronde and Mary
Buttery for The Jean Coutu Group (PJC) Inc.*

)
) *F. Paul Morrison, Fadi Amine, and Kelsey
Sherriff for Pro Doc Limitee*

)
) *Scott Maidment and Jennifer Dent for Mylan
Pharmaceuticals ULC and Mylan N.V.*

**COMPANIES INC.,
AMERISOURCEBERGEN CANADA
CORPORATION, KOHL + FRISCH
DISTRIBUTION INC., NU-QUEST
DISTRIBUTION INC., ABBOTT
LABORATORIES INC., LIMITED; and
PROCURITY INC.**

Defendants

)
) *Kate Crawford, Cindy Clarke, Barry Glaspell*
) *and Brad Dixon* for Purdue Pharma Inc. and
) Purdue Frederick Inc.

)
) *Lesley Mercer, David Byers and Danielle*
) *Royal* for The Purdue Frederick Company
) Inc. and Purdue Pharma LP

)
) *Robert J. McDonell* for Hikma
) Pharmaceuticals PLC, Hikma Labs Inc.,
) West-Ward Columbus Inc.

)
) *Kevin O'Brien, Deborah Glendinning,* and
) *Adam Hirsh* for Sanis Health Inc.

)
) *Peter J. Pliszka* and *Andrew Borrell* for
) Sandoz Canada Inc.

)
) *Andrew Skodyn, Melanie Baird, and James*
) *Sullivan, Q.C.* for Valeant Canada LP /
) Valeant Canada S.E.C. and Bausch Health
) Companies Inc.

)
) *Roger Horst* for Amerisourcebergen Canada
) Corporation, Kohl & Frisch Distribution
) Inc., and Procurity Inc.

)
) *Keith S. Morgan* for Nu-Quest Distribution
) Inc.

)
) *Byron Shaw, Caroline Zayid, and Eric Block*
) for Abbott Laboratories Inc.

AND BETWEEN:

DARRYL GEBIEN

Plaintiff

- and -

KOHL & FRISCH LIMITED

Defendant

Proceeding under the *Class Proceedings Act,*
1992

) **HEARD:** July 5, 2022
)

PERELL, J.

REASONS FOR DECISION

[1] On May 15, 2019, pursuant to the *Class Proceedings Act, 1992*¹ Darryl Gebien sued: (a) Apotex Inc. and Apotex Pharmaceutical Holdings Inc.; (b) Bristol-Myers Squibb Canada and Bristol-Myers Squibb Company; (c) Paladin Labs Inc., Endo Pharmaceuticals Inc., Endo International PLC; (d) Janssen Inc. and Johnson & Johnson; (e) Joddes Limited, Ranbaxy Pharmaceuticals Canada Inc., Sun Pharmaceutical Industries Ltd, Teva Canada Limited, Teva Pharmaceuticals USA, Inc., Teva Pharmaceutical Industries Ltd., and Actavis Pharma Company; (f) Pro Doc Limitee; (g) The Jean Coutu Group (PJC) Inc.; (h) Mylan Pharmaceuticals ULC and Mylan N.V.; (i) Purdue Pharma Inc. and the Purdue Frederick Inc; (j) The Purdue Frederick Company Inc. and Purdue Pharma LP; (k) Hikma Pharmaceuticals PLC, Hikma Labs Inc., West-Ward Columbus Inc.; (l) Sanis Health Inc.; (m) Sandoz Canada Inc. and Sandoz International GMBH; (n) Valeant Canada LP / Valeant Canada S.E.C. and Bausch Health Companies Inc.; (o) Amerisourcebergen Canada Corporation, Kohl & Frisch Distribution Inc., and Procurity Inc.; (p) Nu-Quest Distribution Inc.; and (q) Abbott Laboratories Inc.

[2] On November 5, 2019, the Plaintiff commenced a parallel proposed class proceeding against a sole Defendant Kohl & Frisch Limited.

[3] The Defendants in both actions are manufacturers and distributors of Opioids.

[4] The Plaintiff seeks to represent a class of all persons in Canada who were prescribed Opioids manufactured, marketed or distributed by the Defendants from January 1, 1996 to the present day and suffer or have suffered from Opioid Use Disorder. On behalf of the class, the Plaintiff pleads negligence, fraudulent misrepresentation and deceit, and breaches of the *Competition Act*.

[5] On October 1, 2020, pursuant to the *Smarter and Stronger Justice Act, 2020*² amendments to the *Class Proceedings Act, 1992* came into force. For present purposes, the relevant sections of the amended Act are 5, 29.1, and 39, which state:

Certification

5 (1) The court shall, subject to subsection (6) and to section 5.1, certify a class proceeding on a motion under section 2, 3 or 4 if,

- (a) the pleadings or the notice of application discloses a cause of action;
- (b) there is an identifiable class of two or more persons that would be represented by the representative plaintiff or defendant;
- (c) the claims or defences of the class members raise common issues;
- (d) a class proceeding would be the preferable procedure for the resolution of the common issues; and
- (e) there is a representative plaintiff or defendant who,

¹ S.O. 1992, c. 6.

