**CITATION:** Gebien v. Apotex Inc., 2023 ONSC 6792
**COURT FILE NO.:** CV-19-00620048-00CP
**DATE:** 20231201

**ONTARIO**
**SUPERIOR COURT OF JUSTICE**

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| **BETWEEN:** | |
| **DARRYL GEBIEN**<br>Plaintiff | *Adam Tanel, Vlad Calina, Caitlin Leach,* and *Alec Angle* for the 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 COMPANIES INC., AMERISOURCEBERGEN CANADA CORPORATION, KOHL + FRISCH** | *Fadi Amine, Yves Robillard,* and *Baktash Waseil* for Pro Doc<br><br>*Peter J. Pliszka, Caroline Youdan,* and *Pavel Sergeyev* for Sandoz Canada Inc.<br><br>*Scott Maidment* and *Jennifer Dent* for Mylan Pharmaceuticals ULC and Mylan N.V.<br><br>*Jill Lawrie, Gordon McKee,* and *Sanjit Rajayer* for Janssen Inc. and Johnson & Johnson<br><br>*Laura Fric* and *Robert Carson* 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<br><br>*Caroline Zayid* and *Byron Shaw* for Abbott Laboratories Inc.<br><br>*Barry Glaspell, Cindy Clarke,* and *Adrian Pel* for Purdue Pharma Inc. and Purdue Frederick Inc**.**<br><br>*Geoffrey B. Shaw,* and *Derek Ronde* for The Jean Coutu Group (PJC) Inc. |

| | | |
|---|---|---|
| **DISTRIBUTION INC., NU-QUEST DISTRIBUTION INC., ABBOTT LABORATORIES, LIMITED, and PROCURITY INC**.<br><br>Defendants | ) | *Lesley Mercer,* for The Purdue Frederick Company Inc. and Purdue Pharma LP (watching brief)<br><br>*Harry Radomski* and *Nando De Luca* for Apotex Inc. and Apotex Pharmaceutical Holdings Inc.<br><br>*David Neave* and *Rebecca von Rüti* for Bristol-Myers Squibb Canada and Bristol-Myers Squibb Company<br><br>*Robert J. McDonell* for Hikma Pharmaceuticals PLC, Hikma Labs Inc., West-Ward Columbus Inc.<br><br>*Ankita Gupta* for Sanis Health Inc.<br><br>*Andrew Skodyn, Melanie Baird,* and *Rebecca Torrance* for Valeant Canada LP / Valeant Canada S.E.C. and Bausch Health Companies Inc.<br><br>*Tim Farrell* and *Anna Iourina* for Amerisourcebergen Canada Corporation, Kohl & Frisch Distribution Inc., and Procurity Inc. [and Kohl & Frisch Limited]<br><br>*Keith S. Morgan* for Nu-Quest Distribution Inc.<br><br>**HEARD**: October 17-19, 2023 |

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**PERELL, J.**

## REASONS FOR DECISION

### Prologue

> For ere this the tribes of men lived on earth remote and free from ills and hard toil and heavy sickness which bring the Fates upon men; for in misery men grow old quickly. But the woman [Pandora] took off the great lid of the jar with her hands and scattered all these and her thought caused sorrow and mischief to men. […] But the rest, countless plagues, wander amongst men; for earth is full of evils and the sea is full. Of themselves diseases come upon men continually by day and by night, bringing mischief to mortals silently; …. [Hesiod: *Works and Days* (*circa* 750 BCE) (translated by Hugh G. Evelyn-White, 1914)

[1] In the misogynistic Greek creation myth of Pandora's Box, the cause of evil, including plagues innumerable, is attributed to the deceitfulness of Pandora who opened a box and released around the world countless illnesses and miseries. In this proposed Pandora's Box of a class action, the opioid epidemic, an epidemic that has caused widespread pain, misery, and death around the world, is attributed to the deceitfulness and avarice of the Defendants who manufactured and distributed Opioids.

### A. Introduction

[2] In this action, pursuant to the *Class Proceedings Act, 1992*,[1] the Plaintiff, Dr. Darryl Gebien, moves for certification of his action as a class proceeding.

[3] The Defendants, which are described in the Fresh as Amended Statement of Claim as comprising two groups, i.e., the "Manufacturer Defendants" and the "Distributor Defendants", bring motions to have the Plaintiff's Statement of Claim struck for failure to disclose a reasonable cause of action or for violating the rules of pleading.

[4] The Defendant Pro Doc Limitée, which is a subsidiary of the Defendant The Jean Coutu Group (PJC) Inc., brings a motion pursuant to rule 21.01 (3)(a) of the *Rules of Civil Procedure*[2] for an Order dismissing the action on the grounds that the Ontario court lacks jurisdiction *simpliciter*, or in the alternative pursuant to rule 17.06(1)(b),(2)(c) for an Order staying the action on the grounds that Ontario is *forum non conveniens*.

[5] This is a hearing of Pro Doc's Jurisdiction Motion. It is also a hearing of the Defendants' Motions to Strike. This hearing is also Phase One of Dr. Gebien's motion to certify his action as a class action. Phase One of the Certification Motion is to determine whether or not the cause of action criterion (s. 5(1)(a) of the *Class Proceedings Act, 1992*) has been satisfied as against the Manufacturer Defendants and the Distributor Defendants, respectively.

### B. Housekeeping

#### (a) Kohl & Frisch Distribution Inc. and Kohl & Frisch Limited

[6] The Defendant Kohl & Frisch Distribution Inc. is misspelled in the Fresh as Amended

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[1] S.O. 1992, c. 6.
[2] R.R.O. 1990, Reg. 194.

Statement of Claim with a "+" instead of an "&".

[7] A separate corporation which is related to Kohl & Frisch Distribution Inc. is Kohl & Frisch Limited. That separate company is included as a defendant in the body of the Fresh as Amended Statement of Claim; however, it is not named in the style of cause.

[8] In the body of the Fresh as Amended Statement of Claim, Kohl & Frisch Limited is sued as a distributor of Opioids. In a parallel cloned class action, Dr. Gebien sues Kohl & Frisch Limited as a distributor but also as a manufacturer of Opioids.

[9] Dr. Gebien and Kohl & Frisch Limited have agreed to apply the findings in the motions now before the court in both actions.

[10] Therefore, as a housekeeping matter, I order that the style of cause be amended: (a) to correct the misspelling of Kohl & Frisch Distribution Inc.; and (b) to include Kohl & Frisch Limited as a party defendant.

[11] Further, I order that the Fresh as Amended Statement of Claim be amended to sue Kohl & Frisch Limited as both an opioid distributor and as an opioid manufacturer.

### (b) Mylan Pharmaceuticals Inc.

[12] Mylan Pharmaceuticals ULC, Mylan Pharmaceuticals Inc., and Mylan N.V. (collectively, "Mylan") are among the "Manufacturer Defendants" described in the Fresh as Amended Statement of Claim; however, only Mylan Pharmaceuticals ULC and Mylan N.V. are to be found in the style of cause.

[13] As a housekeeping matter, I order that the style of cause be amended to include Mylan Pharmaceuticals Inc.

### (c) The Purdue Defendants

[14] Dr. Gebien sues as a group, (1) Purdue Pharma Inc., (2) Purdue Frederick Inc., (3) The Purdue Frederick Company Inc., and (4) Purdue Pharma L.P. They are sued as "Manufacturer Defendants".

[15] Purdue Pharma Inc. and Purdue Frederick Inc. are Canadian corporations. The Purdue Frederick Company Inc. and Purdue Pharma L.P. are American corporations.

[16] The American Purdue Companies are in bankruptcy; the Canadian Purdue Companies are not bankrupt.

[17] Pursuant to U.S. and Canadian bankruptcy and insolvency proceedings, there is a stay of proceedings against the American and the Canadian companies.[3] By Order of Justice Conway dated June 1, 2022 the stay of proceedings was lifted in respect of the Canadian companies (Purdue Pharma Inc. and Purdue Frederick Inc.) to allow the motion for certification to proceed as against them.

[18] The stay of proceedings against the American companies continues, but their counsel appeared on a watching brief.

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[3] *Purdue Pharma L.P., Re.,* 2019 ONSC 7042.

### (d) The Endo Defendants

[19] Dr. Gebien sues as a group, Paladin Inc., Endo Pharmaceuticals Inc. and Endo International plc (collectively the "Endo Defendants"). They are sued as "Manufacturer Defendants".

[20] Pursuant to the *Companies' Creditors Arrangement Act*, on August 17, 2022 and August 19, 2022, Chief Justice Morawetz stayed all Canadian proceedings against the Endo Defendants.

[21] The Endo Defendants did not appear and did not participate in the hearing and no relief can be sought or obtained in respect of the Endo Defendants while the stay remains in place.

## C. Synopsis

[22] For the reasons that follow:

[23] The Ontario Court does not have jurisdiction *simpliciter* and it is *forum non conveniens* with respect to Dr. Gebien's claims against Pro Doc. Therefore, Pro Doc's Jurisdiction Motion should be granted.

[24] There are no reasonable causes of action as against the "Distributor Defendants". Therefore, the claims in Dr. Gebien's Fresh as Amended Statement of Claim as against: (1) Abbott Laboratories Inc.; (2) AmerisourceBergen Canada Corporation; (3) Kohl & Frisch Distribution Inc.; (4) Kohl & Frisch Limited - in its capacity as a Distributor; (5) Nu-Quest Distribution Inc.; (6) Pro Doc Limitée; (7) Procurity Inc.; and (8) The Jean Coutu Group (PJC) Inc. - in its capacity as a Distributor Defendant, are struck out without leave to amend.

[25] The claim in the Fresh as Amended Statement of Claim as against The Jean Coutu Group (PJC) Inc. in its capacity as a Manufacturer Defendant should also be struck out without leave to amend. It is not a manufacturer of Opioids and hence is not a Manufacturer Defendant.

[26] Subject to the joinder of Representative Plaintiff**s** and compliance with the *Ragoonanan* Principle, which is authority that in a proposed class action, there must be a representative plaintiff with a claim against each defendant,[4] there are four discrete certifiable causes of action against the remaining Manufacturer Defendants. The discrete certifiable causes of action against the Manufacturer Defendants are: (1) breach of the *Competition Act*;[5] (2) negligent misrepresentation; (3) fraudulent misrepresentation or deceit; and (4) products liability negligence for breach of a duty to warn.

[27] If properly pleaded, each of these four causes of action would satisfy the cause of action criterion of the *Class Proceedings Act, 1992.* To be clear, if properly pleaded with material facts and particulars of the frauds and misrepresentations, these four causes of action would satisfy the cause of action criterion of the *Class Proceedings Act, 1992*.

[28] Although there are legally viable causes of action, Dr. Gebien's Fresh as Amended Statement of Claim, however, is not a proper pleading of the four discrete certifiable causes of

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[4] *Poirer v. Silver Wheaton Corp*, 2022 ONSC 80; *Vecchio Longo Consulting Services Inc. v. Aphria Inc*., 2021 ONSC 5405; *Canada v. Greenwood*, 2021 FCA 186, leave to appeal ref'd [2021] S.C.C.A. No. 377; *Lawrence v. Atlas Cold Storage Holdings Inc.* (2006), 34 C.P.C. (6th) 41 (Ont. S.C.J.); *Ragoonanan Estate v. Imperial Tobacco Canada Ltd*. (2000), 51 O.R. (3d) 603; 128; *Hughes v. Sunbeam Corp. (Canada)*, (2000), 11 B.L.R. (3d) 236 (Ont. S.C.J.) S.C.), var'd on other grounds (2002) 61 O.R. (3d) 433 (C.A.), leave to appeal to S.C.C. ref'd, [2002] S.C.C.A. No. 446.é

[5] R.S.C. 1985, c. C-34.

action. The pleading is the opposite of concise, and it includes a plethora of evidence and irrelevant material and although the pleading demonstrates some reasonable causes of action, it fails to be concise to the point that the Defendants are hindered in developing a responsive pleading.[6] Therefore, the Manufacturer Defendants' motion to strike the Fresh as Amended Statement of Claim should be granted on terms that Dr. Gebien is granted leave to deliver a Second Fresh as Amended Statement of Claim subject to the directions set out next.

[29] The Second Fresh as Amended Statement of Claim should comply with the technical rules of a proper pleading.

[30] Excluding The Jean Coutu Group (PJC) Inc. and Pro Doc Limitée, which were joined in the previous pleadings, for the Second Fresh as Amended Statement of Claim, the Manufacturer Defendants are the following 14 groups of defendants:

1. Apotex Inc. and Apotex Pharmaceutical Holdings, Inc. (collectively, "Apotex");
2. Bristol-Myers Squibb Canada and Bristol-Myers Squibb Company (collectively "Bristol-Myers");
3. Endo Pharmaceuticals Inc., Endo International PLC and Paladin Labs (collectively "Endo");
4. Janssen Inc. (formerly Janssen-Ortho Inc.), Johnson & Johnson, and Oklahoma & Johnson (collectively "Janssen");
5. Kohl & Frisch Limited;
6. Mylan Pharmaceuticals ULC, Mylan Pharmaceuticals Inc., and Mylan N.V. (collectively, "Mylan");
7. Pharmascience Inc. and Joddes Limited (collectively, "Pharmascience");
8. Purdue Pharma Inc., Purdue Frederick Inc., Purdue Pharma L.P., and Purdue Frederick Company Inc. (collectively "Purdue");
9. Ranbaxy Pharmaceuticals Canada Inc. and Sun Pharmaceutical Industries Ltd. (collectively, "Ranbaxy");
10. Hikma Labs Inc., West-Ward Columbus Inc., and Hikma Pharmaceuticals PLC (collectively, "Roxane");
11. Sandoz Canada Inc.;
12. Sanis Health Inc.;
13. Teva Canada Limited, Actavis Pharma Company, Teva Pharmaceuticals USA, Inc. and Teva Pharmaceutical Industries Ltd. (collectively "Teva"); and
14. Valeant Canada LP/ Valeant Canada S.E.C. and Bausch Health Companies Inc. (collectively, "Valeant").

[31] In the Second Fresh as Amended Statement of Claim the 14 groups of Manufacturer Defendants may be sued as 14 groups.

[32] The Second Fresh as Amended Statement of Claim should join a Representative Plaintiff

[6] *Lysko v. Braley* (2006) 79 O.R. (3d) 721 (C.A.).

for each of these groups of defendants.

[33] In the Second Fresh as Amended Statement of Claim, Dr. Gebien and the other plaintiffs may, as they may be advised, make allegations of material facts severally or they may make allegations collectively as against some or all of the groups of Manufacturing Defendants. As the discussion later will reveal, allegations of the same misconduct may sometimes be made by "lumping" the defendants together. The appropriateness of synchronized allegations of material fact will depend on the circumstances of the particular case. A synchronized pleading is appropriate in the immediate case.

[34] To be clear, for the Second Fresh as Amended Statement of Claim the only products liability claims that Dr. Gebien and the other Representative Plaintiffs may assert are claims for: (a) breach of the *Competition Act*; (b) negligent misrepresentation; (c) fraudulent misrepresentation; and (d) for a breach of a duty of warn.

[35] Dr. Gebien and his co-Plaintiffs are not granted leave to plead: manufacturing negligence, distribution negligence, or negligent design or a novel products' liability claim.

[36] To be clear, for the Second Fresh as Amended Statement of Claim, it is plain and obvious that Dr. Gebien does not have a cause of action based on common-design liability nor does he have common-design as a form of concurrent or joint liability. Dr. Gebien and the other co-Plaintiffs are not granted leave to amend to assert such a common-design claim. Apart from the joint and several liability that might arise from the 14 intercorporate grouping of Defendants, there is no joint and several liability in the immediate case.

[37] To be clear, for the Second Fresh as Amended Statement of Claim, it is plain and obvious that Dr. Gebien does not have a cause of action against the Manufacturer Defendants with respect to enabling the black market, and Dr. Gebien and the other Representative Plaintiffs are not granted leave to amend to assert such a claim.

[38] To be clear, there are no causes of action against the Distributor Defendants and they should be removed from the Second Fresh as Amended Statement of Claim.

[39] Subject to Dr. Gebien appealing this Order, he shall have 120 days to deliver a Second Fresh as Amended Statement of Claim that: (a) joins Representative Plaintiffs (the *Ragoonanan* Principle); (b) pleads in accordance with the *Rules of Civil Procedure*; and (c) pleads in accordance with these Reasons for Decision, failing which Dr. Gebien's action shall be dismissed.

[40] If Dr. Gebien delivers a Second Fresh as Amended Statement of Claim, then the Manufacturer Defendants shall have 20 days to bring Motions to Strike the Second Fresh as Amended Statement of Claim, failing which the Certification Motion shall proceed to Phase Two.

[41] If the Manufacturer Defendants or any of them brings a Motion to Strike the Second Fresh as Amended Statement of Claim, the motion(s) shall be scheduled before the hearing of Phase Two of the Certification Motion.

[42] If within 20 days of the delivery of the Second Fresh as Amended Statement of Claim the Manufacturer Defendants do not bring any Motions to Strike, Dr. Gebien's Certification Motion shall proceed to Phase Two.

[43] Subject to the following exceptions, the costs of Dr. Gebien's Phase One Certification Motion and the costs of the Defendants' Motion to Strike shall be costs in the cause of the Certification Motion.

[44] The exceptions are that Pro Doc, Jean Coutu Group, and the Distributor Defendants may make costs submissions within twenty days of the release of these Reasons for Decision followed by Dr. Gebien's submissions within the following twenty days. Any reply costs submissions shall be made within a further ten days.

## D. Procedural and Evidentiary Background

[45] On **May 15, 2019**, pursuant to the *Class Proceedings Act, 1992*,[7] Dr. Gebien commenced a proposed class action.

[46] On **November 4, 2019**, Dr. Gebien commenced a parallel action (CV-19-630389-00CP) against Kohl & Frisch Limited, which was sued as a manufacturer and as a distributor of Opioids. The material allegations are identical.

[47] On **November 14, 2019**, Dr. Gebien delivered an Amended Statement of Claim.

[48] On **June 22, 2022**, Dr. Gebien delivered a Fresh as Amended Statement of Claim.

[49] The "Manufacturer Defendants" are: (1) Apotex Inc. and Apotex Pharmaceutical Holdings, Inc. (collectively, "Apotex"); (2) Bristol-Myers Squibb Canada and Bristol-Myers Squibb Company (collectively "Bristol-Myers"); (3) Endo Pharmaceuticals Inc., Endo International PLC and Paladin Labs Inc. (collectively "Endo"); (4) Janssen Inc. (formerly Janssen-Ortho Inc.) Johnson & Johnson, and Oklahoma & Johnson (collectively, "Janssen"); (5) Mylan Pharmaceuticals ULC, Mylan Pharmaceuticals Inc., and Mylan N.V. (collectively, "Mylan"); (6) Pharmascience Inc. and Joddes Limited (collectively, "Pharmascience"); (7) Pro Doc Limitée and The Jean Coutu Group (PJC) Inc.; (8) Purdue Pharma Inc., Purdue Frederick Inc., Purdue Pharma L.P., and Purdue Frederick Company Inc. (collectively, "Purdue"); (9) Ranbaxy Pharmaceuticals Canada Inc. and Sun Pharmaceutical Industries Ltd. (collectively, "Ranbaxy"); (10) Hikma Labs Inc. (formerly known as Roxane Laboratories Inc.) and West-Ward Columbus Inc. (formerly known as Boehringer Ingelheim Roxane Inc.) and Hikma Pharmaceuticals PLC (collectively, "Roxane"); (11) Sandoz Canada Inc.; (12) Sanis Health Inc.; (13) Teva Canada Limited, Actavis Pharma Company (formerly, Cobalt Pharmaceutical Company), Teva Pharmaceuticals USA, Inc. and Teva Pharmaceutical Industries Ltd. (collectively, "Teva"); and (14) Valeant Canada LP/ Valeant Canada S.E.C. and Bausch Health Companies Inc. (collectively, "Valeant") [and (15) Kohl & Frisch Limited].

[50] The "Distributor Defendants" are: (1) Abbott Laboratories Inc. (formerly, Abbott Laboratories, Limited); (2) AmerisourceBergen Canada Corporation; (3) Kohl & Frisch Distribution Inc.; (4) Kohl & Frisch Limited; (5) Nu-Quest Distribution Inc.; (6) Pro Doc Limitée; (7) Procurity Inc.; and (8) The Jean Coutu Group (PJC) Inc. in its capacity as a distributor.

[51] The Defendants are manufacturers and/or distributors of Opioids, which are a class of drugs that are defined by a chemical compound that is naturally found in the opium poppy plant or which is synthetically made using the same chemical structure.

[52] Dr. Gebien sues on behalf of the following class:

> (a) "Class" and "Class Members" means all persons in Canada, save for excluded persons, who were prescribed Opioids manufactured, marketed or distributed by the Defendants from January 1, 1996

[7] S.O. 1992, c. 6.

> to the present day ("Class Period") and who suffer or have suffered from Opioid Use Disorder, according to the diagnostic criteria hereafter described;
>
> (b) The Class includes the direct heirs of any deceased persons who met the abovementioned criteria;
>
> (c) "Excluded Persons" means:
>
> > (i) any person who was prescribed OxyContin® or OxyNEO® in Canada at any time between January 1, 1996 and April 15, 2016 inclusive, and was not prescribed any other Opioids, as defined below, at any time during the Class Period: and,
> >
> > (ii) any officer or director of any of the Defendants;
>
> (d) "Family Law Class" and "Family Law Class Members" means all persons within Canada, except for excluded persons, who by reason of his or her relationship to a Class Member have standing pursuant to s. 61 (1) of *the Family Law Act,* R.S.O. 1990, c. F.3, or equivalent legislation in other provinces and territories, or the common law; …

[53] Thus, Dr. Gebien 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 who suffer or have suffered from Opioid Use Disorder.

[54] "Opioid Use Disorder" means use of Opioids resulting in: (a) giving up important social occupation or recreational activities; (b) persistent desire or unsuccessful efforts to reduce Opioid use; (c) failure to fulfill occupational, scholastics or home life obligations; (d) persistent or recurrent social or interpersonal problems; (e) impairment in physically hazardous situations; (f) drug tolerance requiring use of larger amounts of Opioids than intended; (g) a persistent or recurrent physical or psychological problems; or (h) Opioid withdrawal syndrome.

[55] On behalf of the class, Dr. Gebien pleads: (a) breaches of the *Competition Act*; (b) negligent misrepresentation; (c) fraudulent misrepresentation or deceit; and (d) common law negligence.

[56] On **December 12, 2022**, I directed that the Certification Motion proceed in two phases. Phase One is to consider whether the cause of action criterion has been satisfied. If that criterion is satisfied, then Phase Two will consider whether the remaining certification criteria are met.

[57] As noted above, the Manufacturer Defendants and the Distributor Defendants brought motions to strike Dr. Gebien's Fresh as Amended Statement of Claim for failing to disclose a reasonable cause of action. This motion is a non-evidentiary motion based on the legal adequacy of the statement of claim. I directed that the motion to strike be heard along with Phase One of the Certification Motion.

[58] As noted above, Pro Doc brought a Jurisdiction Motion. This motion also was to be heard with Phase One of the Certification Motion. Unlike a pure pleadings motion, a jurisdiction motion may have evidence.

[59] Pro Doc supported its Jurisdiction Motion with the following evidence:

> a. Affidavit dated February 28, 2023 and expert report of **Patrice Deslauriers**, LL.B, D.E.A., LL.M of Montreal Québec. Mr. Deslauriers is a practising lawyer and since 1995, a Professor of Law at the University of Montreal, where he teaches Québec civil liability law. He is an Associate Director of the *Canadian Bar Review* and the co-author with Jean-Louis Baudouin and Menoit Moore of *La responsabilité civil* (9th ed.) (Éditions Yvon Blais, 2020).

b. Affidavit dated June 7, 2023 of **Chantal Goudreau** of the City of Laval, Québec. Ms. Goudreau is Director of Planning and Inventory Management with Pro Doc, where she has been employed for over 25 years. Between January 1998 to 2000, she was the Assistant to the President. Then she became Purchasing Manager, responsible for purchases from drug suppliers. In 2008, she became the Director-Planning and Inventory Management, where she participates in operations and management committee meetings and product launch working groups, including the sales and market analysis groups. She has direct knowledge of Pro Doc's business and of the pharmaceuticals and drugs it distributes, including Opioids.

c. Affidavit dated February 24, 2023 of **Robert Labrosse** of the City of Laval, Québec. Mr. Labrosse is an engineer registered with the Order of Engineers of Québec since 1992. Mr. Labrosse has been involved in the pharmaceutical industry for almost two decades. He joined Pro Doc in 2015 as a Vice President. He worked closely with the former president (2007-2020) Marcel Raymond. In 2020, Mr. Labrosse became the President of Pro Doc.

[60] As I shall explain in more detail below, The Jean Coutu Group (PJC) Inc. relied on the evidence in the Jurisdiction Motion as a part of its own motion to strike. It relied on rule 25.11, which is a normal motion that can be supported by affidavit evidence.

[61] Dr. Gebien did not file any responding material in the Jurisdiction Motion, although he had filed a ten-volume Motion Record for the Certification Motion. That material was filed before I allowed the Jurisdiction Motion to be heard as part of the Certification Motion and before I ordered the Certification Motion proceed in two phases.

[62] On **June 7, 2023**, Mr. Labrosse was cross-examined.

[63] On **July 6, 2023**, Ms. Goudreau was cross-examined.

[64] During their cross-examinations, Mr. Labrosse and Ms. Goudreau refused to answer some questions, but Dr. Gebien did not bring a Refusals Motion.

[65] For the Jurisdiction Motion, Pro Doc delivered a factum (88 pages), Dr. Gebien delivered a Responding Factum (65 pages), and Pro Doc delivered a Reply Factum (43 pages).

[66] For the Phase One Certification Motion and for the Defendants' Motions to Strike the Fresh as Amended Statement of Claim: (a) Dr. Gebien deliver a Factum (95 pages); (b) the Defendants collaborated to deliver six factums: Sandoz Canada Inc.'s Factum (46 pages); Mylan Pharmaceuticals ULC's Factum (40 pages); Janssen Inc. and Johnson & Johnson's Factum (44 pages); TRP Defendants'[8] Factum (19 pages -); Distributors' Factum[9] (18 pages); and Purdue Pharma Inc. and Purdue Frederick Inc.'s Factum (20 pages); and (c) Dr. Gebien delivered a Reply Factum (63 pages). All the Manufacturing Defendants and all the Distributor Defendants relied on each other's factums.

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[8] 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.

[9] The Jean Coutu Group (PJC) Inc., AmerisourceBergen Canada Corporation, Kohl + [sic &] Frisch Distribution Inc., Nu-Quest Distribution Inc., Abbott Laboratories Co. (formerly, Abbott Laboratories, Limited), and Procurity Inc.

## E. Facts: The Regulation of Pharmaceuticals

[67] The following facts underly the allegations contained in the Fresh as Amended Statement of Claim.

[68] Health Canada is responsible for approving drugs for sale in Canada. The Manufacturer Defendants and the Distributor Defendants were authorized by Health Canada to manufacture, distribute, and sell prescription opioid products for the treatment of pain in adults.

[69] A drug is licensed for sale by Health Canada issuing a Notice of Compliance ("NOC") after an elaborate and intensive submission and review process. Pursuant to the *Food and Drugs Act*,[10] and the *Food and Drug Regulations*,[11] the manufacturer, described as the sponsor, must file a New Drug Submission ("NDS"). The NDS contains detailed information about: the chemistry of the drug; the manufacturing process; the results of pre-clinical and clinical testing; information about the proposed indications, dosage, and conditions of use; the drug's claimed therapeutic value; and warnings about potential side effects and risks. The NDS submissions by the manufacturer include a draft Product Monograph.

[70] The NDS/NOC process includes an extensive review of the manufacturer's submission and a review of the proposed Product Monograph for the drug. The Health Canada reviewers are physicians, pharmacologists, or other scientists. In determining whether to approve or reject a submission, the reviewers will scrutinize: whether the drug can be made consistently; whether the product quality can be assured; whether the efficacy of the drug is acceptable based on a randomized controlled trial(s), and whether the safety profile of the drug is acceptable based on the risk/benefit analysis.

[71] The Product Monograph is subject to a review by Health Canada's Therapeutic Products Directorate. The Directorate is staffed by scientific experts with extensive clinical and/or medical expertise. The Product Monograph provides pertinent information about the nature and uses of the drug including cautions and warnings. The Product Monograph summarizes the results of the studies submitted to Health Canada.

[72] A Product Monograph consists of three distinct parts; that is: (1) Part I: Health Professional Information, which provides information to healthcare professionals for the prescribing, dispensing, and administering of the medication; (2) Part II: Scientific Information, which provides highly detailed scientific research information such as the drug's chemical composition, toxicology and data from clinical trials; and (3): Part III: Consumer Information, which provides information for the consumer about the medication, how to use it and what are the side effects.

[73] Within a Product Monograph, any particular risk can be profiled with greater or lesser prominence. The most prominent warnings take the form of "boxed warnings," found in Part I and repeated in Part III that highlight serious risks that are clinically significant or life-threatening. Other serious risks will be presented within the WARNINGS AND PRECAUTIONS section in Parts I and III.

[74] If satisfied that the drug and its Product Monograph satisfy the requirements of the *Food*

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[10] R.S.C., 1985, F-27.
[11] C.R.C., c. 870.

*and Drugs Act*, Health Canada will issue a NOC as well as a Drug Identification Number ("DIN") that permits the sponsor to sell the drug in Canada. When a NOC is issued, Health Canada also prepares a "Summary Basis of Decision" ("SBD"). The SBD explains why Health Canada authorized the drug for sale in Canada. The document includes regulatory, safety, effectiveness, and quality (chemistry and manufacturing) considerations.

[75] Health Canada is also responsible for the post-marketing surveillance of drugs once they have been marketed, including monitoring drug safety and ensuring that drug manufacturers comply with the regulations, which include reporting and recordkeeping obligations about the effects of the drug on patients. For example, manufacturers are required to deliver expedited adverse drug reaction (ADR) reports of all serious adverse drug reactions that occur in Canada and all serious and unexpected ADRs that occur outside of Canada. ADRs may also be submitted by patients, health professionals or others.

[76] As new information about a drug becomes available, or as changes are made by the manufacturer, a follow-up submission to Health Canada may be required. If the manufacturer expands the indications for a drug, a supplemental NDS ("SNDS") must be filed. For a change to identify adverse events or to take risk management measures, the manufacturer must file a NOC submission and the changes can be implemented only after Health Canada issues a No Objection Letter (NOL).

[77] After a drug has been approved, Health Canada's Marketed Health Products Directorate (MHPD) monitors ADRs including the required reports from manufacturers and also spontaneous reports of ADRs from healthcare professionals across Canada.

[78] The Defendants are regulated as "manufacturers" under the *Food and Drugs Act*,[12] and the *Food and Drug Regulations*,[13] and as "licensed dealers" under the *Controlled Drugs and Substances Act*, and the *Narcotic Control Regulations*.[14] Under these regulations: (a) the Defendants cannot create an erroneous impression regarding the character, merit, or safety of a drug through labelling, packaging, or advertising;[15] (b) the Defendants must disclose information about serious drug reactions within 15 days of receiving or becoming aware of the information;[16] (c) the Defendants must provide annual reports disclosing whether there has been a change in what is known about the risks and benefit of a drug;[17] (d) the Defendants must record, investigate, and if necessary, correct any issue relating to the quality, deficiencies, or hazards of a drug;[18] (e) the Defendants must keep records of adverse reactions, product testing, investigation of drug tests, and drug sales;[19] and (f) the Defendants must report the loss or theft of a narcotic.[20]

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[12] R.S.C., 1985, c. F-27.
[13] C.R.C., c. 870.
[14] C.R.C., c. 1041.
[15] *Food and Drug Act*, R.S.C. 1985, c. F-27, s. 9.
[16] *Food and Drug Regulations*, C.R.C., c. 870, C.01.017.
[17] *Food and Drug Regulations*, C.R.C., c. 870, C.01.018(1).
[18] *Food and Drug Regulations*, C.R.C., c. 870, C.02.023(1).
[19] *Food and Drug Regulations*, C.R.C., c. 870, C.01.018(1), C.02.022(1).
[20] *Food and Drug Regulations*, C.R.C., c. 870, C.02.022(1), NCR, CRC, c. 1041, ss. 15, 20.

## F. Facts

[79] For the Defendants' Motion to Strike and for Dr. Gebien's Phase One Certification Motion, the material facts are taken from the Fresh as Amended Statement of Claim. For the purposes of the Certification Motion, I assume the following description of the facts to be true and to be provable. (At this juncture, the Defendants admit nothing and will contest everything.)

[80] The Fresh as Amended Statement of Claim, in numerous respects, violates the rules of pleading, particularly by containing evidence to prove the material facts and by other pleading irregularities. It is a prolix-polemical editorial. The pleading is rhetorical and argumentative. The pleading offends rule 25.06 (1) that requires that a pleading to contain a "concise statement of the material facts on which the party relies for the claim or defence, but not the evidence by which those facts are to be proved." The pleading includes a plethora of evidence and irrelevant material and although the pleading demonstrates some reasonable causes of action, it is the opposite of concise. The following description of the material facts describes the material facts without Dr. Gebien's lawyers' conclusory language and rhetorical embellishments.

[81] (As noted above in the Synopsis, should Dr. Gebien deliver a Second Fresh as Amended Statement of Claim, I have directed that this pleading comply with the *Rules of Civil Procedure* so that the Defendants are not hampered in delivering their defence. I have reserved the Defendants' right to bring a pleadings motion to challenge the regularity of the Second Fresh as Amended Statement of Claim.)

### 1. The Plaintiff

[82] **Darry Gebien** is a resident of the City of Toronto. He is a formerly suspended emergency room physician now practising medicine under supervised conditions.

[83] Dr. Gebien's sad story began when he suffered a ligament injury in his thumb while playing recreational hockey. He was prescribed the opioid Percocet for pain. Percocet is manufactured by Bristol-Myers Squibb Canada, a Canadian company, and Bristol-Myers Squibb Company an American company. There is no pleading that Dr. Gebien was prescribed an Opioid manufactured by any other manufacturer.

[84] Dr. Gebien became addicted. As an addict, he committed crimes. He stole opioid drugs, and he falsified prescriptions. His license to practise medicine was suspended. He went to prison. He lost his job. He lost his marriage. He lost custody of his children. He experienced an excruciatingly difficult substance abuse rehabilitation.

### 2. The "Manufacturer Defendants"

[85] **Apotex Inc**. and **Apotex Pharmaceutical Holdings, Inc**. (collectively, "**Apotex**") are Canadian companies. They are inextricably interwoven businesses. Each is the agent of the other for the purposes of manufacturing, marketing, and selling Opioids in Canada, including Apo-Tramadol, Apo-Fentanyl Matrix, Apo-Hydromorphone, and Apo-Oxycodone CR.

[86] **Bristol-Myers Squibb Canada** is a Canadian company and **Bristol-Myers Squibb Company** is an American company (collectively "**Bristol-Myers**"). They are inextricably interwoven businesses. Each is the agent of the other for the purposes of manufacturing, marketing, and selling Opioids in Canada, including Endocet, Percocet, Percocet-DEMI, Percodan, and

Percodan-Demi.

[87] **Endo Pharmaceuticals Inc.** ("Endo USA"), which is an American company, and **Endo International PLC** ("Endo International"), which is an Irish company, control **Paladin Labs**, which is a Canadian company (collectively "**Endo**"). They are inextricably interwoven businesses. Each is the agent of the other for the purposes of manufacturing, marketing, and selling Opioids in Canada, including Opana ER, Abstral, Metadol, Statex, Tridural, pms-Methadone, and Nucynta.

[88] **Janssen Inc.** (formerly Janssen-Ortho Inc.) is a Canadian company and **Johnson & Johnson** is an American company, which is a subsidiary of **Oklahoma & Johnson** (collectively "**Janssen**"). They are inextricably interwoven businesses. Each is the agent of the other for the purposes of manufacturing, marketing, and selling Opioids in Canada and the U.S.A., including Duragesic, Tramacet, Ultram, Nucynta CR, PAT-Tramadol/Acet, Tylenol with Codeine No. 2, Tylenol with Codeine No. 3, Tylenol with Codeine No. 4, and Tylenol with Codeine Elixir.

[89] **Mylan Pharmaceuticals ULC** is a Canadian company. It and **Mylan Pharmaceuticals Inc**. are subsidiaries of **Mylan N.V**., a Dutch company (collectively, "**Mylan**"). They are inextricably interwoven businesses. Each is the agent of the other for the purposes of manufacturing, marketing, and selling Opioids in Canada, including Mylan-Fentanyl Matrix Patch, and Mylan-Tramadol/Acet.

[90] **Pharmascience Inc.** is a Canadian company, which is a subsidiary of **Joddes Limited**, also a Canadian company (collectively, "**Pharmascience**"). They are inextricably interwoven businesses. Each is the agent of the other for the purposes of manufacturing, marketing, and selling Opioids in Canada, including PMS-Butorphanol, PMS-Oxycodone CR, PMS-Fentanyl MTX, PMSHydromorphone, PMS-Morphine Sulfate SR, and PDP-Hydrocodone.

[91] **Pro Doc Limitée** is a Canadian company that is a subsidiary of **The Jean Coutu Group (PJC) Inc**., also a Canadian company. They are inextricably interwoven businesses. Each is the agent of the other for the purposes of manufacturing, marketing, and selling Opioids in Canada, including Fentanyl Patch, Oxycodone, Oxycodone-Acet, and Tramadol-Acet. The Jean Coutu Group (PJC) Inc. also distributed Opioids to pharmacies, hospitals, and other dispensaries across Canada.

[92] **Purdue Pharma L.P**. and the **Purdue Frederick Company Inc.** are American companies, and **Purdue Pharma Inc.** and **Purdue Frederick Inc**. are Canadian companies (collectively "**Purdue**"). They are inextricably interwoven businesses. Each is the agent of the other for the purposes of manufacturing, marketing, and selling Opioids in Canada, including Belbuca, BuTrans, Targin, MS Contin, Hydromorph Contin, Oxycontin and OxyNEO.

[93] **Ranbaxy Pharmaceuticals Canada Inc**. is a Canadian company that is a subsidiary of **Sun Pharmaceutical Industries Ltd.** which is an Indian company (collectively, "**Ranbaxy**"). They are inextricably interwoven businesses. Each is the agent of the other for the purposes of manufacturing, marketing, and selling Opioids in Canada, including RAN-Fentanyl Matrix Patch and RAN-Oxycodone CR.

[94] **Hikma Labs Inc.** (formerly known as Roxane Laboratories Inc.) and **West-Ward Columbus Inc.** (formerly known as Boehringer Ingelheim Roxane Inc.) are American companies, and **Hikma Pharmaceuticals PLC** is a Jordanian company (collectively, "**Roxane**"). They are inextricably interwoven businesses. Each is the agent of the other for the purposes of manufacturing, marketing, and selling Opioids in Canada, including Hydromorphone HCL,

Oramorph SR, and Roxicet.

[95] **Sanis Health Inc.** is a Canadian company. It manufactured, marketed, and sold Opioids in Canada, including Oxycodone/Acet, Tramadol/Acet, and Morphine SR.

[96] **Sandoz Canada Inc.** is a Canadian company. It manufactured, marketed, and sold Opioids in Canada including Sandoz Fentanyl Patch, Sandoz Oxycodone, Fentanyl Citrate Injection SDZ, Morphine HP 25, Morphine HP 50, Sandoz Opium & Belladonna, Sandoz Methadone, Sandoz Morphine SR, Morphine Sulfate Injection USP, and Meperidine Hydrochloride Injection USP.

[97] **Teva Canada Limited** and **Actavis Pharma Company** (formerly Cobalt Pharmaceutical Company) are Canadian companies, and **Teva Pharmaceuticals USA, Inc.** is an American company, **Teva Pharmaceutical Industries Ltd**. is an Israeli company. Teva Canada Limited, Actavis Pharma Company, and Teva USA are subsidiaries of Teva Pharmaceutical Industries Ltd. (collectively "**Teva**"). They are inextricably interwoven businesses. Each is the agent of the other for the purposes of manufacturing, marketing, and selling Opioids in Canada and the U.S.A. including Teva-Oxycocet, Teva-Tramadol/Acetaminophen, Teva-Fentanyl, Teva-Hydromorphone, Teva-Morphine SR, and ACT Oxycodone CR and CO Fentanyl.

[98] **Valeant Canada LP/ Valeant Canada S.E.C**., which is a Canadian company, is a branch of **Bausch Health Companies Inc**., another Canadian company (collectively, "**Valeant**"). They are inextricably interwoven businesses. Each is the agent of the other for the purposes of manufacturing, marketing, and selling Opioids in Canada including M.O.S.-SR (Morphine Hydrochloride), Cophylac, and Cophylac Drops.

[99] The Manufacturer Defendants marketed and sold in Canada prescription pain medications that contained Opioids under brand names and generic counterparts.

### 3. The "Distributor Defendants"

[100] **Abbott Laboratories Inc. (**formerly Abbott Laboratories Limited) is an American company with Canadian offices in Ontario and Quebec. During the Class Period, it distributed Opioids to pharmacies, hospitals, and other dispensaries across Canada.

[101] **Kohl & Frisch Distribution Inc**. and **Kohl & Frisch Limited** are Canadian companies. **AmerisourceBergen Canada Corporation** is a Canadian Company that on March 28, 2013 was acquired by Kohl & Frisch Limited (collectively "**Kohl & Frisch**"). They are inextricably interwoven businesses. Each is the agent of the other for the purposes of distributing Opioids in Canada.

[102] **Nu-Quest Distribution Inc**. is a Canadian company. It distributed Opioids to pharmacies, hospitals, and other dispensaries across Canada.

[103] **Procurity Inc.** is a Canadian Company. It distributed Opioids to pharmacies, hospitals, and other dispensaries across Canada.

### 4. Opioids and the "New Narrative"

[104] Opioids are controlled substances, some listed under Schedule I of the *Controlled Drugs*

*and Substances Act*.[21] The Defendants are regulated as "manufacturers" under the *Food and Drugs Act*,[22] and the *Food and Drug Regulations*,[23] and as "licensed dealers" under the *Controlled Drugs and Substances Act*, and the *Narcotic Control Regulations*.[24]

[105] The Opioid supply chain begins with the Manufacturer Defendants, who develop the Opioids, obtain regulatory approval, and market the drugs. The manufacturers transfer the Opioids to wholesale distributors, the Distributor Defendants, who then dispense the Opioids to hospitals and pharmacies. Physicians prescribe the drugs, which cannot be purchased off the shelf. Hospitals and pharmacies then dispense the Opioids to patients. The availability of Opioids is highly regulated.

[106] Prescription Opioids are powerful pain reducing medicines that encourage the release of dopamine. Opioids present potentially serious risks of drug addiction and substance abuse. With continued use, patients become tolerant to the drug and patients require progressively higher doses to abate their pain. With increased doses, the risk of addiction, overdose, and death also increases. Withdrawal symptoms are severe including nausea, muscle pain, depression, anxiety, diarrhea, vomiting, restlessness, and chills.