² S.O. 2020, c. 11, Sched. 4.

- (i) would fairly and adequately represent the interests of the class,
- (ii) has produced a plan for the proceeding that sets out a workable method of advancing the proceeding on behalf of the class and of notifying class members of the proceeding, and
- (iii) does not have, on the common issues for the class, an interest in conflict with the interests of other class members.

Same

(1.1) In the case of a motion under section 2, a class proceeding is the preferable procedure for the resolution of common issues under clause (1) (d) only if, at a minimum,

- (a) it is superior to all reasonably available means of determining the entitlement of the class members to relief or addressing the impugned conduct of the defendant, including, as applicable, a quasi-judicial or administrative proceeding, the case management of individual claims in a civil proceeding, or any remedial scheme or program outside of a proceeding; and
- (b) the questions of fact or law common to the class members predominate over any questions affecting only individual class members.

[...]

{*****}

Mandatory dismissal for delay

29.1 (1) The court shall, on motion, dismiss for delay a proceeding commenced under section 2 unless, by the first anniversary of the day on which the proceeding was commenced,

- (a) the representative plaintiff has filed a final and complete motion record in the motion for certification;
- (b) the parties have agreed in writing to a timetable for service of the representative plaintiff's motion record in the motion for certification or for completion of one or more other steps required to advance the proceeding, and have filed the timetable with the court;
- (c) the court has ordered that the proceeding not be dismissed and has established a timetable for service of the representative plaintiff's motion record in the motion for certification or for completion of one or more other steps required to advance the proceeding; or
- (d) any other steps, occurrences or circumstances specified by the regulations have taken place.

[...]

Transition

39 (1) Except as otherwise provided by this section, this Act, as it read immediately before section 35 of Schedule 4 to the *Smarter and Stronger Justice Act, 2020* came into force, continues to apply with respect to,

- (a) a proceeding commenced under section 2 before that day;

(b) a proceeding under section 3 or 4, if the motion for certification was made before that day; and

(c) any other proceeding under this Act that may be prescribed, in the prescribed circumstances, including a proceeding commenced under this Act on or after that day.

Same

(2) Section 29.1 applies, with necessary modifications, to a proceeding referred to in clause (1) (a), except that the reference in subsection 29.1 (1) to the day on which the proceeding was commenced shall be read as a reference to the day on which section 35 of Schedule 4 to the *Smarter and Stronger Justice Act, 2020* came into force.

[6] As appears, pursuant to the transition provisions of the amended Act, the Plaintiff had a deadline of October 1, 2021, to satisfy the conditions of s 29.1 (1) for the prosecution of the two class actions or the court shall, on motion, dismiss the proposed class actions for delay.

[7] The Plaintiff did not meet the deadline in either action and in December 2021, the Defendants Apotex Inc., Paladin Labs Inc., Valeant Canada LP / Valeant Canada S.E.C., Bausch Health Companies Inc., Nu-Quest Distribution Inc., Amerisourcebergen Canada Corporation, Kohl & Frisch Distribution Inc., Procurity Inc., Sandoz Canada Inc., The Jean Coutu Group (PJC) Inc., Janssen Inc., Teva Canada Limited, Actavis Pharma Company, Ranbaxy Pharmaceuticals Canada Inc., Pharmascience Inc., Mylan Pharmaceuticals ULC, and Abbott Laboratories, Limited, and Kohl & Frisch Limited in the parallel action moved pursuant to s. 29.1(1) of the *Class Proceedings Act, 1992* for an Order: (a) dismissing the action(s) for delay; (b) requiring counsel for the Plaintiff to give notice of the dismissal at counsel's own cost by posting the notice and order on counsel's website and mailing or emailing the same to proposed class members who have contacted them; and (c) requiring the plaintiff to pay the costs of the action(s) and the motion(s).

[8] On January 25, 2022, in response to the Moving Defendants' motions for delay, the Plaintiff brought motions for *nunc pro tunc* orders, effective September 30, 2021, setting a certification motion date and timetables for the certification motions.

[9] Also, in response to the Moving Defendants' motion for delay in the two actions, the Plaintiff cloned his proposed class actions and commenced proposed class actions in Manitoba; namely: (a) *Gebien v. Apotex Inc., et al*, in The Queen's Bench, Winnipeg Centre with the Court File No. CI 21-01-33888; and (b) *Tryon v. Apotex Inc., et al*, in The Queen's Bench, Winnipeg Centre with the Court File No. CI 22-01-34320.

[10] After the delivery of the motion materials and an exchange of Plaintiff's Factum, Defendants' Responding Factum, Plaintiff's Reply Factum, Defendants' Factum, Plaintiff's Responding Factum, and Defendants' Reply Factum, the parties decided to settle the competing motions.