[107] Until the mid-1990s, the medical profession's orthodoxy was that Opioids should be prescribed sparingly and only for palliative care or for short-term conditions such as surgery for an acute injury. Opioids were thought to be too addictive to treat pain conditions that would require long-term Opioid use.

[108] In the mid-1990s, the Manufacturer Defendants introduced time-release formulations of Opioids. The manufacturers claimed these Opioid drugs were safe for long-term use.

[109] The Manufacturer Defendants were able very lucratively to market these products for a wider range of pain conditions. The Manufacturer Defendants developed and promoted a false and misleading "New Narrative" about Opioids to broaden the market and to increase sales of Opioids.

[110] Each of the Manufacturer Defendants by the various acts and omissions contributed to promoting the New Narrative.

[111] Each of the Manufacturer Defendants acted in furtherance of a common design, the object of which was to broaden the market for and increase the sale of Opioids without regard for the risk of addiction and at the expense of the class.

[112] To create a demand for Opioid drugs, the Manufacturer Defendants deliberately downplayed risks in order to displace the medical orthodoxy that Opioids are too addictive and too dangerous for widespread or long-term use. The Manufacturer Defendants promulgated the inaccurate and fraudulent message that concerns about addiction were overblown and that screening and monitoring would be able to prevent addiction. They marketed Opioids as less addictive than they knew the drugs to be. They promoted Opioids as safe, effective, and appropriate for long-term use in routine pain conditions when they knew or reasonably ought to have known that this use was inappropriate and dangerous and that marketing them as safe for long-term use

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[21] S.C. 1996, c. 19. Historically, Opioids were regulated through the *Opium and Drug Act*, passed in 1911. It was repealed by the *Narcotic Control Act* in 1961. *The Narcotic Control Act*, R.S.C., 1985, c. N-1, was repealed by the *Controlled Drugs and Substances Act*, S.C. 1996, c. 19.
[22] R.S.C., 1985, c. F-27.
[23] C.R.C., c. 870.
[24] C.R.C., c. 1041.

would lead to greater Opioid addiction and death. The Manufacturer Defendants concealed the dangers of the New Narrative from regulators, health care professionals, and patients.

[113] Each of the Manufacturer Defendants, through their acts and omissions, contributed to creating and promoting the New Narrative. The hallmarks of the New Narrative were seven core false messages that induced the overprescribing of Opioids to patients who ought not to have been prescribed the drug.

[114] First, the New Narrative stated that Opioids were safe for long-term use. The Manufacturer Defendants misrepresented that there was little risk of addiction from Opioid drug use.

[115] Second, the New Narrative overstated the safety and effectiveness of long-acting, time-release Opioids. The Manufacturer Defendants knowingly falsely stated that long-acting Opioids would provide long-term pain relief when the Opioids were not effective for 12 hours in many, if not most, patients. The Manufacturer Defendants did not warn of the adverse effects or disclose the risks of Opioid use, including the risks of overdose, addiction, hyperalgesia (hypersensitivity to pain, hormonal and immunity dysfunction, disorientation), respiratory depression, and death, including fatal interactions with alcohol or benzodiazepines. The Manufacturer Defendants' warnings in the drug packaging were insufficient. The Manufacturer Defendants failed to properly warn healthcare professionals and consumers of the risks and dangers associated with Opioid use in the Information for Patients and Product Monographs found in the Compendium of Pharmaceuticals and Specialties.

[116] Third, the New Narrative exaggerated the benefits of Opioids for patient health, function, flourishing, and quality of life. Without genuine clinical evidence, the Manufacturer Defendants represented that Opioids were therapeutic and would improve patient functioning and quality of life.

[117] Fourth, the New Narrative understated the risk that patients would become tolerant to time-release Opioids and require higher doses, which in turn increased the risk of addiction. The Manufacturer Defendants misrepresented that even patients with a high risk of addiction could be prescribed Opioids. Healthcare professionals and patients were not warned that increased doses of Opioids increase the risks. The Manufacturer Defendants failed to warn that higher doses increase tolerance to the drug that, in turn, requires still higher doses for pain, which, in turn, increases the risk of addiction, the difficulties of withdrawal, and the chances of respiratory depression, overdose, and death.

[118] Fifth, the New Narrative minimized the risk of Opioid addiction being caused by their drugs. The Manufacturer Defendants created the term "pseudoaddiction" to promote the idea that patients were not addicted to Opioids. Conversely, they attributed addiction to patients who abused the drug or were criminals.

[119] Sixth, the New Narrative misrepresented that Opioid withdrawal could be easily managed. The Manufacturer Defendants misrepresented that withdrawal from Opioids could be easily managed knowing that healthcare professionals would be induced to prescribe Opioids.

[120] Seventh, the New Narrative falsely compared the side effects from Opioids to the side effects from common over-the-counter drugs like nonsteroidal anti-inflammatory drugs ("NSAIDs") when the side effects from Opioids were far more serious and dangerous. The Manufacturer Defendants' marketing materials did not refer to the known risks of chronic Opioid therapy and exaggerated risks of competing products such as the NSAIDs.

[121] The Manufacturer Defendants developed marketing campaigns to influence the prescription behaviour of healthcare providers and to influence patient (consumer) behaviour to increase the use of Opioids.

[122] In furtherance of their marketing campaigns to increase Opioid use and sales of their drugs, the Manufacturer Defendants: (a) placed false advertisements about the safety and efficacy of their drugs and the New Narrative; (b) recruited Key Opinion Leaders, peer physicians to campaign on behalf of Opioid drugs; (c) systematically financially awarded and influenced healthcare providers to prescribe Opioid drugs through speakers' bureaus, medical societies, think tanks, and/or patient advocacy groups ("Front Groups") to promote the New Narrative with false and misleading educational materials; (d) sponsored and funded educational programs at medical schools at continuing education programs that were disguised marketing presentations for increasing opioid prescriptions.

[123] The Manufacturer Defendants promulgated false scientific literature, concealing its biased sources.

[124] The Defendants fraudulently concealed their conduct from detection by the public, the Plaintiff, and patients.

[125] The Manufacturer Defendants and the Distributor Defendants supplied Opioids in quantities that they knew or should have known exceeded any legitimate market. The Defendants knew or ought to have known that there was a suspicious rise in distribution of Opioids to retailers in Canada and did nothing to prevent or reduce the diversion of drugs. The Distributor Defendants failed to put in place systems to identify suspicious orders of Opioids and they failed to report suspicious orders of which they were aware. The Defendants enabled the expansion of the black market, paving the way for a public health crisis.

[126] As a result of the Manufacturer Defendants' marketing activities, the prescribing of Opioids as a long-term means to treat chronic pain became routine and widespread. After the 1980s, Opioids sold to hospitals and pharmacies in Canada increased by more than 3,000%. Many Canadians became addicted to Opioids. More than 30,000 Canadians are estimated to have died of Opioid overdoses in the past two decades.

[127] On average, every day, approximately eleven Canadians die of Opioid overdoses.

### 5. The End of the New Narrative

[128] In June 2018, the Minister of Health sent a letter to manufacturers and distributors of opioids in Canada calling on them voluntarily to stop all marketing and advertising of Opioids to healthcare professionals.

[129] On October 23, 2018, Health Canada under the *Food and Drug Regulations*,[25] ordered the Manufacturer Defendants to provide clear information about the safe use of opioids and the risks associated with their use. The new regulations require the Manufacturer Defendants to include a warning sticker and information handout. The warning indicates that opioids can cause dependence, addiction, and overdose. The warning states that the use of opioids can result in overdose, addiction, physical dependence, life-threatening breathing problems, worsening rather

[25] C.R.C., c 870.

than improving pain and withdrawal.

[130] Opioids continue to be used for patient treatment and care.

### 6. Damages and Other Remedies

[131] The Plaintiff and the Class Members claim compensatory damages including damages for personal injuries, mental anguish, pain and suffering, loss of employment income and benefits, loss of enjoyment of life, possible death, and special damages and expenses.

[132] The Family Law Class has suffered damages, including: (a) actual expenses reasonably incurred for Class Members; (b) travelling expenses incurred while visiting Class Members during treatment or recovery; (c) loss of income or the value of services provided for Class Members where services, including nursing and housekeeping have been provided; and (d) compensation for loss of support, guidance, care, and companionship that they might reasonably have expected to receive from Class Members.

[133] The Plaintiff claims punitive damages in the sum of $100 million as a result of the egregious, outrageous, and unlawful conduct of the Defendants, and in particular, their callous disregard for the health and lives of vulnerable patients in Canada.

[134] The plaintiff claims an accounting of all profits earned by the defendants during the class period from the sale of Opioids pursuant to the New Narrative and disgorgement.

[135] Dr. Gebien pleads that the Manufacturer Defendants and Distributor Defendants are jointly and severally liable for the damage suffered by the Class.

### 7. Jurisdictional Connection to Ontario

[136] Dr. Gebien pleads that his action has a real and substantial connection to Ontario because: (a) the Defendants distribute and sell their products in Ontario and derive substantial revenue; (b) the Defendants' head offices are located in Ontario; (c) the Defendants advertised their products, including Opioids, in Ontario; (d) the torts were committed in Ontario; (e) the Plaintiff and Class Members were administered Opioids in Ontario and sustained consequent damages in Ontario; and (f) the Defendants are necessary and proper parties to the action.

## G. Miscellaneous Facts: Parallel Opioid Actions

### 1. 2017 OxyContin®/OxyNEO® Settlement

[137] Between 2007 and 2012, class actions were brought with respect to claims arising from patients prescribed OxyContin® and/or OxyNEO® tablets in Canada. These actions were settled nationally in 2017 for claims up to March 1, 2017.[26] The 2017 Settlement was approved by the courts of Saskatchewan, Ontario, Québec, and Nova Scotia. The claims protocol is currently being administered by RicePoint.

[138] The defined class under the 2017 Settlement is:

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[26] *Perdikaris v. Purdue Pharma Inc.*, 2017 SKQB 287 and 2018 SKQB 86; *Carruthers v. Purdue Pharma*, 2022 SKKB 214. *MacKay v. Purdue Pharma Inc.*, 07-CV-343201CP.

> "All persons including their estates, who at any time between January 1, 1996 and February 28, 2017 inclusive were prescribed … and ingested OxyContin® tablets and/or OxyNEO® tablets, manufactured, marketed and/or sold or otherwise placed into the stream of commerce in Canada by one or more of the Defendants", as well as the family members of such patients. The 2017 Settlement released their claims.

### 2. ***Bourassa c. Abbott Laboratories Limited et al.***

[139] In Québec Jean-François Bourassa has brought an action on behalf of Québec consumers of opioids manufactured by a group of defendants. The action is *Bourassa v. Abbott Laboratories Limited et al.*[27] The class definition is:

> All persons in Québec who have been prescribed and consumed any one or more of the opioids manufactured, marketed, distributed, and/or sold by the Defendants between 1996 and the present day and who suffer or have suffered from Opioid Use Disorder.

[140] A motion for authorization is currently under reserve.

### 3. ***British Columbia v. Apotex Inc. et al.***

[141] In British Columbia, pursuant to British Columbia's *Opioid Damages and Health Care Costs Recovery Act*,[28] the Government of British Columbia has brought an action against approximately 50 opioid manufacturers, wholesalers, and distributors. The action also includes pharmacy franchisor and franchisee retailers. The action, which is in part a statutory action, is *British Columbia v. Apotex Inc. et al.*[29]

[142] The Government of British Columbia's claim is advanced on behalf of a class of all federal, provincial, and territorial governments that, during the period from 1996 to the present (the "Class Period"), paid healthcare, pharmaceutical, treatment and other costs related to Opioids. It is alleged that the defendants created or assisted in the creation of an epidemic of addiction that caused deaths and serious and long-lasting injuries and harmed the governments' ability to deliver health care to their citizens. The Government alleges that manufacturer defendants marketed and promoted opioids in Canada as less addictive than they knew them to be, and for conditions they knew the drugs were not effective in treating. The claim against the distributor defendants is that they delivered opioids in quantities they knew or should have known exceeded any legitimate market, thereby intensifying the crisis of opioid use, addiction, and death in Canada.

[143] The Government of British Columbia's action was filed on August 29, 2018. The pleading was amended on June 20, 2019 after the passage of the *Opioid Damages and Health Care Costs Recovery Act*. The pleading was further amended after a pleadings motion similar to the motions now before the court. As in the immediate case, the Defendants, many of them the same as in the immediate case, brought motions to strike the pleading for failure to plead viable causes of action. In a decision affirmed by the British Columbia Court of Appeal Justice Brundrett dismissed the

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[27] Court File No. 500-06-001004-197.

[28] S.B.C. 2018, c 35. The legislation is similar to the legislation that was previously enacted in tobacco litigation: see *Tobacco Damages and Health Care Costs Recovery Act*, S.B.C. 2000, c. 30. The tobacco legislation survived a constitutional challenge and was held to be *infra vires*: *British Columbia v. Imperial Tobacco Canada Ltd.*, 2005 SCC 49.

[29] Court File No. S189395.

motions to strike.[30]

[144] The Government of British Columbia's proposed class action advances both statutory and common law causes of action. The *Opioid Damages and Health Care Costs Recovery Act* provides the government has a direct and distinct action against a manufacturer or wholesaler to recover the cost of health care benefits caused or contributed to by an opioid-related wrong. The Government's common law actions include: negligent misrepresentation, fraudulent misrepresentation, deceit, design negligence, and failure to warn. There is also a statutory cause of action for misrepresentations and liability under the *Competition Act*. Without advancing a conspiracy cause of action, the Government of British Columbia also submitted that the defendants were jointly and severally liable based on their having a common design that caused harm.

[145] In 2022, in a decision subsequently affirmed by the British Columbia Court of Appeal, Justice Brundrett dismissed a motion to declare the *Opioid Damages and Health Care Costs Recovery Act, ultra vires*.[31]

[146] Also in 2022, in *British Columbia v. Apotex Inc., et al.*, Pro Doc and Jean Coutu Group brought applications challenging the jurisdiction *simpliciter* of the Supreme Court of British Columbia. They reserved the right to challenge *forum conveniens.* In a decision now under appeal, Justice Brundrett dismissed Pro Doc's and Jean Coutu Group's jurisdiction *simpliciter* motion.[32]

[147] There are obviously many similarities between the immediate case and *British Columbia v. Apotex Inc., et al.* I shall have more to say about *British Columbia v. Apotex Inc., et al* later in the discussion of Pro Doc's Jurisdiction motion, to which I now turn.

## H. Pro Doc's Jurisdiction Motion: Facts

[148] Unlike a pure pleadings motion, where no evidence is admissible without leave of the court, on a Jurisdiction Motion, the defendant may deliver evidence to contest jurisdiction. If the defendant delivers evidence to challenge the factual allegations contained in the Statement of Claim, the plaintiff must meet the evidentiary challenge by cross-examination or by filing evidence of its own.

[149] In the immediate case, as noted above, Pro Doc supported its Jurisdiction Motion with the evidence of Professor Deslauriers, Ms. Goudreau, and Mr. Labrosse. In the immediate case, Dr. Gebien cross-examined Pro Doc's witnesses, but on the Jurisdiction Motion, he did not deliver evidence to contradict the evidence provided by Pro Doc.

[150] Before describing the evidence on the Jurisdiction Motion, as mentioned above and as discussed later in these Reasons for Decision, it shall become important to note and to keep in mind that in its motion to strike Dr. Gebien's Fresh as Amended Statement of Claim as an abuse

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[30] *British Columbia v. Apotex Inc., et al.,* 2022 BCSC 1, aff'd 2022 BCCA 366, leave to appeal to S.C.C. refused, [2023] S.C.C.A. No. 13.

[31] *British Columbia v. Apotex Inc*., 2022 BCSC 2147, aff'd 2023 BCCA 306, motion for leave to appeal to the S.C.C. filed.

[32] *British Columbia v. Apotex Inc., et al.,* 2023 BCSC 662. Motion for stay pending appeal dismissed: *British Columbia v. Apotex Inc., et al.*, 2023 BCSC 1354. Justice Brundrett had originally ordered Pro Doc's Jurisdiction Motion to be heard in conjunction with the Certification Motion: *British Columbia v. Apotex Inc.*, 2020 BCSC 412. That scheduling motion, however, was reversed by the British Columbia Court of Appeal: *British Columbia v. The Jean Coutu Group (PJC) Inc.*, 2021 BCCA 219.

of process, The Jean Coutu Group (PJC) Inc. relies on the evidence proffered on the Jurisdiction Motion.

[151] Turning to the evidence, notwithstanding Dr. Gebien's arguments about the quality and the admissibility of the evidence, the evidence on the Jurisdiction Motion from Ms. Goudreau and Mr. Labrosse establishes the following jurisdictional facts.

[152] Pro Doc is a wholly owned subsidiary of The Jean Coutu Group (PJC) Inc., a company incorporated under the laws of Québec with its head office in Montréal, Québec. Jean Coutu Group is a franchisor for a network of retail stores that sell pharmaceutical products, and consumer goods. Jean Coutu Group's franchisees comprise a major chain of pharmacies with stores in Québec, New Brunswick, and nine stores in Ontario. Jean Coutu Group is not a manufacturer of Opioids. It does not develop, test, manufacture, produce, assemble, or package Opioid products. Jean Coutu Group's principal business is operating a franchise pharmacy business much like the large pharmacies in Ontario like Rexall or Shoppers Drug Stores.

[153] Pro Doc is a company incorporated under the laws of Québec with its head office in Laval, Québec. Pro Doc specializes in the distribution of pharmaceutical private label generic drugs that it purchases from manufacturers.

[154] Pro Doc does not manufacture drugs. At all material times, Pro Doc was a reseller of Opioid Products, even though within the meaning of the *Food and Drug Regulations*, it is identified as a "manufacturer".

[155] The uncontroverted evidence is that Pro Doc is a small Québec-only based business. It sells private label generic drugs, which are manufactured by other third party manufacturers. Pro Doc is the distributor of products sold at the stores of the pharmacist franchisees of Jean Coutu Group.

[156] As part of its role as a supplier to a franchisor for its franchisees, Pro Doc purchases Opioids from Laboratoire Riva Inc. Pro Doc also purchases Opioids from Apotex Canada Inc., Pharmascience Inc., and Sandoz Canada Inc., three of the Manufacturer Defendants in this proposed class action. Pro Doc does not itself develop, test, manufacture, produce, assemble, or package Opioid products.

[157] The evidence establishes that Pro Doc does not carry on business in Ontario. It does not sell its products in Ontario. Pro Doc's private label generic drugs are not authorized for sale in Ontario. It has no offices, no factory, nor any other business premises in Ontario. It does not have, nor is it required to have, a registered office or address in Ontario. It does not store in or ship goods to Ontario. It does not have any inventory or any other assets located in Ontario. It does not generate any revenue from activities in Ontario. It does not employ any employees, agents, or other representatives in Ontario nor is any management function exercised in Ontario.

[158] Pro Doc purchases drugs from generic manufacturers, and then it resells 98.7% to Jean Coutu Group for it to supply its franchisee pharmacies, which are owned by independent pharmacists. Although there are a few Jean Coutu Group pharmacies in Ontario, Pro Doc did not supply the Ontario pharmacies of the Jean Coutu Group. The balance of 1.3% of Pro Doc's sales are to wholesalers in Québec.

[159] Pro Doc distributed only six generic opioid analgesics between 2009 and 2019, namely: Fentanyl Patch, Oxycodone, Oxycodone-Acet, Procet-30, Pronal C, and Tramadol-Acet. The distribution of these drugs was only in Québec. Pro Doc received Health Canada approval before distributing the drugs in Québec.

[160] Pro Doc has a relationship with the Province of Québec with respect to prescription drugs, which are known as "formulary" drugs. The prices of formulary drugs are regulated and set by the Province of Québec. Of the Pro Doc Opioid Products, Fentanyl Patch, Oxycodone and Procet 30 were formulary drugs.

[161] Pro Doc did not sell Opioid products outside of Québec. Pro Doc did not sell any Opioids to the Province of Ontario, nor did it have any contractual arrangements with the Province of Ontario. Pro Doc products are not listed on the Ontario Formulary. Pro Doc always limited itself to distributing its opioids in the province of Québec. Pro Doc 's relationship with Jean Coutu Group stopped at the border, and the franchisees in Ontario sold **non-**Pro Doc Opioids.

[162] To be clear, although there are some Jean Coutu Group locations in Ontario, Jean Coutu Group did not distribute Pro Doc products to the Ontario pharmacies. This is because, before 2020, private label generic drugs could not be dispensed under Ontario regulations.

[163] As a result of the Ontario Regulations, Pro Doc always limited itself to distributing its Opioids to wholesalers in the province of Québec so as to not be in breach of Ontario laws.

[164] In 2019, Pro Doc discontinued supplying any Opioid products.

[165] Pro Doc is only affiliated with Jean Coutu Group. It is not affiliated with any of the other Defendants in this action. Pro Doc does not have any agency agreements or agency arrangements with any of the other Defendants. As noted above, it is supplied Opioids by three of the Manufacturer Defendants in this action.

[166] As required by regulatory law, Pro Doc tracked all of its shipments and ensured that the delivery arrived at its destination and that the quantities shipped were received. Pro Doc used couriers to transport packages of designated substances. These packages were shipped with a chain of signatures allowing careful and diligent recording of any handling of the parcel as well as the signature of any person having carried out this handling during transport, until its delivery to the recipient and confirmation of receipt by the pharmacies. All Opioid Products were shipped to wholesalers in Québec.

[167] There is a single instance where one product worth $12 was accidentally sent to New Brunswick. No Opioid Products were shipped to Ontario.

[168] Pro Doc has never engaged in any marketing activities directly or indirectly in relation to the Opioid Products in Ontario, or – elsewhere. Advertising of Pro Doc's products to the general public is prohibited by Canadian Regulations and at all times Pro Doc complied with the law. And, its evidence was that it has never taken steps to promote or advance the "New Narrative" as alleged in Dr. Gebien's Fresh as Amended Statement of Claim.

[169] There are Pro Doc Health Canada-approved monographs for its private label Opioid products. Pro Doc issued newsletters at the launch of each of the Opioid Products. The newsletters stated the name of the new product available. The newsletters were distributed only in Québec and only to those Jean Coutu Group pharmacies that were selling Pro Doc's products. The newsletters merely listed what products were available. The newsletters are in French.

[170] Information about Pro Doc's products was also available on Pro Doc's website; the information was limited to: DIN, Format, UPC, pictures, product description, active ingredient name, non-medicinal ingredients list, and Québec formulary status. Most of the information was available on the section of the website that was accessible only to health care professionals. There

are no marketing representations.

[171] The business records of Pro Doc are located in Québec and most of the business records are in French only.

[172] Pro Doc's representatives and witnesses are domiciled in Québec. They are predominantly francophone.

[173] Pro Doc anticipates that its witnesses will include pharmacists who have counseled users and physicians who have prescribed Opioids to users. These witnesses are domiciled in Québec and are predominantly francophone.

[174] Pro Doc is named as a Defendant in an application for authorization to institute a class action filed in the Superior Court of Québec, District of Montreal No. 500-06-001004-197, *Bourassa v. Abbott Laboratories, Limited et al*. The judgment on that class action authorization is currently under reserve.

[175] Pro Doc, along with Jean Coutu Group are named defendants in *British Columbia v. Apotex Inc., et al.*, where they unsuccessfully brought a Jurisdiction Motion about jurisdiction *simpliciter*, i.e., about where there is assumption-based jurisdiction in British Columbia. The jurisdiction decision is under appeal and the matter of *forum conveniens* remains to be argued in British Columbia.

## I. Pro Doc's Jurisdiction Motion: Legal Background

[176] In this next section of these Reasons for Decision, I discuss the legal background to Pro Doc's Jurisdiction Motion.

### 1. Jurisdiction *Simpliciter*

[177] Pro Doc's Jurisdiction motion is brought pursuant to rule 23.01 (3) of the *Rules of Civil Procedure*, which states:

> *To Defendant*
>
> 21.01 (3) A defendant may move before a judge to have an action stayed or dismissed on the ground that,
>
> *Jurisdiction*
>
> (a) The court has no jurisdiction over the subject matter of the action,
>
> […]
>
> and the judge may make an order or grant judgment accordingly.

[178] Jurisdiction *simpliciter* addresses the procedural question whether an Ontario court can properly assume jurisdiction over a matter, given the interrelationships among the matter, the parties, and Ontario.

[179] Jurisdiction *simpliciter*, or subject-matter jurisdiction, exists if the court has authority over

the party and the subject matter and the power to make the order sought.[33] There are three ways in which the Ontario court may assert jurisdiction against an out-of-province defendant: (1) consent-based jurisdiction; (2) presence-based jurisdiction; and (3) assumed jurisdiction.[34] Pro Doc's motion is about assumed jurisdiction.

[180] Assumed jurisdiction arises when the court takes jurisdiction because the litigation with a foreign element has a "real and substantial connection" to Ontario. Before a court can assume jurisdiction over a claim, a "real and substantial connection" must be shown between the circumstances giving rise to the claim and the jurisdiction where the claim is brought.[35]

[181] The test for whether an Ontario court has jurisdiction *simpliciter* based on assumed jurisdiction is whether there is a real and substantial connection between the matter, the parties, and Ontario.[36] The real and substantial connection test for assumed jurisdiction was designed to ensure that claims are not prosecuted in a jurisdiction that has little or no connection with either the transactions or the parties, and the test requires that a judgment rendered by a court which has properly assumed jurisdiction in a given case be recognized and enforced.[37]

[182] In *Club Resorts Ltd. v. Van Breda*,[38] the Supreme Court of Canada developed an analytical framework to determine when a court has jurisdiction *simpliciter* by assumed jurisdiction. The analytical framework begins by identifying circumstances where a court may presumptively assume jurisdiction on the basis of a real and substantial connection with the litigation. The underlying idea to all presumptive factors is that there are some circumstances where there would be a relationship between the subject matter of the litigation and the forum where it would be reasonable to expect that the defendant attend to answer the claim made against him or her in that forum.

[183] The list of presumptive connecting factors is not closed; however, the court should not adopt an *ad hoc* approach to assuming jurisdiction based upon the circumstances of a particular case. The court may, however, identify new factors that will establish a new presumptive connection, which can be used in other cases presumptively to assume jurisdiction.

[184] In identifying new presumptive factors, a court should look to connections that give rise to a relationship with the forum that is similar in nature to the ones which result from the established

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[33] *Canada (Attorney General) v. Telezone Inc.*, 2008 ONCA 892 (C.A.), aff'd 2010 SCC 62; *R. v. Mills*, [1986] 1 S.C.R. 863.

[34] *Yip v. HSBC Holdings plc*, 2017 ONSC 5332, aff'd 2018 ONCA 626, leave to appeal refused, [2018] S.C.C.A. No. 410; *Chevron Corp. v. Yaiguaje*, 2015 SCC 42; *Club Resorts Ltd. v. Van Breda*, 2012 SCC 17; *Incorporated Broadcasters Ltd. v. Canwest Global Communications Corp.* (2003), 63 O.R. (3d) 431 at para. 36 (C.A.), leave to appeal refused [2003] S.C.C.A. No. 186.

[35] *Lapointe Rosenstein Marchand Melançon LLP v. Cassels Brock & Blackwell LLP*, 2016 SCC 30 at para. 25, aff'g 2014 ONCA 497, aff'g 2013 ONSC 2289; *Club Resorts Ltd. v. Van Breda*, 2012 SCC 17 at paras. 22-24, aff'g (*sub nom. Van Breda v. Village Resorts Ltd.*) 2010 ONCA 84, aff'g [2008] O.J. No. 2624 (S.C.J.); *Society of Composers, Authors and Music Publishers of Canada v. Canadian Assn. of Internet Providers*, 2004 SCC 45 at para. 60; *Tolofson v. Jensen*, [1994] 3 S.C.R. 1022, at p. 1049; *Hunt v. T&N plc*, [1993] 4 S.C.R. 289 at pp. 325-26 and 328; *Morguard Investments Ltd. v. De Savoye*, [1990] 3 S.C.R. 1077, at pp. 1108-10.

[36] *Club Resorts Ltd. v. Van Breda*, 2012 SCC 17, aff'g (*sub nom. Van Breda v. Village Resorts Ltd.*) 2010 ONCA 84 (C.A.), aff'g [2008] O.J. No. 2624 (S.C.J.); *Schreiber v. Mulroney* (2007), 88 O.R. (3d) 605 (S.C.J.); *Muscutt v. Courcelles* (2002), 60 O.R. (3d) 20 (C.A.).

[37] *Haaretz.com v. Goldhar*, 2018 SCC 28 at paras. 26–32; *Club Resorts Ltd. v. Van Breda*, 2012 SCC 17 at para. 26, aff'g (*sub nom. Van Breda v. Village Resorts*) 2010 ONCA 84, aff'g [2008] O.J. No. 2624 (S.C.J.).

[38] 2012 SCC 17, aff'g (*sub nom. Van Breda v. Village Resorts*) 2010 ONCA 84, aff'g [2008] O.J. No. 2624 (S.C.J.).

factors. Relevant considerations include: (a) similarity of the connecting factor with the recognized presumptive connecting factors; (b) treatment of the connecting factor in the case law; (c) treatment of the connecting factor in statute law; and (d) treatment of the connecting factor in the private international law of other legal systems with a shared commitment to order, fairness and comity.[39] A new presumptive factor must have a genuine factual connection to the domestic court; the fact that a foreign party qualifies as a third party in an existing action in the domestic forum is not by itself a reliable indicator that there is a real and substantial connection to establish a presumptive factor or to support the assertion of jurisdiction over the foreign party.[40]

[185] If a presumptive connection (established or newly established) applies, the connection can be rebutted by the defendant through evidence that the connection is weak.[41] The ability to rebut the presumption of jurisdiction serves as an important check on a court overreaching and assuming jurisdiction. The burden of rebutting the presumption of jurisdiction rests on the defendant. In order to rebut the presumption, the defendant must demonstrate that the relationship between the forum and the subject matter of the litigation is such that it would not be reasonable to expect that the defendant would be called to answer proceedings in that forum.[42]

[186] In *Club Resorts Ltd. v. Van Breda*, the Supreme Court of Canada identified four non-exhaustive presumptive connecting factors for a tort claim: (a) the defendant is domiciled or resident in the province; (b) the defendant carries on business in the province, with the qualification that the business must have an actual and not a virtual presence; (c) there is a contract made in the province connected to the dispute; and (d) the *situs* of the tort is in the province.[43]

[187] Whether the defendant is carrying on business in the province is a question of fact, and the court will examine whether the defendant has a physical presence in the jurisdiction accompanied by a degree of sustained business activity.[44] Each case involving whether a defendant is carrying on business in Ontario or has a connection to Ontario must be considered on its unique facts.[45]

[188] In *Club Resorts Ltd. v. Van Breda*, at para. 87, Justice LeBel stated:

> Carrying on business in the jurisdiction may also be considered an appropriate connecting factor. But considering it to be one may raise more difficult issues. Resolving those issues may require some caution in order to avoid creating what would amount to forms of universal jurisdiction in respect of tort claims arising out of certain categories of business or commercial activity. Active advertising in the jurisdiction or, for example, the fact that a Web site can be accessed from the jurisdiction would not suffice to establish that the defendant is carrying on business there. The notion

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[39] *Club Resorts Ltd. v. Van Breda*, 2012 SCC 17 at paras. 91–92, aff'g (*sub nom. Van Breda v. Village Resorts*), 2010 ONCA 84, aff'g [2008] O.J. No. 2624 (S.C.J.).
[40] *Export Packers Co. v. SPI International Transportation*, 2012 ONCA 481 at para. 18–23.
[41] *Purolator Canada Inc. v. Canada Council of Teamsters*, 2022 ONSC 5009; *Club Resorts Ltd. v. Van Breda*, 2012 SCC 17 at paras. 95–98, aff'g (*sub nom. Van Breda v. Village Resorts*), 2010 ONCA 84, aff'g [2008] O.J. No. 2624 (S.C.J.).
[42] *Haaretz.com v. Goldhar*, 2018 SCC 28 at para. 43; *Club Resorts Ltd. v. Van Breda*, 2012 SCC 17 at paras. 81, 97, aff'g (*sub nom. Van Breda v. Village Resorts*), 2010 ONCA 84, aff'g [2008] O.J. No. 2624 (S.C.J.).
[43] *Ontario v. Rothmans Inc.*, 2013 ONCA 353 at paras. 31–52, leave to appeal refused [2013] S.C.C.A. No. 327; *Club Resorts Ltd. v. Van Breda*), 2012 SCC 17 at para. 90, aff'g (s*ub nom. Van Breda v. Village Resorts*), 2010 ONCA 84, aff'g [2008] O.J. No. 2624 (S.C.J.).
[44] *H.M.B. Holdings Ltd. v. Antigua and Barbuda*, 2021 SCC 44; *Chevron Corp. v. Yaiguaje*, 2015 SCC 42 at para. 85; *Club Resorts Ltd. v. Van Breda*, 2012 SCC 17 at para. 87.
[45] *Beijing Hehe Fengye Investment Co. Limited v. Fasken Martineau Dumoulin LLP*, 2020 ONSC 934; *Stuart Budd & Sons Ltd. v. IFS Vehicle Distributors ULC*, 2016 ONCA 977; *Yaiguaje v. Chevron Corp.*, 2015 SCC 42; *582556 Alberta Inc. v. Canadian Royalties Inc*., 2008 ONCA 58.

> of carrying on business requires some form of actual, not only virtual, presence in the jurisdiction, such as maintaining an office there or regularly visiting the territory of the particular jurisdiction. But the Court has not been asked in this appeal to decide whether and, if so, when e-trade in the jurisdiction would amount to a presence in the jurisdiction. With these reservations, "carrying on business" within the meaning of rule 17.02(p) may be an appropriate connecting factor.

[189] In *Yaiguaje v. Chevron Corp.*,[46] at para. 85, Justice Gascon stated:

> Whether a corporation is "carrying on business" in the province is a question of fact… [T]he court must inquire into whether the company has "some direct or indirect presence in the state asserting jurisdiction, accompanied by a degree of business activity which is sustained for a period of time"… These factors are and always have been compelling indicia of corporate presence… [T]he common law has consistently found the maintenance of physical business premises to be a compelling jurisdictional factor: LeBel J. accepted this in *Van Breda* when he held that "carrying on business requires some form of actual, not only virtual, presence in the jurisdiction, such as maintaining an office there"…

[190] In *H.M.B. Holdings Ltd. v. Antigua and Barbuda*,[47] the Supreme Court of Canada adopted the test from the English Court of Appeal in *Adams v. Cape Industries Plc*[48] that for a foreign defendant to be carrying on business in a jurisdiction it must either: (a) have established and maintained at its own expense a fixed place of business for more than a minimal period of time and carried on business in that place by its servants or agents; or (b) have a representative for more than a minimal period of time carry on the foreign defendant's business at a fixed place of business in the jurisdiction. In cases involving a representative, it will be necessary to investigate whether the representative is doing no more than carrying on its own business and that investigation will necessitate a rigorous examination of all aspects of the relationship between the foreign defendant and the person said to be its representative in the jurisdiction.

[191] In determining whether the representative has been carrying on the foreign defendant's business or just its own business the following non-exhaustive list of questions may be relevant: (a) Was the fixed place of business originally acquired for the purpose of enabling the representative to act on behalf of the foreign defendant? (b) Did the foreign defendant reimburse the representative for the cost of the fixed place of business and the cost of staff? (c) Did the foreign defendant contribute to the financing of the representative's business? (d) Was the representative remunerated for its work? (e) Did the foreign defendant exercise any control over the business conducted by the representative? (f) Did the representative designate some of its staff to conducting the business of the foreign defendant? (g) Did the representative display the foreign defendant's name at the fixed place of business or in other ways? (h) Did the representative identify itself as a representative of the foreign defendant? (i) What were the representative's own exclusive businesses? (j) Did the representative make contact with customers or other third parties in the name of the foreign defendant; and (k) Did the representative have specific authority to bind the foreign defendant to contracts?[49]

[192] A tort occurs in the jurisdiction substantially affected by the defendant's activities or its

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[46] 2015 SCC 42.
[47] 2021 SCC 44.
[48] [1990] 1 Ch 433 (C.A.).
[49] *H.M.B. Holdings Ltd. v. Antigua and Barbuda*, 2021 SCC 44; *Adams v. Cape Industries Plc* [1990] 1 Ch 433 (C.A.).

consequences or where the important elements of the tort occurred.[50] For example, the torts of fraudulent or negligent misrepresentation occur where the misinformation is received or acted upon.[51] In determining the *situs* of a tort for jurisdictional purposes, the Court adopts a flexible and pragmatic approach to consider whether the jurisdiction was substantially affected by the defendants' activities, or its consequences or where the important elements of the alleged torts occurred. Whether all the elements required to complete the alleged tort occurred in the jurisdiction is not determinative.[52]

[193] In order to succeed in establishing that the court has jurisdiction *simpliciter*, the plaintiff need only show that there is a "good arguable case" for an assumption of jurisdiction.[53] A good arguable case is not a high threshold and means no more than a serious question to be tried or a genuine issue or that the case has some chance of success.[54]

[194] In determining whether there is a real and substantial connection between the action and Ontario, the court will consider the statement of claim and affidavit evidence where the pleading is inadequate to demonstrate the jurisdictional connections.[55] The good arguable case standard can apply solely to the pleadings, but where a defendant adduces evidence to challenge the allegations in the statement of claim, the plaintiff may respond with affidavit evidence and the good arguable case standard applies to the combination of the pleadings and the evidence adduced by the parties.[56]

[195] Any allegation of fact that is not put into issue by the defendant is presumed to be true for the purposes of the jurisdiction motion, and the plaintiff is under no obligation to call evidence for any allegation that has not been challenged by the defendant; however, if a foreign defendant files affidavit evidence challenging the allegations in the statement of claim that are essential to jurisdiction, the low evidentiary threshold for the plaintiff to meet is that it has a good arguable case on those allegations.[57]

[196] Unless challenged by the defendant, the allegations of fact in the statement of claim are presumed to be true, and the plaintiff is under no obligation to call evidence.[58] However, where a

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[50] *Das v. George Weston Limited*, 2017 ONSC 4129, aff'd. 2018 ONCA 1053, leave to appeal to S.C.C. ref'd. [2019] S.C.C.A. No. 69; *Gulevich v. Miller*, 2015 ABCA 411; *Central Sun Mining Inc. v. Vector Engineering Inc.*, 2013 ONCA 601; *Canadian Commercial Bank v. Carpenter* (1989), 39 B.C.L.R. (2d) 312 (C.A.).

[51] *Industrial Avante Monterrey, S.A. de C.V. v. 1147048 Ontario Ltd.*, 2016 ONSC 6004; *2249659 Ontario Ltd. v. Siegen*, 2013 ONCA 354 at para. 31; *Central Sun Mining Inc. v. Vector Engineering Inc.*, 2013 ONCA 601; *Cannon v. Funds for Canada Foundation*, 2010 ONSC 4517 at para. 52.

[52] *Yip v. HSBC Holdings plc*, 2017 ONSC 5332 at para. 207, aff'd. 2018 ONCA 626, leave to appeal to S.C.C. refused [2018] S.C.C.A. No. 41; *Airia Brands Inc. v. Air Canada*, 2017 ONCA 792 at para. 112.

[53] *Ontario v. Rothmans Inc.*, 2013 ONCA 353 at paras. 53–54; *Tucows.com Co. v. Lojas Renner S.A.*, 2011 ONCA 548 at para. 36, leave to appeal refused [2011] S.C.C.A. No. 450; *Schreiber v. Mulroney*, (2007), 88 O.R. (3d) 605 (S.C.J.); *Van Breda v. Village Resorts Ltd.***,** [2008] O.J. No. 2624 (S.C.J.), aff'd 2010 ONCA 84, aff'd (*sub nom. Club Resorts Ltd. v. Van Breda*) 2012 SCC 17.

[54] *Shah v. LG Chem Ltd.*¸ 2015 ONSC 2628; *Ontario v. Rothmans*, 2012 ONSC 22, aff'd 2013 ONCA 353; *Inukshuk Wireless Partnership v. 4253311 Canada Inc*, 2013 ONSC 5631 at para. 19; *Tucows.com Co. v. Lojas Renner S.A.*, 2011 ONCA 548 at para. 36, leave to appeal refused [2011] S.C.C.A. No. 450.

[55] *Haaretz.com v. Goldhar*, 2018 SCC 28 at para. 21; *Van Breda v. Village Resorts Ltd.*, [2008] O.J. No. 2624 (S.C.J.), aff'd 2010 ONCA 84, aff'd (*sub nom. Club Resorts Ltd. v. Van Breda*) 2012 SCC 17.

[56] *Ontario v. Rothmans Inc.*, 2013 ONCA 353 at paras. 101–102, 110; *Vitapharm Canada Ltd. v. F. Hoffman-La Roche Ltd.*, [2002] O.J. No. 298 at para. 64 (S.C.J.).

[57] *Ontario v. Rothmans Inc.*, 2013 ONCA 353.

[58] *Tucows.com Co. v. Lojas Renner S.A.*, 2011 ONCA 548, leave to appeal refused [2011] S.C.C.A. No. 450; *Schreiber v. Mulroney* (2007), 88 O.R. (3d) 605 (S.C.J.).

pleading lacks sufficient particularity or if the defendant challenges the factual underpinning for jurisdiction, the plaintiff bears the relatively low burden of supplementing the pleading with affidavit evidence establishing that it has a good arguable case for an assumption of jurisdiction.[59] In determining whether a presumptive connecting factor is present, the court, however, should not accept allegations in the pleadings that are contradicted by the evidence adduced by the defendants.[60]

[197] While the "good arguable case" is a low threshold, to be satisfied it requires admissible evidence and not speculation of a good arguable case. The test is similar to the "some-basis-in-fact" criteria for certification.[61]

### 2. *Forum Conveniens* and *Forum Non Conveniens*

[198] If a domestic Canadian court has jurisdiction *simpliciter*, the action against the foreign defendant may proceed, but subject to the court's discretion to stay the proceedings on the basis of the doctrine of *forum non conveniens*. If and only if the court has jurisdiction *simpliciter* may it go on to consider the matter of *forum conveniens, i.e.,* whether there is another forum that also has jurisdiction over the matter that would be the better forum to determine the dispute. The objectives in determining the appropriate forum are to ensure fairness to the parties and to provide an efficient process for resolving their dispute.[62]

[199] Before staying its own proceedings on the grounds of *forum non conveniens*, the Ontario court must be satisfied that there is another jurisdiction connected with the matter in which justice can be done between the parties at substantially less inconvenience and expense.[63] In *Kaynes v. BP, plc*,[64] Justice Sharpe explained at paragraph 35 the nature of the *forum conveniens* analysis as follows:

> 35. It is well-established that if the plaintiff succeeds in demonstrating that Ontario has jurisdiction, the court has the discretion to decline to exercise that jurisdiction under the *forum non conveniens* doctrine as was explained in *Van Breda*, at paras. 103-5. The defendant bears the burden "to show why the court should decline to exercise its jurisdiction and displace the forum chosen by the plaintiff". To succeed in discharging that burden, "[t]he defendant must identify another forum that has an appropriate connection under the conflicts rules and that should be allowed to dispose of the action" and "must demonstrate why the proposed alternative forum should be preferred and considered to be more appropriate." The doctrine "tempers the consequences of a strict application of the rules governing the assumption of jurisdiction" and "requires a court to go beyond a strict application of the test governing the recognition and assumption of jurisdiction." The *forum non conveniens* doctrine is a "flexible concept" which "cannot be understood as a set of well-defined rules, but rather as an attitude of respect and deference to other states": *Van Breda*, at para. 74. *Forum non conveniens* recognizes that there is "a residual power to decline to exercise its

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[59] *The Hershey Company v. Leaf*, 2023 BCCA 264; *Ontario v. Rothmans*, 2012 ONSC 22, aff'd 2013 ONCA 353 at paras. 108–119; *Schreiber v. Mulroney* (2007), 88 O.R. (3d) 605 (S.C.J.); *Purple Echo Productions Inc. v./ KCTS Television*, 2008 BCCA 85; *Roth v. Interlock Services Inc.*, 2004 BCCA 407.
[60] *Beijing Hehe Fengye Investment Co. Limited v. Fasken Martineau Dumoulin LLP*, 2020 ONSC 934; *Éditions Écosociété Inc. v. Banro Corp.*, 2012 SCC 18 at paras. 37–38.
[61] *Shah v. LG Chem, Ltd.*, 2015 ONSC 2628.
[62] *Club Resorts Ltd. v. Van Breda*, 2012 SCC 17 at para. 109; *Bouzari v. Bahremani*, 2015 ONCA 275 at para. 47.
[63] *Goldhar v. Haaretz.com*, 2018 SCC 28; *Breeden v. Black*, 2012 SCC 19 at para. 23; *Frymer v. Brettschneider* (1994), 19 O.R. (3d) 60 (C.A.), aff'g (1992), 10 O.R. (3d) 157 (Gen. Div.); *Bonaventure Systems Inc. v. Royal Bank* (1986), 57 O.R. (2d) 270 (Div. Ct.).
[64] 2016 ONCA 601.