[11] The parties agree to an Order in the main action on the following terms:

THIS COURT ORDERS that:

(a) The Plaintiff and his counsel shall take all steps required to have the following proceedings discontinued with prejudice and without costs, as soon as practicable: (i) *Gebien v. Apotex Inc., et al*, in The Queen's Bench, Winnipeg Centre with the Court File No. CI 21-01-33888, and (ii) *Tryon v. Apotex Inc., et al*, in The Queen's Bench, Winnipeg Centre with the Court File No. CI 22-01-34320;

(b) Conditional upon the discontinuances of the Manitoba proceedings referred to above in (a) being filed, and if required approved, and being effective and final:

(i) the Moving Defendants motion pursuant to section 29.1 shall be dismissed without costs;

(ii) the Plaintiff's motion for a *nunc pro tunc* timetable order shall be dismissed without costs;

(iii) This proceeding shall be deemed, for all purposes other than in relation to applicable limitation periods, to have been commenced on October 2, 2020. Amendments made to the Ontario *Class Proceedings Act, 1992*, pursuant to Bill 161, in force as of October 1, 2020, shall apply to this proceeding including without limitation:

(1) Section 5(1.1) respecting requirements for certification;

(2) Section 4.1 respecting the early resolution of issues, and

(3) Section 30 respecting appeals; and

(iv) The following timetable is established, subject to future agreement of the parties to revise and/or subject to further order:

the defendants shall advise by October 31, 2022, whether any are bringing preliminary motions, after which the parties shall agree upon and file a further timetable (or, failing agreement, a further timetable will be established by the court), with the certification motion, in any event, not to be scheduled to be heard prior to December 31, 2023.

2. THIS COURT ORDERS that this Order does not bind Purdue Pharma L.P. or The Purdue Frederick Company Inc., pursuant to the terms of the stays of proceeding set forth in the Initial Recognition Order (Foreign Main Proceeding) dated September 19, 2019, the Supplemental Order (Foreign Main Proceeding) dated September 19, 2019, and the Order (Re: Related Party Stay) dated December 30, 2019, and any subsequent extensions or amendments to those orders.

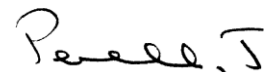
3. THIS COURT ORDERS that this Order and all its provisions are effective from the date it is made without any need for entry and filing.

[12] The proposed Order in the parallel proceedings is similar.

[13] As appears, the essence of the settlement is that the competing motions are both dismissed and the proposed class proceedings shall be prosecuted in accordance with the certification test of the amended *Class Proceedings Act, 1992*. Meanwhile the cloned proceedings in Manitoba shall be discontinued.

[14] The non-moving party Defendants do not oppose the settlement or take no position. I am satisfied with the terms of settlement of the motions.

[15] I have signed the Orders.



Perell, J.

Oral Decision: July 5, 2022

Written Reasons Released: July 15, 2022

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SUPERIOR COURT OF JUSTICE**

BETWEEN:

DARRYL GEBIEN

Plaintiff

- and -

APOTEX INC., APOTEX PHARMACEUTICAL HOLDINGS, INC., BRISTOL- MYERS SQUIBB CANADA, BRISTOL- MYERS SQUIBB COMPANY, PALADIN LABS, ENDO PHARMACEUTICALS INC., ENDO INTERNATIONAL PLC, JANSSEN INC., JOHNSON & JOHNSON, PHARMASCIENCE INC., JODDES LIMITED, PRO DOC LIMITEE, THE JEAN COUTU GROUP (PJC) INC., MYLAN PHARMACEUTICALS ULC, MYLAN N.V., PURDUE PHARMA INC., PURDUE PHARMA L.P., THE PURDUE FREDERICK COMPANY INC., PURDUE FREDERICK INC., RANBAXY PHARMACEUTICALS CANADA INC., SUN PHARMACEUTICAL INDUSTRIES LTD., HIKMA LABS INC., HIKMA PHARMACEUTICALS PLC, WESTWARD COLUMBUS INC., SANIS HEALTH INC., SANDOZ CANADA INC., SANDOZ INTERNATIONAL GMBH, TEVA CANADA LIMITED, TEVA PHARMACEUTICALS USA, INC., TEVA PHARMACEUTICAL INDUSTRIES LTD., ACTAVIS PHARMA COMPANY, VALEANT CANADA LP/ VALEANT CANADA S.E.C, BAUSCH HEALTH COMPANIES INC., AMERISOURCEBERGEN CANADA CORPORATION, KOHL + FRISCH DISTRIBUTION INC., NU-QUEST DISTRIBUTION INC., ABBOTT LABORATORIES INC., LIMITED; and PROCURITY INC.

Defendants

AND BETWEEN:

DARRYL GEBIEN

Plaintiff

- and -

KOHL & FRISCH LIMITED

Defendant

REASONS FOR DECISION

PERELL J.

Oral Decision: July 5, 2022
Written Reasons Released: July 15, 2022