> jurisdiction in appropriate, but limited, circumstances in order to assure fairness to the parties and the efficient resolution of the dispute": *Van Breda*, at para. 104.

[200] As Justice Sharpe noted, the flexible *forum non conveniens* doctrine espouses an attitude of respect and deference to other states. The principle of comity underlies the *forum non conveniens* analysis and compels a domestic court to engage in a contextual analysis and to give respect to the courts and legal systems of other jurisdictions that have assumed or could assume jurisdiction over a matter without leaning too instinctively in favour of the domestic court.[65]

[201] In addition to the overarching concern about comity, courts have developed a list of factors that may be considered in determining the most appropriate forum for an action; including: (a) the location of the majority of the parties; (b) the location of the key witnesses and evidence; (c) contractual provisions that specify applicable law or accord jurisdiction; (d) the avoidance of multiplicity of proceedings; (e) the applicable law and its weight in comparison to the factual questions to be decided; (f) geographical factors suggesting the natural forum; (g) juridical advantage; *i.e.*, whether declining jurisdiction would deprive the plaintiff of a legitimate juridical advantage in the domestic court; and (h) the existence of a default judgment in the competing forum.[66]

[202] The discretionary factors are not exhaustive, and the weight to be given any factor is a matter of the exercise of the court's discretion, which is guided by three principles; namely: (1) the threshold for displacing the plaintiff's choice is high and the existence of a more appropriate forum must be clearly demonstrated; (2) the court should consider and balance the efficiency and convenience of a particular forum with the fairness and justice of that choice to the parties; and (3) because a *forum non conveniens* motion is brought early in the proceeding, the court should adopt a cautious approach to fact-finding particularly with respect to matters that are at the heart of the lawsuit; the assessment of the factors should be based on the plaintiff's claim if it has a reasonable basis in the record.[67]

### 3. ***British Columbia v. Apotex Inc., et al.***

[203] Before applying the law described above to the factual circumstances of Pro Doc it is necessary to discuss *British Columbia v. Apotex Inc., et al.*, which was introduced above. This case was much relied on by Dr. Gebien as supporting his argument that Ontario has jurisdiction *simpliciter* over Pro Doc.

[204] At first blush, *British Columbia v. Apotex Inc., et al.* does appear to support Dr. Gebien's argument that the Ontario court does have jurisdiction *simpliciter* with respect to the claims against

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[65] *Kaynes v. BP, plc*, 2016 ONCA 601 at paras. 35-54; *Prince v. ACE Aviation Holdings Inc.*, 2014 ONCA 285 at para. 63, leave to appeal refused [2014] S.C.C.A. No. 273.

[66] *Amtim Capital Inc. v. Appliance Recycling Centers of America*, 2012 ONCA 664; *Precious Metal Capital Corp. v. Smith*, [2008] O.J. No. 1236 (S.C.J.), aff'd (2008), 92 O.R. (3d) 701 (C.A.); *Young v. Tyco International of Canada Ltd.* (2008), 92 O.R. (3d) 161 (C.A.); *Incorporated Broadcasters Ltd. v. Canwest Global Communications Corp.* (2003), 63 O.R. (3d) 431 at para. 36 (C.A.), leave to appeal refused [2003] S.C.C.A. No. 186; *Muscutt v. Courcelles* (2002), 60 O.R. (3d) 20 at paras. 41-42 (C.A.).

[67] *Industrial Avante Monterrey, S.A. de C.V. v. 1147048 Ontario Ltd*., 2016 ONSC 6004.*Orthoarm Inc. v. American Orthodontics Corp*., 2015 ONSC 1880; *Silvestri v. Hardy*, 2009 ONCA 40 at para. 7; *Young v. Tyco International of Canada Ltd.* (2008), 92 O.R. (3d) 161 (C.A.); *Hunt v. T&N plc*, [1993] 4 S.C.R. 289; *Amchem Products Inc. v. British Columbia (Workers' Compensation Board)*, [1993] 1 S.C.R. 897; *Antares Shipping Corp. v. Capricorn (The)*, [1977] 2 S.C.R. 422.

Pro Doc. However, as I shall now explain, on closer analysis, the case does not assist Dr. Gebien.

[205] As noted earlier in these Reasons for Decision, in British Columbia, the provincial government enacted the *Opioid Damages and Health Care Costs Recovery Act*.[68] This statute authorized a single action against multiple defendants to determine their liability in respect of systemic conduct connected to the distribution of Opioids. In part, pursuant to that statutory cause of action, the British Columbia government advanced a proposed class action for itself and the other Canadian provinces for the recovery of health care costs from pharmaceutical manufacturers, distributors, and pharmacy franchisors who provided Opioids to pharmacies and hospitals in Canada.

[206] In *British Columbia v. Apotex Inc., et al.,* the British Columbia Government alleged that the defendants, which included Pro Doc as a distributor, and Jean Coutu Group as a franchisor, delivered Opioids to pharmacies and hospitals in Canada in quantities they knew or should have known exceeded any legitimate market, thereby intensifying the crisis of Opioid use, addiction, and death in Canada.

[207] As noted above, Pro Doc and Jean Coutu Group brought a Jurisdiction Motion challenging the territorial jurisdiction, i.e., jurisdiction *simpliciter*, of the British Columbia court. (There is also a constitution law (*ultra vires*) challenge.) On the Jurisdiction Motion, the British Columbia Government submitted that the B.C. court had a real and substantial connection with the out-of-province defendants because: (a) they carried on business in British Columbia; or (b) they had committed a tort or had restitutionary obligations that made them liable for compensation for healthcare costs.

[208] In *British Columbia v. Apotex Inc., et al.*,[69] Justice Brundrett held that although Pro Doc (the pharmaceutical distributor) and Jean Coutu Group (the franchisor) did not carry on business in British Columbia, they were substantially connected to the province as alleged joint tortfeasors in the conspiracy or common-design case being advanced by the provincial government. Justice Brundrett held that although the pharmaceutical distributor (Pro Doc) and franchisor (Jean Coutu Group) might have been relatively minor players in the Opioid market in the province, that fact was not a sufficient basis to decline the jurisdiction if harm from their products in the province was reasonably foreseeable.

[209] The decision in *British Columbia v. Apotex Inc., et al.* is distinguishable and does not assist Dr. Gebien in demonstrating that the Ontario court should assume jurisdiction in the immediate case. In the immediate case, there is no statutory cause of action connecting Pro Doc to the Ontario court. This is significant because in a statutory claim, the constituent elements of the claim and the material facts must be pleaded by reference to the legislation creating the cause of action, and not by reference to the common law.[70] In *British Columbia v. Apotex Inc., et al.,* the various statutory and common law claims are advanced to recover economic losses caused by the Opioid epidemic;

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[68] S.B.C. 2018, c 35.

[69] 2023 BCSC 662. Motion for stay pending appeal dismissed: *British Columbia v. Apotex Inc., et al.*, 2023 BCSC 1354.

[70] *British Columbia v. Apotex Inc. et al,* 2022 BCSC 1 at para. 85, aff'd 2022 BCCA 366, leave to appeal to S.C.C. refused, [2023] S.C.C.A. No. 13; *Her Majesty the Queen in Right of Ontario v. Rothmans Inc. et al.*, 2016 ONSC 59 at paras. 89-97; *Newfoundland and Labrador (A.G.) v. Rothmans Inc.*, 2015 NLTD(G) 191. In *British Columbia v. Apotex Inc. et al, supra* in the BCCA, Justice Harris stated at para. 10:" It would be a surprising result if we were to conclude that it is plain and obvious that an action rooted in the enabling statute did not disclose a reasonable cause of action."

the immediate case is advanced to recover compensation for personal injuries from the Opioid epidemic. In the immediate case, as was the situation in British Columbia, Pro Doc is not connected to the dispute through the connecting factor of doing business in the province. In the immediate case, however, Pro Doc cannot otherwise be connected to Ontario. In the immediate case, it is not reasonably foreseeable that Pro Doc's products, which it does not manufacture, will be a part of the distribution chain in Ontario. In the immediate case, as I shall explain in some detail below, there is no viable conspiracy or common-design cause of action nor are there common-design allegations as a form of concurrent or joint liability. If there was such a cause of action, there is no good arguable case that Pro Doc had any part in the common design.

[210] In Ontario, there is no good arguable case that Pro Doc contributed to the creation of the New Narrative that is the predicate for the common-design case. Moreover, harm from Pro Doc's products in Ontario was not reasonably foreseeable because the products distributed by Pro Doc were not part of the pharmaceutical marketplace in Ontario.

[211] It is to be kept in mind that the Jurisdiction Motion in *British Columbia v. Apotex Inc., et al.* was a preliminary motion argued and decided before the Certification Motion. In the immediate case, the Jurisdiction Motion is being heard along with Phase One of the Certification Motion. In the immediate case, unlike the situation in British Columbia, where it is premature to determine the viability of the common design or conspiracy cause of action with its statutory underpinnings, as foreshadowed above, and discussed below, I have determined that there is no joint and several liability causes of action and there is no viable cause of action against the Distributors, of which Pro Doc has been grouped.

[212] I do not doubt the correctness of the judgments in *British Columbia v. Apotex Inc., et al.*, but although the factual underpinning of the British Columbia case is virtually identical to the immediate case insofar as the allegations about the liability of the defendants for the Opioid epidemic are concerned, *British Columbia v. Apotex Inc., et al.* is both procedurally and substantively distinguishable from the case at bar for the purposes of the Jurisdiction Motion.

## J. Pro Doc's Jurisdiction Motion: Discussion and Analysis

### 1. Analysis: Jurisdiction *Simpliciter*

[213] In so far as Pro Doc is concerned, Dr. Gebien did not and could not satisfy the very low standard of proof for establishing jurisdiction *simpliciter*. He was and is incapable of showing that there is a "good arguable case" for an assumption of jurisdiction. The evidence establishes that (a) Pro Doc is not domiciled or resident in Ontario; (b) Pro Doc does not carry on business in Ontario; (c) there are no contracts made in Ontario connected to the dispute; and (d) insofar as Pro Doc is concerned the *situs* of the torts is not in Ontario.

[214] Dr. Gebien pleads that his action has a real and substantial connection to Ontario because: (a) Pro Doc distributes and sell its products in Ontario and derives substantial revenue; (b) Pro Doc's head offices are located in Ontario; (c) Pro Doc advertised its products, including Opioids, in Ontario; and (d) Pro Doc committed a tort in Ontario. Dr. Gebien appears to be relying on the presumptive connecting factors of doing business in Ontario and/or the commission of a tort in Ontario. He does not propose a new presumptive connective factor. As the above description of the background facts reveals, none of the connecting factors exist nor could they exist. As far as

Pro Doc is concerned, Dr. Gebien's assertion of jurisdiction *simpliciter* dies on the evidentiary launch pad. No presumptive connection (established or newly established) exists. There is nothing for Pro Doc to rebut.

[215] The factual predicate of Dr. Gebien's various causes of action is a set of misrepresentations described as the New Narrative. These misrepresentations allegedly convinced the medical establishment across the country to overprescribe Opioids; however, the evidence on the Jurisdiction Motion is that Pro Doc made no representations that had any persuasive force at all. Pro Doc's evidence went beyond a denial of participation in the New Narrative. It provided evidence of what it did in the marketing and the distribution of Opioids. It was Dr. Gebien who failed to provide evidence of a good arguable case against Pro Doc.

[216] I agree with what Pro Doc argued in paragraph 4 of its Reply Factum:

> 4. The core allegation in this case against the Manufacturer Defendants, as which Pro Doc is categorized, is about the "New Narrative" which alleges various misrepresentations and marketing strategies allegedly engaged in by the Defendants to increase the market for opioids. In response to that, Pro Doc has denied these allegations by explaining that it never marketed those products other than to notify pharmacies in newsletters that a new product is available along with basic information about that product such as DIN and formulary status. Mr. Labrosse's affidavit produced all those newsletters. Beyond that, there is nothing else to produce. A denial need not be supported by documentary evidence because if something did not happen, there are not going to be documents about it.

[217] The evidence from the Jurisdiction Motion also establishes that there is no good arguable case there is a real and substantial connection between Ontario and Pro Doc because it has a principal and agent relationship with Jean Coutu Group. The explanation for the lack of connection is that assuming that Pro Doc was the agent of Jean Coutu Group, which is a contestable allegation, then that agency is for matters outside the province of Ontario. Any agency concerns activities in Québec. Moreover, if an agency relationship exists, it is with respect to Jean Coutu Group being a manufacturer of Opioids and Pro Doc being its agent for distribution; however, as explained below, the action against Jean Coutu Group is being dismissed because it is plain and obvious that there is no claim against it as a manufacturer or distributor of Opioids and the action against the Distributor Defendants is also being dismissed for the failure to show a reasonable cause of action.

[218] The immediate case is similar to *The Hershey Company v. Leaf*,[71] where the British Columbia Court of Appeal reversed the motions judge and held that there was no jurisdiction *simpliciter* against the American chocolate candy maker in an action against it and its Canadian subsidiary for the tort of negligent misrepresentation and for false advertising contrary to s. 52 of the *Competition Act.* In the *Hershey Company v. Leaf* case, the plaintiffs alleged that the defendants had falsely represented that they did not use and opposed the use of child labour and slavery in the cocoa supply chain. The motions judge dismissed The Hershey Company's jurisdiction challenge made pursuant to British Columbia's *Court Jurisdiction and Proceedings Transfer Act*,[72] which requires that there be a "real and substantial connection between British Columbia and the facts on which the proceeding against the appellant is based. However, the British Columbia Court of Appeal disagreed that there was evidence of misrepresentations made in British Columbia and so the appellate court held that there was no tort committed in the province upon which to establish a good arguable case. The situation in the immediate case is analogous. There were no

[71] 2023 BCCA 264.
[72] S.B.C. 2003, c. 28.

representations made or received in Ontario that can be attributed to Pro Doc.

[219] The above analysis is not a matter of a blinkered approach analyzing Pro Doc in isolation as an individual defendant. It is an analysis of whether Pro Doc has a real and substantial connection to the multi-party dispute that has been brought in Ontario.

[220] Ontario's connection to Pro Doc is not weak, it is non-existent. Thus, with respect to Pro Doc., there is no real and substantial connection between Pro Doc, the matter, the parties, and Ontario.

[221] Accordingly, the claims as against Pro Doc should be struck from the Fresh as Amended Statement of Claim.

### 2. Analysis: *Forum Conveniens*

[222] As noted above, if and only if the Ontario court has jurisdiction *simpliciter* may the court go on to consider the matter of *forum conveniens*. I, therefore, shall not undertake a detailed analysis of *forum conveniens*.

[223] On the assumption, however, that this judgment is appealed, I will offer the general analysis and the conclusion that the evidence on this motion satisfied me that there is another jurisdiction connected with the matter; namely Québec, in which justice can be done between the parties at substantially less inconvenience and expense. Upon analysis the discretionary principles favour a proceeding in Québec governed by the Québec civil law enacted for the citizens of Québec.

## K. The Claim Against The Jean Coutu Group (PJC) Inc.

[224] Before addressing the Defendants' Motion to Strike Dr. Gebien's Fresh as Amended Statement of Claim, and the issue of whether the pleading satisfies or could satisfy the cause of action criterion for certification, it is convenient to address the unique argument advanced by The Jean Coutu Group (PJC) Inc. to have Dr. Gebien's pleading struck out as against it as a Manufacturer Defendant.

[225] In advancing its argument to be let out of the action, Jean Coutu Group relies on rule 21.01 (3)(d) which provides that a defendant may move to have an action stayed or dismissed on the ground that the action is frivolous or vexatious or is otherwise an abuse of the process of the court. An action will be frivolous or vexatious if its unsuccessful fate is sealed from the outset.

[226] In advancing this argument, Jean Coutu Group also relies on rule 25.11, which provides that the court may strike out a pleading that may prejudice or delay the fair trial of the action or that is scandalous, frivolous, vexatious or an abuse of process of the court. The same test that is used for striking a pleading for the failure to show a reasonable cause of action, *i.e.*, the plain and obvious test, is used to determine whether a pleading is scandalous, frivolous, or an abuse of process of the court.

[227] Jean Coutu Group also relies on the evidence before the court because of its subsidiary Pro Doc Limitée's successful Jurisdiction Motion.

[228] Jean Coutu Group's argument is eloquently simple and amply supported by the material facts. Jean Coutu Group argues that unlike a motion brought pursuant to rule 21.01 (1)(b), motions pursuant to 21.01 (3)(d) and 25.11 may be supported by evidence, and then it submits that in the

immediate case from the evidence, it is plain and obvious that a claim against Jean Coutu Group as a Manufacturer Defendant is doomed to failure because it is not a manufacturer.

[229] I agree with this argument. Jean Coutu Group does not manufacture Opioids. Jean Coutu Group is not a pharmaceutical company; it is not a manufacturer; it is a franchisor of a chain of pharmacies.

[230] While Jean Coutu Group is also amongst the Distributor Defendants, as I shall explain below, there is no legally viable cause of action against the Distributor Defendants. It is plain and obvious that as a factual matter Jean Coutu Group is not among the Manufacturer Defendants who perpetrated the New Narrative. It is plain and obvious as a legal matter there is no viable action against Jean Coutu Group as a Distributor Defendant.

[231] In these circumstances I shall strike the Fresh as Amended Statement of Claim as against The Jean Coutu Group (PJC) Inc. as a party defendant, without leave to amend.

## L. Cause of Action Criterion and the Defendants' Motion to Strike the Pleadings

### 1. Methodology and the *Ragoonanan* Principle

[232] I turn now to Phase One of the Certification Motion and to the Defendants' Motions to Strike the Fresh as Amended Statement of Claim without leave to amend.

[233] For the purposes of the discussion that follows, I shall assume that Pro Doc Limitée and The Jean Coutu Group (PJC) Inc. remain party defendants to Dr. Gebien's action. I shall include The Purdue Frederick Company Inc. and Purdue Pharma LP in the discussion although technically and jurisdictionally speaking, the action is stayed against them because of the bankruptcy proceedings.

[234] Under the rubric of what Dr. Gebien labels the New Narrative and the material fact allegations found in the Fresh as Amended Statement of Claim, which Dr. Gebien submits establish the joint liability of a common-design tortious liability, Dr. Gebien advances four causes of action; namely: (1) breach of the *Competition Act*;[73] (2) negligent misrepresentation; (3) fraudulent misrepresentation or deceit; and (4) products liability negligence. He does not advance common design as a distinct cause of action; rather, he submits that the common-design allegations support concurrent or joint liability. He purports to be the Representative Plaintiff in one class action against the Manufacturer Defendants and the Distributor Defendants.

[235] In the Notices of Motion for the Motions to Strike and in their eight factums, the Defendants advance seven arguments to request the court to strike Dr. Gebien's Fresh as Amended Statement of Claim without leave to amend.

[236] The Defendants' first argument is that there is no collective liability and at most there could only be separate causes of action against separate Defendants. If this argument is correct, and I conclude that it is, it follows that Dr. Gebien has a problem because of the *Ragoonanan* Principle, which is authority that in a proposed class action, there must be a representative plaintiff with a claim against each defendant,[74] Dr. Gebien, himself, only has a claim against the manufacturers of

[73] R.S.C. 1985, c. C-34.

[74] *Poirer v. Silver Wheaton Corp*, 2022 ONSC 80; *Vecchio Longo Consulting Services Inc. v. Aphria Inc*., 2021 ONSC 5405; *Canada v. Greenwood*, 2021 FCA 186, leave to appeal to S.C.C. ref'd, [2021] S.C.C.A No. 377;

Percocet. It follows that if his proposed class action is to proceed against all of the Manufacturer Defendants, Dr. Gebien must be joined by co-plaintiffs to be additional Representative Plaintiffs.

[237] The Defendants' second argument is that Dr. Gebien "has lumped the Defendants together and conflated their separate identities and activities through a set of sweeping allegations that do not give fair notice to any Defendant of the case to be met." Thus, the Defendants submit that Dr. Gebien fails to plead material facts to support any of the causes of action claims against any Defendant and that he fails to plead what any Defendant allegedly did wrongfully, and therefore the claims should be dismissed.

[238] The Defendants' third argument is that Dr. Gebien's Fresh as Amended Statement of Claim fails to plead the material facts necessary to establish against the Manufacturer Defendants the causes of action for the statutory misrepresentation claim under the *Competition Act*; therefore. this claim should be struck.

[239] The Defendants' fourth argument is that Dr. Gebien's Fresh as Amended Statement of Claim fails to plead the material facts necessary to establish a negligent misrepresentation cause of action against the Manufacturer Defendants; therefore, this claim should be struck.

[240] The Defendants' fifth argument is that Dr. Gebien's Fresh as Amended Statement of Claim fails to plead the material facts necessary to establish a fraudulent misrepresentation or deceit cause of action against the Manufacturer Defendants; therefore, this claim should be struck.

[241] The Defendants' sixth argument is that Dr. Gebien's Fresh as Amended Statement of Claim fails to plead the material facts necessary to establish a negligence claim against the Manufacturer Defendants; therefore, this claim should be struck.

[242] The Defendants' seventh argument is that Dr. Gebien's Fresh as Amended Statement of Claim fails to plead the material facts necessary to establish a negligence claim against the Distributor Defendants; therefore, this claim should be struck.

[243] In advancing these arguments, the Defendants note that with a few exceptions, where a particular act is attributed to a particular defendant, the Fresh as Amended Statement of Claim does not identify any specific acts or omissions alleged to have been committed by any specific Defendant, either individually or collectively. The Defendants assert that the Fresh as Amended Statement of Claim does not identify any specific statements alleged to have been made by any Defendant – whether individually or collectively – in any specific circumstances.

[244] In this part of my Reasons for Decision, after discussing the *Ragoonanan* Problem, I shall consider the merits of each of these seven arguments. The analysis of these seven arguments will explain the outcomes that I foreshadowed in the Synopsis near the beginning of this decision.

[245] Thus, by way of methodology, first, I will set out the *Rules of Civil Procedure* that are relevant to the Defendants' seven arguments and then I will discuss and analyze the Defendants' seven arguments to strike the Fresh as Amended Statement of Claim. I will analyze whether there is any collective liability in the immediate case and the problems of pleading joint liability. I will address each of Dr. Gebien's four pleaded causes of action. The common law negligence cause

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*Lawrence v. Atlas Cold Storage Holdings Inc.* (2006), 34 C.P.C. (6th) 41 (Ont. S.C.J.); *Ragoonanan Estate v. Imperial Tobacco Canada Ltd*. (2000), 51 O.R. (3d) 603; 128; *Hughes v. Sunbeam Corp. (Canada)*, [2000] O.J. No. 4595 (S.C.J.), var'd on other grounds (2002) 61 O.R. (3d) 433 (C.A.), leave to appeal to S.C.C. ref'd, [2002] S.C.C.A. No. 446.

will be addressed separately for the Manufacturer Defendants and the Distributor Defendants.

[246] The outcome of this methodology, which is summarized in the Synopsis, is that Dr. Gebien shall be granted leave to amend his pleading and to deliver a Second Fresh as Amended Statement of Claim subject to complying with certain directions, including the direction that the amended pleading be compliant with the rules of pleading.

[247] Amendments are necessary to comply with the *Ragoonanan* Principle and to plead only the legally viable causes of action against the Manufacturer Defendants. Amendments are also necessary to comply with the technical rules of pleading set out in the *Rules of Civil Procedure.*

[248] For the present purpose of ascertaining the legal viability of the pleading, I note again that apart from the *Ragoonanan* Principle and the cause of action problems that I shall be discussing, the Fresh as Amended Statement of Claim, violates the technical rules of pleading. Since I shall be granting Dr. Gebien leave to deliver a Second Fresh as Amended Statement of Claim in order to resolve the *Ragoonanan* Problem and to assert only his legally viable causes of action against the Manufacturer Defendants, he should also address the technical issues.

[249] I have reserved the Defendants' right to challenge the Second Fresh as Amended Statement of Claim if it offends the technical rules of pleading the causes of action that I have held satisfy the cause of action criterion for certification.

## 2. Pleadings Motion: General Principles

[250] The first criterion for certification is that the plaintiff's pleading discloses a cause of action. The "plain and obvious" test from Rule 21 of the *Rules of Civil Procedure* for disclosing a cause of action from *Hunt v. Carey Canada*,[75] is used to determine whether a proposed class proceeding discloses a cause of action for the purposes of s. 5(1)(a) of the *Class Proceedings Act, 1992*.

[251] In the immediate case, the Defendants' motion to strike Dr. Gebien's Fresh as Amended Statement of Claim is brought pursuant to rules 21.01(1)(b), 21.01(2), 21.01(3)(d) and 25.11 of the *Rules of Civil Procedure*.

[252] Also relevant to the Defendants' motion to strike are rules 5.01 (1)(3), 5.02 (1)(2) and 25.06 (1)(2) and (8).

[253] The relevant rules are set out below.

RULE 5 JOINDER OF CLAIMS AND PARTIES

*Joinder of Claims*

5.01 (1) A plaintiff or applicant may in the same proceeding join any claims the plaintiff or applicant has against an opposite party.

[…]

(3) Where there is more than one defendant or respondent, it is not necessary for each to have an interest in all the relief claimed or in each claim included in the proceeding.

[75] [1990] 2 S.C.R. 959.

*Joinder of Parties*

Multiple Plaintiffs or Applicants

5.02 (1) Two or more persons who are represented by the same lawyer of record may join as plaintiffs or applicants in the same proceeding where,

(a) they assert, whether jointly, severally or in the alternative, any claims to relief arising out of the same transaction or occurrence, or series of transactions or occurrences;

(b) a common question of law or fact may arise in the proceeding; or

(c) it appears that their joining in the same proceeding may promote the convenient administration of justice. R.R.O. 1990, Reg. 194, r. 5.02 (1); O. Reg. 575/07, s. 9.

*Multiple Defendants or Respondents*

(2) Two or more persons may be joined as defendants or respondents where,

(a) there are asserted against them, whether jointly, severally or in the alternative, any claims to relief arising out of the same transaction or occurrence, or series of transactions or occurrences;

(b) a common question of law or fact may arise in the proceeding;

(c) there is doubt as to the person or persons from whom the plaintiff or applicant is entitled to relief;

(d) damage or loss has been caused to the same plaintiff or applicant by more than one person, whether or not there is any factual connection between the several claims apart from the involvement of the plaintiff or applicant, and there is doubt as to the person or persons from whom the plaintiff or applicant is entitled to relief or the respective amounts for which each may be liable; or(e) it appears that their being joined in the same proceeding may promote the convenient administration of justice

{…}

RULE 21 DETERMINATION OF AN ISSUE BEFORE TRIAL

*To any Party on Question of Law*

21.01 (1) A party may move before a judge,

(a) […]

(b) to strike out a pleading on the ground that it discloses no reasonable cause of action or defence,

and the judge may make an order or grant judgment accordingly.

(2) No evidence is admissible on a motion, …

(b) under clause (1)(b).

*To Defendant*

(3) A defendant may move before a judge to have an action stayed or dismissed on the ground that,

[…]

*Action Frivolous, Vexatious or Abuse of Process*

(d) the action is frivolous or vexatious or is otherwise an abuse of the process of the court

And the judge may make an order or grant judgment accordingly.

{…}

*Rules of Pleading – Applicable to all Pleadings*
*Material Facts*

25.06 (1) Every pleading shall contain a concise statement of the material facts on which the party relies for the claim or defence but not the evidence by which those facts are to be proved.

*Pleading Law*

(2) A party may raise any point of law in a pleading, but conclusions of law may be pleaded only if the material facts supporting them are pleaded.

[…]

*Nature of Act or Condition of Mind*

(8) Where fraud, misrepresentation, breach of trust, malice or intent is alleged, the pleading shall contain full particulars, but knowledge may be alleged as a fact without pleading the circumstances from which it is to be inferred.

[…]

*Striking out a Pleading or Other Document*

25.11 The court may strike out or expunge all or part of a pleading or other document, with or without leave to amend, on the ground that the pleading or other document,

(a) may prejudice or delay the fair trial of the action;

(b) is scandalous, frivolous or vexatious; or

(c) is an abuse of the process of the court.

[254] To satisfy the first criterion for certification, a claim will be satisfactory, unless it has a radical defect, or it is plain and obvious that it could not succeed.[76] The court must rather ask whether, assuming the facts pleaded are true, there is a reasonable prospect that the claim will succeed. To satisfy the first criterion for certification, a claim will be satisfactory, unless it has a radical defect, or it is plain and obvious that it could not succeed.[77]

[255] The failure to establish a cause of action usually arises in one of two ways: (1) the allegations in the statement of claim do not plead all the elements necessary for a recognized cause of action; or (2) the allegations in the statement of claim do not come within a recognized cause

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[76] *176560 Ontario Ltd. v. Great Atlantic & Pacific Co. of Canada Ltd.* (2002), 62 O.R. (3d) 535 at para. 19 (SCJ), leave to appeal granted, 64 O.R. (3d) 42 (S.C.J.), aff'd (2004), 70 O.R. (3d) 182 (Div. Ct.); *Anderson v. Wilson* (1999), 44 O.R. (3d) 673 at p. 679 (CA), leave to appeal to S.C.C. ref'd, [1999] S.C.C.A. No. 476.
[77] *176560 Ontario Ltd. v. Great Atlantic & Pacific Co. of Canada Ltd.* (2002), 62 O.R. (3d) 535 at para. 19 (S.C.J.), leave to appeal granted, 64 O.R. (3d) 42 (S.C.J.), aff'd (2004), 70 O.R. (3d) 182 (Div. Ct.); *Anderson v. Wilson* (1999), 44 O.R. (3d) 673 at p. 679 (C.A.), leave to appeal to S.C.C. ref'd, [1999] S.C.C.A. No. 476.

of action.[78]

[256] In *R. v. Imperial Tobacco Canada Ltd*.,[79] the Supreme Court of Canada noted that although the tool of a motion to strike for failure to disclose a reasonable cause of action must be used with considerable care, it is a valuable tool because it promotes judicial efficiency by removing claims that have no reasonable prospect of success and it promotes correct results by allowing judges to focus their attention on claims with a reasonable chance of success. Chief Justice McLachlin stated:

> Valuable as it is, the motion to strike is a tool that must be used with care. The law is not static and unchanging. Actions that yesterday were deemed hopeless may tomorrow succeed. Before *McAlister (Donoghue) v. Stevenson*, [1932] A.C. 562 (U.K. H.L.) introduced a general duty of care to one's neighbor premised on foreseeability, few would have predicted that, absent a contractual relationship, a bottling company could be held liable for physical injury and emotional trauma resulting from a snail in a bottle of ginger beer. Before *Hedley Byrne & Co. v. Heller & Partners Ltd*., [1963] 2 All E.R. 575 (U.K. H.L.), a tort action for negligent misstatement would have been regarded as incapable of success. The history of our law reveals that often new developments in the law first surface on motions to strike or similar preliminary motions, like the one at issue in *McAlister (Donoghue) v. Stevenson*. Therefore, on a motion to strike, it is not determinative that the law has not yet recognized the particular claim. The court must rather ask whether, assuming the facts pleaded are true, there is a reasonable prospect that the claim will succeed. The approach must be generous and err on the side of permitting a novel but arguable claim to proceed to trial.

[257] In *Atlantic Lottery Corp. Inc. v. Babstock*,[80] the Supreme Court stated that the test applicable on a motion to strike is a high standard that calls on courts to read the claim as generously as possible because cases should, if possible, be disposed of on their merits based on the concrete evidence presented before judges at trial. However, Justice Brown stated that it is beneficial, and indeed critical to the viability of civil justice and public access thereto that claims, including novel claims, which are doomed to fail be disposed of at an early stage in the proceedings.[81]

[258] In a proposed class proceeding, in determining whether the pleading discloses a cause of action, no evidence is admissible, and the material facts pleaded are accepted as true, unless patently ridiculous or incapable of proof. The pleading is read generously, and it will be unsatisfactory only if it is plain, obvious, and beyond a reasonable doubt that the plaintiff cannot succeed.[82]

[259] Bare allegations and conclusory legal statements based on assumption or speculation are not material facts; they are incapable of proof and, therefore, they are not assumed to be true for the purposes of a motion to determine whether a legally viable cause of action has been pleaded.[83]

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[78] *2106701 Ontario Inc. (c.o.b. Novajet) v. 2288450 Ontario Ltd.*, 2016 ONSC 2673 at para. 42; *Aristocrat Restaurants Ltd. v. Ontario*, [2004] O.J. No. 5164 (SCJ); *Dawson v. Rexcraft Storage & Warehouse Inc.*, [1998] O.J. No. 3240 at para. 10 (CA).
[79] *R. v. Imperial Tobacco Canada Ltd*., 2011 SCC 42 at paras. 17-25.
[80] *Atlantic Lottery Corp. Inc. v. Babstock*, 2020 SCC 19 at para. 87-88.
[81] *Atlantic Lottery Corp. Inc. v. Babstock*, 2020 SCC 19 at para. 19.
[82] *Cloud v. Canada (Attorney General)* (2004), 73 O.R. (3d) 401 at para. 41 (C.A.), leave to appeal to the S.C.C. refused, [2005] S.C.C.A. No. 50, rev'g, (2003), 65 O.R. (3d) 492 (Div. Ct.); *Hollick v. Toronto (City)*, 2001 SCC 68 at para. 25; *Abdool v. Anaheim Management Ltd.* (1995), 21 O.R. (3d) 453 at p. 469 (Div. Ct.).
[83] *Deluca v. Canada (AG)*, 2016 ONSC 3865; *Losier v. Mackay, Mackay & Peters Ltd*., [2009] O.J. No. 3463 at paras. 39-40 (S.C.J.), aff'd 2010 ONCA 613, leave to appeal ref'd [2010] SCCA 438; *Grenon v. Canada Revenue Agency*, 2016 ABQB 260 at para. 32; *Merchant Law Group v. Canada Revenue Agency*, 2010 FCA 184 at para. 34.

[260] Matters of law that are not fully settled should not be disposed of on a motion to strike an action for not disclosing a reasonable cause of action,[84] and the court's power to strike a claim is exercised only in the clearest cases.[85] The law must be allowed to evolve, and the novelty of a claim will not militate against a plaintiff.[86] However, a novel claim must have some elements of a cause of action recognized in law and be a reasonably logical and arguable extension of established law.[87] In the Ontario Court of Appeal's decision in *Darmar Farms Inc. v. Syngenta Canada Inc.*,[88] Justice Zarnett stated:

> The fact that a claim is novel is not a sufficient reason to strike it. But the fact that a claim is novel is also not a sufficient reason to allow it to proceed; a novel claim must also be arguable. There must be a reasonable prospect that the claim will succeed.

[261] Rule 25.06 (1) directs that every pleading shall contain a concise statement of the material facts on which the party relies for the claim or defence, but not the evidence by which those facts are to be proved. A pleading should be brief, clear, focused and contain the skeletal or core facts and not the evidence that details those facts unless particulars are required by the rules.[89]

[262] Material facts are comprised of the facts that would be necessary for the party to prove to support their claim or defence and include facts that the party pleading is entitled to prove at trial, and at trial, anything that affects the determination of the party's rights can be proved; accordingly, material facts include facts that can have an effect on the determination of a party's rights.[90] A fact that is not provable at the trial or that is incapable of affecting the outcome is immaterial and ought not to be pleaded.[91] A pleading of fact will be struck if it cannot be the basis of a claim or defence and is designed solely for the purposes of atmosphere or to cast the opposing party in a bad light.[92] As described by Riddell J. in *Duryea v. Kaufman*,[93] such a pleading is said to be "embarrassing".

[263] "Material" facts include facts that establish the constituent elements of the claim or defence.[94] The causes of action must be clearly identifiable from the facts pleaded and must be supported by facts that are material.[95]

[264] A pleading shall contain material facts, but it should not contain the evidence by which

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[84] *Dawson v. Rexcraft Storage & Warehouse Inc.* (1998), 164 D.L.R. (4th) 257 (Ont. C.A.).
[85] *Temelini v. Ontario Provincial Police (Commissioner)* (1990), 73 O.R. (2d) 664 (C.A.).
[86] *Johnson v. Adamson* (1981), 34 O.R. (2d) 236 (C.A.), leave to appeal to the S.C.C. refused (1982), 35 O.R. (2d) 64n.
[87] *Silver v. Imax Corp.*, [2009] O.J. No. 5585 (S.C.J.) at para. 20; *Silver v. DDJ Canadian High Yield Fund*, [2006] O.J. No. 2503 (S.C.J.).
[88] *Darmar Farms Inc. v. Syngenta Canada Inc*., 2019 ONCA 789 at para. 51.
[89] *Mudrick v. Mississauga Oakville Veterinary Emergency Professional Corp*., [2008] O.J. No. 4512 (Master).
[90] *The Hershey Company v. Leaf*, 2023 BCCA 264 at para. 42; *Canada (Attorney General) v. Frazier*, 2022 BCCA 379 at para. 69; *Brydon v. Brydon*, [1951] O.W.N. 369 (C.A.); *Hammell v. British American Oil Co.*, [1945] O.W.N. 743 (Master); *Daryea v. Kaufman* (1910), 21 O.L.R. 161 (H.C.J.).
[91] *Wood Gundy Inc. v. Financial Trustco Capital Ltd.*, [1988] O.J. No. 275 (H.C.J.); *Guaranty Trust Co. of Canada v. Public Trustee* (1978), 20 O.R. (2d) 247 (H.C.J.); *Everdale Place v. Rimmer*, (1975), 8 O.R. (2d) 641 (H.C.J.); *Elder v. Kingston (City)*, [1953] O.W.N. 409 (H.C.J.).
[92] *Canadian National Railway Co. v. Brant* (2009), 96 O.R. (3d) 734 (S.C.J.); *Wilson v. Wilson*, [1948] O.J. No. 62 (H.C.J.).
[93] *Duryea v. Kaufman* (1910), 21 O.L.R. 165 at p. 168 (H.C.J.).
[94] *Philco Products, Ltd. v. Thermionics, Ltd.*, [1940] S.C.R. 501.
[95] *Cerqueira v. Ontario*, 2010 ONSC 3954 at para. 11.

those facts are to be proved.[96] Pleadings of evidence may be struck out.[97] The prohibition against pleading evidence is designed to restrain the pleading of facts that are subordinate and that merely tend toward proving the truth of the material facts.[98]

[265] Under rule 25.11, the court may strike out a pleading that may prejudice or delay the fair trial of the action or that is scandalous, frivolous, vexatious or an abuse of process of the court.[99] The same test that is used for striking a pleading for the failure to show a reasonable cause of action; *i.e.*, the plain and obvious test, is used to determine whether a pleading is scandalous, frivolous or an abuse of process of the court.[100]

[266] A claim may be found to be frivolous, vexatious or an abuse of process when it asserts untenable pleas, is argumentative, contains insufficient material facts to support the allegations made, or is made for an extraneous or collateral purpose.[101] For the purpose of rule 25.11, the term "scandalous", includes allegations that are irrelevant, argumentative, simply inserted for colour or to impugn the behaviour or character of the other party unrelated to the issues in the litigation.[102] Parties are to be allowed a great deal of latitude in how they plead, but there are limits, and the court has the jurisdiction to strike a pleading to remove the pleading of evidence, prolix or vague allegations, repetitive or redundant allegations, or inconsistent allegations that are not clearly pled as alternatives and to direct a party to plead with certainty, precision and with sufficient particulars.[103]

[267] A scandalous pleading refers to indecent or offensive allegations designed to prejudice the opponent or unnecessary allegations maliciously directed at the moral character of the opponent.[104] Pleadings that are irrelevant, argumentative or inserted only for colour, or that constitute bare unfounded allegations should be struck out as scandalous.[105] A pleading that raises an issue that cannot influence the outcome of the action is scandalous.[106] The pleading is struck out because it

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[96] *McDowell and Aversa v. Fortress Real Capital Inc*., 2017 ONSC 4791; *Murray v. Star*, 2015 ONSC 4464; *Mudrick v. Mississauga Oakville Veterinary Emergency Professional Corp*., [2008] O.J. No. 4512 (Master).
[97] *Envirochill Cryogen Development Corporation v. University of Ontario Institute of Technology*, 2018 ONSC 766 (Master); *Jacobson v. Skurka*, 2015 ONSC 1699; *Sun Life Assurance Co. of Canada v. 401700 Ontario Ltd.* (1991), 3 O.R. (3d) 684 (Gen. Div.).
[98] *Grace v. Usalkas*, [1959] O.W.N. 237 (H.C.J.).
[99] *876502 Ontario Inc. v. I.F. Propco Holdings (Ontario) 10 Ltd.* (1997), 37 O.R. (3d) 70 (Gen. Div.); *R. Cholkan & Co. v. Brinker* (1990), 71 O.R. (2d) 381 (H.C.J.); *Demeter v. British Pacific Life Insurance Co.* (1983), 43 O.R. (2d) 33 (H.C.J.), affd (1984), 48 O.R. (2d) 266 (C.A.); *Foy v. Foy* (1978), 20 O.R. (2d) 747 (C.A.).
[100] *Resolute Forest Products Inc. v. 2471256 Canada Inc. (c.o.b. Greenpeace Canada)*, 2016 ONSC 5398 (Div. Ct.); *Miguna v. Toronto (City) Police Services Board*, 2008 ONCA 799.
[101] *Carney Timber Co. v. Pabendinskas*, [2008] O.J. No. 4818 (S.C.J.); *Hainsworth v. Ontario*, [2002] O.J. No. 1380 (S.C.J.); *Panalpina Inc. v. Sharma*, [1988] O.J. No. 1401 (H.C.J.).
[102] *Holder v. Wray*, 2018 ONSC 6133 (S.C.J.); *Carney Timber Co. v. Pabendinskas*, [2008] O.J. No. 4818 (S.C.J.); *George v. Harris*, [2000] O.J. No. 1762 (S.C.J.).
[103] *Cadieux (Litigation guardian of) v. Cadieux*, 2016 ONSC 4446 (Master); *Dolan v. Centretown Citizens Ottawa Corp.*, 2015 ONSC 2145 (Master); *Fockler v. Eisen*, 2012 ONSC 5435; *Lysko v. Braley* (2006), 79 O.R. (3d) 721 (C.A.).
[104] *Wolker v. Ogilvie Realty Ltd*., [2006] O.J. No. 381 (S.C.J.); *876502 Ontario Inc. v. I.F. Propco Holdings (Ontario) 10 Ltd.* (1997), 37 O.R. (3d) 70 (Gen. Div.); *Paul v. Paul* (1980), 28 O.R. (2d) 78 (H.C.J.).
[105] *Gardner v. Toronto Police Services Board*, [2006] O.J. No. 3320 (Ont. S.C.J.), var'd 2007 ONCA 489; *Senechal v. Muskoka (District Municipality)*, [2003] O.J. No. 885 (S.C.J.); *Solid Waste Reclamation Inc. v. Philip Enterprises Inc*., [1991] O.J. No. 213 (Gen. Div.).
[106] *Caras v. IBM Canada Ltd*., [2004] O.J. No. 3009 (Master); *Everdale Place v. Rimmer* (1975), 8 O.R. (2d) 641 (H.C.J.).

serves no purpose other than to add colour or argument and to disconcert or humiliate the opponent.[107]

[268] The rule authorizing the court to strike out a pleading as prejudicial, scandalous, frivolous, vexatious, or an abuse of the process of the court is exercised only in the clearest of cases.[108]

[269] Where a pleading is struck as defective, leave to amend should only be denied in the clearest cases when it is plain and obvious that no tenable cause of action is possible on the facts as alleged.[109] Leave to amend will be refused, however, where there is no reason to suppose that the party could improve his or her case by any amendment or if an entirely new cause of action would have to be set up by way of amendment.[110] The test is whether the amendment can properly be made without prejudice to the other side, and unless it is clear that the plaintiff cannot allege further facts that he or she knows to be true to support the allegations in the pleading, leave to amend will be granted.[111] The usual practice is to grant the plaintiff leave to amend unless it is clear that the plaintiff cannot improve its case by any further and proper amendment.[112]

## 3. Is there Collective or is there Separate Liability in the Immediate Case?

[270] In their Motions to Strike Dr. Gebien's Fresh as Amended Statement of Claim, the Defendants' first argument to have the pleading struck without leave to amend, which is a substantive legal argument, is that there is no collective liability and at most there could only be separate causes of action against separate Defendants; however, these separate causes of action have not been properly pleaded nor could they be pleaded; therefore, the pleading should be struck.

[271] I agree with the Defendants that there is no collective joint and several liability against the Defendants taken altogether; however, there are separate causes of action against separate defendants that are adequately pleaded. Because of the *Ragoonanan* Principle in Ontario, these separate causes of action require additional plaintiffs to prosecute the claims.

[272] Apparently for strategic reasons, Dr. Gebien has dressed up 15 separate products liability class actions against 15 pharmaceutical manufacturers as if it was a common-design cause of action or as a form of proceeding where the 15 pharmaceutical companies are jointly and severally liable for each other's wrongdoings in designing, manufacturing, and marketing.

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[107] *Sequin v. Van Dyke* 2011 ONSC 2566 (Master); *Dugal v. Manulife Financial Corp.*, 2011 ONSC 387; *Williams v. Wai-Ping*, [2005] O.J. No. 1940 (S.C.J.), aff'd, [2005] O.J. No. 6186 (Div. Ct.); *Jane Doe v. Escobar*, [2004] O.J. No. 2760 (S.C.J.); *Hodson v. Canadian Imperial Bank of Commerce*, [2001] O.J. No. 4378 (Div. Ct.); *George v. Harris*, [2000] O.J. No. 1762 (S.C.J.).

[108] *Tarion Warranty Corp. v. Brookegreene Estates Inc.*, [2006] O.J. No. 923 (S.C.J.); *Wernikowski v. Kirkland, Murphy & Ain* (1999), 50 O.R. 124 (C.A.).

[109] *Fernandez Leon v. Bayer Inc*., 2023 ONCA 629; *Burns v. RBC Life Insurance Company*, 2020 ONCA 347; *Klassen v. Beausoleil*, 2019 ONCA 407; *McHale v. Lewis*, 2018 ONCA 1048; *Mitchell v. Lewis*, 2016 ONCA 903; *Conway v. Law Society of Upper Canada*, 2016 ONCA 72; *Piedra v. Copper Mesa Mining Corp.*, 2011 ONCA 191; *Heydary Hamilton Professional Corp. v. Hanuka*, 2010 ONCA 881.

[110] *1523428 Ontario Inc. v. TDL Group Corp.*, 2018 ONSC 5886; *Sheridan v. Ontario*, 2015 ONCA 303; *Piedra v. Copper Mesa Mining Corp.*, 2011 ONCA 191; *Kennedy v. Kennedy* (1911), 24 O.L.R. 183 (H.C.J.). *Hubbuck & Sons, Ltd. v. Wilkinson, Heywood & Clark, Ltd.*, [1899] 1 Q.B. 86 (C.A.)

[111] *RWDI Air Inc. v. N-SCI Technologies Inc*. 2015 ONCA 817; *Miguna v. Ontario (Attorney General)*, [2005] O.J. No. 5346 (C.A.).

[112] *Fournier Leasing Co. v. Mercedes-Benz Canada Inc.*, 2012 ONSC 2752; *AGF Canadian Equity Fund v. Transamerica Commercial Finance Corp. Canada*, (1993), 14 O.R. (3d) 161 (Gen. Div.).

[273] One strategic reason is that if there is a collective liability, then circumventing the *Ragoonanan* Principle, Dr. Gebien, who consumed Opioids from only one of the 15 pharmaceutical companies, can sue them all. A second strategic reason is that a common-design cause of action or form of action class action closely resembles a *Competition Act* or consumer protection class action of which many have been certified. A third strategic reason is that Dr. Gebien's strategic goal is establish liability against the whole industry that markets Opioids in Canada.

[274] These strategic imperatives became very clear from the Fresh as Amended Statement of Claim, from the oral argument, and his factum where Dr. Gebien's lawyers repeatedly describe the New Narrative in economic terms as if the proposed class action resembled a conspiracy cause of action, of which many have been certified as a class proceeding. Polemically and repeatedly, I was told that the pharmaceutical companies had a common design to increase their profits by collectively expanding the market demand for Opioids heartlessly ignoring the resulting epidemic of Opioid Use Disorder.

[275] It is painfully obvious (to the point that the reader needs a painkiller, other than an Opioid for sure) that Dr. Gebien has strategically designed his products liability proposed class action to resemble a civil conspiracy tort claim. Dr. Gebien cannot be faulted for want of transparency. He manifestly is advancing his products liability class action against the pharmaceutical industry as a personal injury tort of wrongfully expanding the market for Opioids without regard to the harms that expansion would cause to the class members. What he has transparently attempted to do is substitute a common design for an actual agreement between the conspirators to manipulate the market.

[276] Visualize, quoting from Dr. Gebien's factum (and I have not included all the references to the pharmaceutical companies together profiteering by wrongfully expanding the market for Opioids):

> 6. […] the Defendants chose profit over health. They set out to convince the world that Opioids were safe, despite knowing they were not. They skewed the science, misled the doctors, and deceived their patients. Opioids did not become safe overnight. Instead, through the combined efforts of an entire industry, they came to be seen as safe by physicians and patients. Those efforts produced what is described in the Claim as the "New Narrative": an engineered and errant (mis)understanding of the effects and abuse potential of Opioids, created, perpetuated, and facilitated by the Defendants.
>
> 7. The New Narrative sparked, and then fueled, one of the most significant public health crises of our lifetimes: the Opioid Epidemic. […]
>
> […]
>
> 10. Class members suffered from the misdeeds of an industry. The New Narrative succeeded not only through concerted efforts to replace existing knowledge with a more profitable pseudoreality, but also through the uniform failure of the industry to correct the messaging of the New Narrative, to inform physicians and patients about the risks of Opioid use, or to sound the alarm as the Opioid Epidemic ignited.
>
> […]
>
> 12. This case, which seeks remedies for those most harmed by the Opioid Epidemic from the manufacturers and distributors that make up the industry, asks, at its core, one essential question.

Can the various participants that make up the Opioid industry be held accountable to the individuals harmed in their successful and joint pursuit of profit?

[…]

17. Practices that may be acceptable in other industries – like expanding the market for a product, or passively profiting from expansion – are dangerous in this one. Those who choose to participate in the pharmaceutical industry must balance the pursuit of profitability with the duties they owe to those who will consume their drugs. Profit-seeking is tempered by responsibility.

18. The Defendants failed to fulfill those responsibilities, placing profits before their duties to the Plaintiff and the Class, who were prescribed Opioids and, as a result, developed Opioid Use Disorder.

[…]

20. The Defendants chose to disregard these regulatory duties and the common law duties that they owe to consumers. In spite of the substantial profits they were already earning through the manufacture and distribution of opioids, and indifferent to the consequences of their choices on consumers, the Defendants chased even greater revenues, resulting in harms to the Class.

21. The Defendants caused these harms by participating in a sustained and intentional effort to expand the market for prescription Opioids in Canada. […]

[…]

23. Each of the Defendants reaped profits from massive increases in Opioid prescriptions. Those profits morphed into greater profits as individuals prescribed Opioids found themselves unable to stop taking them, and requiring greater dosages over time. Meanwhile, the Defendants ignored signs of problems, evidence that the claims made about the products they traded in had been false, and alarming prescribing and dispensing patterns. The Defendants had sparked a fire, and none of them – preferring their pocketbooks to people's lives – would put it out.

[…]

33. […] Manufacturer and Distributor Defendants reacted to the success of the New Narrative by shifting their business models and practices to manufacture, distribute and sell more Opioids, in order to profit from the expanded Opioid market that the New Narrative had created.

34. […] Through the New Narrative, the Defendants dramatically expanded the market for prescription Opioids and caused an across-the-board increase in Opioid prescriptions. Through their expansion of the prescription Opioid market, each Defendant contributed to the harm suffered by the Class as a result of their use of Opioids. Each Defendant greatly profited by facilitating and promoting the New Narrative, and, in the process, disregarded and breached their duties to their consumers.

[…]

62. […] By pushing these hallmarks on patients and their doctors, the Manufacturer Defendants achieved the objectives of the New Narrative: to expand the market for prescription Opioids, and profit from that expansion.

[…]

*The New Narrative Succeeds in Expanding the Opioid Market*

> 73. […] Together, each of the Defendants sought – by promoting and maintaining the New Narrative – to increase the sale of Opioids, regardless of the harm that would ensue for patients. As a result, they reaped record profits at the expense of the Class.
>
> 74. […] The Defendants made extraordinary profits, as Class Members bore the cost.
>
> […]
>
> 122. The Defendants did not expand the Opioid market in Canada in a lawful way, nor did they respect prevailing scientific and medical science. Dissatisfied with the size of an already lucrative Opioid market, the Defendants constructed an alternative reality where Opioids could be safely used for a range of conditions. […]
>
> […]
>
> 129. […] The Defendants knew or should have known of real dangers of Opioids. Despite that knowledge, they set about expanding the market by causing the Opioid prescriptions that the Class received. The resulting harms were entirely foreseeable.
>
> […]
>
> 191. Here, as set out above, each of the Defendants committed tortious conduct in furtherance of a single common design: expanding the market for Opioids without regard to the harms that would ensue for the class. That object is, in itself, wrongful and unlawful, being inconsistent with the Defendants' duties as participants in the pharmaceutical industry. Each Defendant acted in furtherance of this wrong. As a result, the Defendants are joint tortfeasors in relation to the Plaintiff and each class member.
>
> 192. These elements are pled in the Claim. The purpose of the New Narrative was "to expand the prescription market for Opioids." […]

[277] The Fresh as Amended Statement of Claim is replete with the same allegations of a common design cause of action or as a common design supporting joint and several liability. It is, however, plain and obvious that Dr. Gebien has no viable cause of action for wrongfully and unlawfully expanding the market for Opioids in Canada.

[278] The simplest explanation for why it is plain and obvious that the Fresh as Amended Statement of Claim does not plead a viable common design cause of action is that ironically what the pleading does is that it pleads the defence to such a claim rather than the constituent elements of the claim. The Fresh as Amended Statement of Claim is actually the material facts of a pleading of "conscious parallelism," which is not wrongful or unlawful.

[279] In *Jensen v. Samsung Elec. Co. Ltd.*,[113] at paragraphs 30 and 104, Justice Gascon described "conscious parallelism" as follows:

> 30. […] Broadly speaking, conscious parallelism refers to situations where, in the absence of an agreement to limit competition, competitors unilaterally adopt similar or identical business practices or pricing, as a result of rational and profit-maximizing strategies based on observations of market trends and activities of competitors. This type of conduct is frequent in oligopolistic markets where competitors base their actions in part on the anticipated reactions of their rivals. […]
>
> […]

[113] 2021 FC 1185, aff'd 2023 FCA 89.

> 104. […] Conscious parallelism refers to those situations where, in the absence of an agreement, competitors unilaterally adopt similar or identical business practices or pricing, as a result of rational and profit-maximizing strategies based on observations of market trends and activities of each other's past behaviour. Such parallel conduct is frequent in oligopoly markets where leading firms may closely monitor their rivals' reactions to changes in their behaviour, and each firm accounts for the reaction of others in deciding on prices, production and output. […]

[280] If "conscious parallelism" is done unilaterally, it is not regarded as illegal in the United States[114] or in Canada.[115] A market policy resulting from conscious parallelism, if conducted without collusion, does not constitute a conspiracy or offence or common-design joint liability.

[281] The longer explanation for why it is plain and obvious that there is no collective common-design liability in the immediate case is that the overriding principle – and it is a principle that is inherent in the notion of justice – is that it is unjust to make a person liable for someone else's misdeeds. Substantive collective liability is quite rare in the civil law, and upon analysis, some apparent examples of situations where the members of a group are liable for the activities of the group can be explained as within the general principle that liability is fault-based and personal.

[282] Perhaps the best illustration of this point is the tort of conspiracy – which conspicuously is absent in the immediate case – where the co-conspirators are jointly and severally liable for the damages caused by their conspiracy. Upon analysis, however, this collective liability is based on the personal fault of each conspirator who agrees to join the conspiracy and who actually contributes to the planning, financing, and execution of the conspiracy.

[283] In the immediate case, it is plain and obvious that Dr. Gebien cannot make out a case of multilateral misconduct. I agree with the following excerpt from the factum of 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 (the "Teva Factum"):

> **Common design** – The "common design" allegations should be struck out in their entirety. As the plaintiff acknowledges, common design is not a cause of action. In limited circumstances, the common design doctrine operates as an exception to the bedrock principle that one person is not liable for the tortious acts of another. But the Claim fails to plead the threshold requirements to invoke the doctrine. Among other defects:
>
> > a. The Claim fails to plead a common object that was unlawful. The Claim alleges that the object was to increase sales of opioids. Even if such an object existed, there would be nothing unlawful about it. At its highest, the Claim asserts efforts to perform lawful – and regulated – business activities, such as manufacturing and distributing Health Canada-approved, doctor-prescribed medications.
> >
> > b. The Claim fails to plead material facts that could support the necessary element of the doctrine that any defendant provided "substantial assistance" in tortious acts in furtherance of its common object. The Claim does not plead any material fact to show that any defendant assisted any other defendant(s) in alleged tortious activity – let alone any material fact that could rise to the level of substantial assistance.

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[114] *White v. R.M. Packer Co., Inc*., 635 F.3d 571 (1st Cir. 2011); *Brooke Grp. Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209 (1993); *The Jeanery, Inc. v. James Jeans, Inc*., 849 F.2d 1148 (9th Cir. 1988).

[115] *Jensen v. Samsung Elec. Co. Ltd*., 2021 FC 1185, aff'd 2023 FCA 89; *Proulx c. R.*, 2016 QCCA 1425; *Atlantic Sugar Refineries Co Ltd et al v. Attorney General of Canada*, [1980] 2 S.C.R. 644.

> c. The Claim fails to plead material facts that any defendant was anything more than an independent actor. Mere similarity of action or design by independent actors is not sufficient to establish common design. There must be concerted action by the alleged joint tortfeasors towards a common end.

[284] For a cause of action based on common design to be made out mere similarity of conduct on the part of independent actors, in this case the 15 groups of Manufacturer Defendants are competitors, is not sufficient to establish a collective liability; there must be concerted action by the alleged tortfeasors towards a common, unlawful object. For a defendant to be jointly liable on the basis of common design: (a) the defendant must have provided substantial assistance to the commission of a tortious act by a tortfeasor; (b) the assistance must have been in direct furtherance of the common design; and (c) the defendant's act must constitute a tort as against the plaintiff.[116]

[285] In the immediate case, there are pleaded material facts only for the third of the constituent elements of a common design claim. In the immediate case, each of the Manufacturer Defendant groups may have severally committed the torts of negligence, negligent misrepresentation, or fraudulent misrepresentation, or each may have severally committed a violation of the *Competition Act;* however, each group of Manufacturer Defendants did not provide substantial assistance in each other's commission of the torts.

[286] Nor could the Manufacturer Defendants have provided substantial assistance having regard to the pleaded fact that they entered the Opioid marketplace at different times. The new entrants essentially copycatted, not assisted, what was already occurring in the marketplace. There are no material facts pled nor could material facts be pled that the Manufacturer Defendants substantially assisted in direct furtherance of a common design that was unlawful. There is nothing *per se* unlawful for competitors to increase profits and to expand a market for their goods. There is nothing *per se* to copy the successful marketing strategies of a competitor.

[287] It is doubtful that the wrong of expanding a market is a personal injury tort. The unlawful object requirement of a common design tort focusses on whether the end (the object) of the common design was unlawful. The Manufacturer Defendants were manufacturing a pharmaceutical product that was subject to rigorous regulation. A party will not be jointly liable merely because another party acted unlawfully (or tortiously) in seeking to further a common design that is itself lawful – even if potentially dangerous.[117] There is nothing *per se* unlawful in having the purpose of expanding the market of a dangerous good.

[288] The notion of each of the Manufacturer Defendants assisting in the common design of expanding the market for Opioids over a time period spanning almost 30 years is implausible. The Fresh as Amended Statement of Claim acknowledges that generic manufacturers did not obtain authorization to sell generic oxycodone until at least 2012, when the New Narrative, if it existed,

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[116] *Carcillo v. Canadian Hockey League*, 2023 ONSC 886; *Li et al v. Barber et al*, 2023 ONSC 679; *British Columbia v. Apotex Inc., et al*, 2022 BCCA 366, leave to appeal to S.C.C. refused, [2023] S.C.C.A. No. 13; *Waterway Houseboats Ltd v. British Columbia*, 2019 BCSC 581, rev'd in part on other grounds 2020 BCCA 378; *Dowd et al v. Skip the Dishes Restaurant Services Inc. et al*, 2019 MBQB 63; *Rutman v. Rabinowitz*, 2018 ONCA 80; *Liu v. Huang*, 2018 BCSC 227; *ICBC v. Stanley Cup Rioters*, 2016 BCSC 1108; *Sea Shepherd UK v. Fish & Fish Ltd.*, [2015] UKSC 10; *Fullowka v. Pinkerton's of Canada Ltd.*, 2010 SCC 5; *I.C.B.C. v. The Corporation of the City of Vancouver*, 2000 BCCA 12; *Botiuk v. Toronto Free Press Publications Ltd.*, [1995] 3 S.C.R. 3; *General Accident Insurance Company v. Newcastle (Town)* (1988), 52 D.L.R. (4th) 356 (N.B.C.A.); *Bains v. Hofs* (1992), 76 B.C.L.R. (2d) 98 (S.C.).

[117] *Waterway Houseboats Ltd v. British Columbia*, 2019 BCSC 581 at para. 353, rev'd in part on other grounds 2020 BCCA 378.

needed no assistance in reshaping the marketplace.

[289] Once again, I agree with the submission found at paragraph 18 of the Teva Factum:

> 18. […] the Claim does not contain any material fact to support (or even suggest) that any defendant assisted any other defendant(s) in the underlying tortious activity, let alone any fact which, if proven, would constitute "substantial assistance." […] Moreover, even if the allegations were capable of proof – though they are not – most if not all of the alleged actions are routine commercial activities and would not constitute "substantial assistance" in the commission of a tort.

[290] Therefore, I conclude that it is plain and obvious in the immediate case that there is no legally viable common design claim that would ground joint and several liability.

[291] Each of the Manufacturer Defendants may be liable for what they severally did that caused injuries to their consumers, but each Manufacturer Defendant is not jointly and severally liable for the independent wrongdoings committed before, during, and after a Manufacturer Defendant began to sell Opioids pursuant to the New Narrative.

### 4. The Problems of Pleading Joint Misconduct

[292] In this section of my Reasons for Decision, I shall explain how from a pleadings perspective, notwithstanding the arguments of the Defendants, Dr. Gebien can properly lump the members of the 14 groups of Defendants together to advance the causes of action against the Manufacturer Defendants.

[293] In the immediate case, the Defendants make two sweeping arguments that Dr. Gebien's Fresh as Amended Statement of Claim is wholly deficient because he makes sweeping arguments.

[294] The Defendants assert that Dr. Gebien has failed to plead any material facts to constitute his various causes of action but instead has "lumped the Defendants together and conflated their separate identities and activities through a set of sweeping allegations that do not give fair notice to any Defendant of the case to be met." Since the Defendants submit that Dr. Gebien admits in his factum that he does not have knowledge of the material facts that he has swept together, the Defendants submit that his claim should be struck in its entirety without leave to amend.

[295] Apart from the fact that Dr. Gebien does not make the self-damning admission that he allegedly made in his factum, but rather makes the commonplace trope that the Defendants are hiding the facts that will emerge with documentary production and examinations for discovery, in this section of my Reasons, I shall explain that it is not the case that from a pleadings perspective that Dr. Gebien has improperly "lumped the Defendants together". Nor is it impossible for the Defendants to be given fair notice of the case they need to meet.

[296] Although the problems are not unsolvable, there are three problems about how Dr. Gebien has pled his action against the large assembly of defendants.

[297] The first problem is the *Ragoonanan* Problem. Because the only Opioid that Dr. Gebien consumed was Percocet, which is manufactured by Bristol-Myers Squibb Canada, and Bristol-Myers Squibb Company, Dr. Gebien has a *Ragoonanan* Problem, but that is not a fatal problem because pursuant to rule 5.02 (1), which is set out above, where two or more persons are represented by the same lawyer of record, they may join together as plaintiffs: (a) where they assert, whether jointly, severally or in the alternative, any claims to relief arising out of the same transaction or occurrence, or series of transactions or occurrences; or (b) where there is a common

question of law or fact in the proceeding. For the analysis that follows, I shall just assume that there is no *Ragoonanan* Problem and address the Defendants' two arguments that Dr. Gebien has improperly "lumped the Defendants together".

[298] For the reasons expressed above, I have already explained that Dr. Gebien does not have any claims for a collective liability. I shall explain later that Dr. Gebien: (a) has no cause of action against the Distributor Defendants; but (b) as against the 14 groups of Manufacturer Defendants (15 if Kohl & Frisch Limited is included in the Fresh as Amended Statement of Claim), he has discrete causes of action. What needs analysis, is whether Dr. Gebien can properly sue 14 groups of Manufacturer Defendants as groups.

[299] The first point to note in the explanation is that Dr. Gebien is within his procedural rights to join in one action his separate claims against each of the 14 groups of Manufacturer Defendants. Pursuant to rule 5.02 (2), which is set out above, Dr. Gebien may sue two or more persons as defendants: (a) where there are asserted against them, whether jointly, severally or in the alternative, any claims to relief arising out of the same transaction or occurrence, or series of transactions or occurrences; or (b) where a common question of law or fact may arise in the proceeding.

[300] In the immediate case, whether this joinder of causes of action will satisfy the common issues and the preferable procedure criteria is an issue for another day, but the starting point for analysis is that subject to joining the requisite number of plaintiffs, Dr. Gebien does not need to start 14 (or 15 if Kohl & Frisch Limited is included) separate class actions nor did he have to start separate actions for some 40 defendants.

[301] The next point to note is that in his Fresh as Amended Statement of Claim, Dr. Gebien could have sequentially plead some 40 sets of material facts against each Manufacturer Defendant. Had he done that what was an almost 200-paragraph pleading (53 pages) would become an 8,000-paragraph (2,120 pages) monstrosity. However, sensibly enough, he did not do that.

[302] Rather, in his proposed class action against the Manufacturer Defendants, Dr. Gebien groups these Defendants in two ways. The first grouping is that of assembling the Manufacturer Defendants into 14 (or 15) groups of related corporations. The second grouping involves simultaneously pleading the same allegations of material fact against the 14 (or 15) groups of Manufacturer Defendants.

[303] The Defendants challenge each of these ways of grouping the Defendants as deficient and incapable of repair. As I shall now explain, I disagree.

### (a) Corporate Enterprise Liability

[304] Dr. Gebien groups the Manufacturer Defendants into 14 groups or 15, if Kohl & Frisch are included in his Fresh as Amended Statement of Claim. Three members of the groups have a single Manufacturer Defendant member single member; namely: Sanis Health Inc., and Sandoz Canada Inc. and Kohl & Frisch Limited.

[305] Twelve of the groups are comprised of more than one member. An example is the group comprised of Mylan Pharmaceuticals ULC, Mylan Pharmaceuticals Inc., and Mylan N.V., (collectively, "Mylan"). For each of these twelve groupings, Dr. Gebien repetitiously pleads of the members of the group: "Each is the agent of the other for the purposes of manufacturing, marketing, and selling Opioids in Canada." The pleading then identifies the Opioids sold by the

particular group. Thus, for example, the Fresh as Amended Statement of Claim pleads in paragraphs 28, 29, and 30 with respect to the collective that is Mylan:

> 28. Mylan Pharmaceuticals ULC is a Canadian company. During the Class Period, Mylan Pharmaceuticals ULC manufactured, marketed and sold Opioids in Canada.
>
> 29. Mylan N.V. is a Dutch company. Mylan Pharmaceuticals Inc. is a subsidiary of Mylan N.V. During the Class Period, Mylan N.V., directly or through its subsidiaries or affiliates, manufactured, marketed and sold Opioids in Canada and the U.S.A.
>
> 30. The businesses of each of the Defendants Mylan Pharmaceuticals ULC and Mylan N.V. (collectively, "Mylan") are inextricably interwoven with that of the other and each is the agent of the other for the purposes of the manufacture, marketing and sale of Opioids in Canada, including but not limited to Mylan-Fentanyl Matrix Patch, and Mylan-Tramadol/Acet.

[306] The Defendants argue that this pleading, of which Mylan is one of 12 examples, offends the fundamental principle of corporate law that a corporation is a legal entity separate and apart from its owners and associated companies.

[307] The Defendants submit that separate corporate personality cannot be disregarded to impose liability on one corporation for the debts, liabilities, or obligations of another and that Dr. Gebien has not pleaded material facts that could support imposing joint liability among related corporations. nor has he pleaded the material facts that would justify piercing the corporate veil.[118]

[308] In my opinion, the Manufacturer Defendants in advancing this argument to strike Dr. Gebien's pleading intentionally misread the Fresh as Amended Statement of Claim.

[309] In so far as each of the 14 or 15 Manufacturer Defendants is concerned, Dr. Gebien is not seeking to pierce the corporate veil nor is he seeking to make an innocent defendant member of the group liable for the wrongdoings of its fellows.

[310] Taciturn as it may be in providing details, the nature of Dr. Gebien's pleading is that the members of each group worked together in advancing the New Narrative for the Opioids that they manufactured and distributed. It is with that aim that Dr. Gebien pleads that the members of the group were "inextricably interwoven." Remembering that a Statement of Claim is not the place to plead the evidence, that allegation of working together is as far as Dr. Gebien needed to go for the purposes of the Fresh as Amended Statement of Claim.

[311] However, Dr. Gebien goes further to plead that the members of the corporate group were agents of one another. That allegation, however, may not be factually true but is to be taken to be true for the purpose of analyzing a pleading. In any event, the Defendants' objection to the pleading misses the point that the essential material fact is that the group members worked together to advance the New Narrative. They could have done that as agents of one another, but they also could have worked together as contracting parties, joint venturers, partners, or common employers. The precise way that they worked together is something that will emerge as the litigation proceeds. Each group of Defendants knows that the case they have to meet concerns whether they worked together in advancing the New Narrative.

[312] The case at bar is not like the typical case where perhaps the president or a senior officer

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[118] *FNF Enterprises Inc. v. Wag and Train Inc*, 2023 ONCA 92; *Yaiguaje v. Chevron Corporation*, 2018 ONCA 472, leave to appeal to SCC refused [2018] S.C.C.A. No. 255; *Europro (Kitchener) Limited Partnership v. Dream Office Real Estate Investment Trust*, 2018 ONSC 7040; *Lysko v. Braley* (2006) 79 O.R. (3d) 721 (C.A.).

of a corporation, who happens to be a shareholder, is sued for the activities of his or her corporation without himself or herself doing anything outside of the normal course of business. In the immediate case, the gist of Dr. Gebien's allegation is that in myriad ways, the members of a corporate group acted in concert to advance the New Narrative.

[313] Dr. Gebien should make it manifest in his Second Fresh as Amended Statement of Claim that he is not pleading to pierce the corporate veil and that he is not advancing some disguised group enterprise theory of liability – a theory rejected in Canada,[119] but he rather simply alleges that the members of the group worked together to perpetrate the wrongs associated with the New Narrative. In my opinion, this lumping together of the Defendants is not objectionable.

**(b) <u>Sweeping Allegations or Synchroneity</u>**

[314] In *Burns v. RBC Life Insurance Company*,[120] the Court of Appeal stated that each defendant in a multiple defendant tort action should be able to look at the Statement of Claim and find the answer to the question: "What do you say I did that has caused you, the plaintiff, harm and when did I do it?" The Court also stated that to meet this standard of notice to the defendant, a plaintiff is required "to set out the material facts specific to each defendant that support a claim against the defendant that it owed a duty of care to the plaintiff, and by reason of specified conduct, breached that duty and caused injury or harm to the plaintiff."

[315] The Court in *Burns v. RBC Life Insurance Company* also stated that where a claim is brought against multiple defendants, the plaintiff must differentiate the material facts for each defendant by making clear the specific facts alleged against each defendant.

[316] From these propositions from the *Court of Appeal*, with which I agree and with which I am bound to agree,[121] the Defendants assert that there is a rule against "grouping" or lumping allegations against a group of co-defendants with the only exception to the rule being where all the defendants are alleged to have engaged in a single course of conduct such as making the same misrepresentation,[122] and each defendant would know the case that, he, she or it had to meet. The Defendants then assert that this rule against lumping has been violated in the immediate case.

[317] I do not agree with the Defendants. There is no general rule against lumping. *Burns v. RBC Life Insurance* was not a case about grouping or lumping co-defendants. It was a case about when an employee can be sued for torts allegedly committed in the course of his or her employment. Further, if there is a rule against lumping, it admits of more exceptions than the situation posited by the Defendants of all the defendants being engaged in a single course of conduct.

[318] In my opinion, in the immediate case, if there is a general rule against lumping, then Dr. Gebien has not violated the rule either because he has complied with the rule or because his Fresh as Amended Statement of Claim is within the exceptions to the rule.

[319] There is no general rule against lumping. The general rule is that a defendant is entitled to

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[119] *Yaiguaje v. Chevron Corporation*, 2018 ONCA 472, leave to appeal to SCC refused [2018] S.C.C.A. No. 255; *Durling v. Sunrise Propane Energy Group Inc*, 2012 ONSC 4196.
[120] 2020 ONCA 347.
[121] And happy to agree because the Court of Appeal affirmed the lower court decision that I wrote in *Burns v. RBC Insurance Company.*
[122] *Europro (Kitchener) Limited Partnership v. Dream Office Real Estate Investment Trust*, 2018 ONSC 7040; *Lysko v. Braley* (2006), 79 O.R. (3d) 721 (Ont. C.A.).

notice of what he, she, or it in particular did wrong. Often that will require, that his, her, or its conduct will have to be individually particularized, and in those circumstances, he, she, or it cannot be wholly lumped together with the co-defendants. I say "wholly" because even when a particular defendant is entitled to an idiosyncratic particularization of what he, she or it did wrong, lumping of common material facts may be unobjectionable. For example, if defendants A, B, and C are all citizens of Canada, or owners of the same property, or signatories of the same contract, they could be lumped together before particularizing their idiosyncratic misbehaviour.

[320] In *Jevco Insurance Co. v. Pacific Investment Centre Inc.*,[123] I stated at paragraph 59:

> 59. The pleadings principle that it is improper to lump the defendants together must be applied in a way that respects the underlying principle that the pleading must disclose to each individual defendant the case being made against them. Thus, in a given case, it may not be inappropriate to group the defendants.

[321] In the immediate case, Dr. Gebien did not lump together the common material fact that all the Manufacturer Defendants manufacture Opioids, and rather he pleaded by identifying 14 (or 15) groups of Opioid manufacturers and he associated each group with the particular Opioid products that it sold. The point, however, is that he would not have violated any supposed rule against lumping if he had listed the Defendants and then pleaded that they all manufactured Opioids.

[322] In the immediate case, Dr. Gebien did lump together all the Defendants as making the misrepresentations that constituted the New Narrative. If there is a rule against lumping then this grouping would not violate the rule or this grouping would be within the posited exception of a singular course of conduct. In all events, the Defendants know the case that they have to meet.

[323] Upon analysis, it emerges that the actual objection of the Manufacturer Defendants is that they are not told how it is they in particular made the misrepresentations that constituted the New Narrative.

[324] With a few exceptions or examples found in the Fresh as Amended Statement of Claim, it is true that Dr. Gebien lumps the Manufacturer Defendants together for the purposes of pleading that they all did propagate the New Narrative; however, this lumping together does not violate the rule against lumping or is within a different exception to the general rule against lumping, which is that the lumping is permissible when the defendants did the same alleged wrong albeit in different ways that do not need to be particularized for the Defendant to know the case that he or she has to meet.

[325] For example, in the Indian Residential Schools Class Action, *Fontaine v. Canada (Attorney General)* there were 44 co-plaintiffs that sued Canada, and 83 co-defendant churches and church organizations of various grouping of defendants that operated the 139 schools. In that case, it was not and would not have been necessary for the purposes of pleading to particularize how each defendant committed wrongdoing. The defendants knew the case that they were expected to meet.

[326] For another example, in *Carcillo v. Canadian Hockey League*, the three plaintiffs sued 78 co-defendant hockey teams and leagues. For the purpose of pleading, it was not and would not have been necessary to particularize what the defendants did wrong at training camp, in their

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[123] 2014 ONSC 2244, at para. 59, aff'd 2015 ONSC 7751 (Div. Ct.). See also: *Kates v. Trapeze Asset Management Inc.*, 2019 ONSC 3483; *Europro (Kitchener) Limited Partnership v. Dream Office Real Estate Investment Trust*, 2018 ONSC 7040; *Lysko v. Braley* (2006) 79 O.R. (3d) 721 at paras 32-34 (C.A.).

respective locker rooms and on team buses for 60 hockey teams. The defendants knew the case that they were expected to meet.

[327] The point is that there is no general rule against lumping. Whether allegations can be synchronized depends on the circumstances of the particular case. I do not disagree with the case law where plaintiffs have been faulted for the synchronized pleadings of material facts against co-defendants; in those cases, the allegations against the defendants are lumped together but any defendant does not know what he, she, or it did that was wrong,[124] but each case has to be decided on its own merits. In the immediate case, there are many allegations of material fact that can be brought together against the co-defendant Manufacturer Defendants without disturbing the procedural due process of which they are entitled.

[328] In advancing their argument that there is a general rule prohibiting lumping, the Manufacturer Defendants rely on rule 25.06 (8), which provides that "where fraud, or misrepresentation is alleged, the pleading shall contain full particulars," and on case law that stipulates that full particulars means pleading the who, where, when, why, and how of the fraud or misrepresentation.[125]

[329] It should immediately be noted that rule 25.06 (8) does not prohibit lumping of the allegations of material facts of the who, where, when, why and how of frauds and misrepresentations and, thus once again, lumping together allegations of material fact in a misrepresentation case will be appropriate or inappropriate depending on the circumstances of the particular case.

[330] In the immediate case, the Defendants submit – and I agree with them - that it is not plausible that every one of the "Manufacturer Defendants," with different products at different times, made the exact same misrepresentations, regarding the same products, at the same time, in the same manner, to the same persons. However, what is plausible is that every one of the Manufacturer Defendants made misrepresentations that convinced the consumers of their Opioid products that it was safe to use their Opioid products notwithstanding that their consumers were not in need of palliative care for serious pain from a serious condition.

[331] If that is a plausible allegation against one Manufacturer Defendant, it is a plausible allegation against all of them severally, and if that is the case, the several allegations can be synchronized in one paragraph of a Second Fresh as Amended Statement of Claim as opposed to repeated in 14 (or 15) paragraphs for each grouping of Manufacturer Defendants.

[332] In the immediate case, for the purposes of pleading, the where, when, and how of making the misrepresentations that constituted the New Narrative is in the context of this case, a particular that need not be pleaded for each of the Defendants. In the immediate case, generalized pleadings are sufficient.

[333] For example, if a particular Manufacturer Defendant did not sponsor and fund educational programs at medical schools at continuing education programs that were disguised marketing presentations for increasing opioid prescriptions, they will have the easy defence of denial. If they

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[124] *RH20 North America Inc. v. Bergman* 2023 ONSC 2378; *Martin v. Astrazeneca Pharmaceuticals PLC,* 2012 ONSC 2744.

[125] *EnerWorks Inc. v. Glenbarra Energy Solutions Inc,* 2012 ONSC 414; *Hamilton v. Osborne,* 2009 ONCA 684; *Lana International Ltd v. Menasco Aerospace Ltd.,* (1996), 28 O.R. (3d) 343 (Gen. Div.); *Rahn v. McNeill,* [1987] B.C.J. No. 2337 (B.C.S.C.).

did sponsor and fund education programs, they would appreciate that the heavy burden will be on Dr. Gebien to prove that those programs were disguised as marketing presentations.

[334] For these reasons and for the reasons expressed above with respect to the groupings of related pharmaceutical companies as Manufacturer Defendants, I conclude that the Defendants' second argument that Dr. Gebien has lumped the Defendants together and conflated their separate identities and activities through a set of sweeping allegations that do not give fair notice to any Defendant of the case to be met is an incorrect and unsuccessful argument.

[335] For completeness and for the record, I note that in reaching this conclusion I have not needed to rely on the discussion of the pleadings in *British Columbia v. Apotex Inc. et al.*,[126] the pleadings decision of Justice Brundrett, which was affirmed by the British Columbia Court of Appeal. Relying largely on British Columbia decisions, he arrived at the same conclusions that I reach in the immediate case that the plaintiff's approach of grouping defendants is permissible, and that the enterprise approach of grouping corporate families together is unobjectionable.

### 5. Breach of the *Competition Act*

[336] Dr. Gebien alleges that each of the Manufacturer Defendants, as a result of their promotion of the New Narrative, is liable under sections 36 and 52 of the *Competition Act*, for knowingly or recklessly making a representation to the public that is false or misleading in a material respect.

[337] Sections 36 and 52 of the *Competition Act* state:

> *Recovery of damages*
>
> 36 (1) Any person who has suffered loss or damage as a result of
>
> **(a)** conduct that is contrary to any provision of Part VI, or
>
> **(b)** the failure of any person to comply with an order of the Tribunal or another court under this Act,
>
> may, in any court of competent jurisdiction, sue for and recover from the person who engaged in the conduct or failed to comply with the order an amount equal to the loss or damage proved to have been suffered by him, together with any additional amount that the court may allow not exceeding the full cost to him of any investigation in connection with the matter and of proceedings under this section.
>
> […]
>
> *False or misleading representations*
>
> 52 (1) No person shall, for the purpose of promoting, directly or indirectly, the supply or use of a product or for the purpose of promoting, directly or indirectly, any business interest, by any means whatever, knowingly or recklessly make a representation to the public that is false or misleading in a material respect.
>
> *Proof of certain matters not required*
>
> (1.1) For greater certainty, in establishing that subsection (1) was contravened, it is not necessary to prove that

[126] 2022 BCSC 1, aff'd 2022 BCCA 366, leave to appeal to S.C.C. refused, [2023] S.C.C.A. No. 13.

> (a) any person was deceived or misled;
>
> (b) any member of the public to whom the representation was made was within Canada; or
>
> (c) the representation was made in a place to which the public had access.
>
> *Permitted representations*
>
> (1.2) For greater certainty, in this section and in sections 52.01, 52.1, 74.01, 74.011 and 74.02, the making or sending of a representation includes permitting a representation to be made or sent.
>
> […]
>
> *Representations accompanying products*
>
> (2) For the purposes of this section, a representation that is
>
> > (a) expressed on an article offered or displayed for sale or its wrapper or container,
> >
> > (b) expressed on anything attached to, inserted in or accompanying an article offered or displayed for sale, its wrapper or container, or anything on which the article is mounted for display or sale,
> >
> > (c) expressed on an in-store or other point-of-purchase display,
> >
> > (d) made in the course of in-store or door-to-door selling to a person as ultimate user, or by communicating orally by any means of telecommunication to a person as ultimate user, or
> >
> > (e) contained in or on anything that is sold, sent, delivered, transmitted or made available in any other manner to a member of the public,
>
> is deemed to be made to the public by and only by the person who causes the representation to be so expressed, made or contained, subject to subsection (2.1).
>
> […]
>
> *Deemed representation to public*
>
> (3) Subject to subsection (2), a person who, for the purpose of promoting, directly or indirectly, the supply or use of a product or any business interest, supplies to a wholesaler, retailer or other distributor of a product any material or thing that contains a representation of a nature referred to in subsection (1) is deemed to have made that representation to the public.
>
> *General impression to be considered*
>
> (4) In a prosecution for a contravention of this section, the general impression conveyed by a representation as well as its literal meaning shall be taken into account in determining whether or not the representation is false or misleading in a material respect.
>
> […]

[338] Dr. Gebien alleges that the Manufacturer Defendants' misrepresentations were: (a) false and misleading in a material respect; (b) made to the public; and, (c) made for the purpose of promoting the business interests of the Defendants.

[339] Dr. Gebien alleges that he and the Class Members suffered damages as a result of the Manufacturer Defendants' unlawful breach of s. 52 of the *Competition Act*. The Class Members seek compensatory damages, as well as their costs of investigation, pursuant to s. 36 of the

*Competition Act*.

[340] The constituent elements of a pleading of a breach of s. 52 of the *Competition Act* are straightforward and amount to a business vendor selling its wares by false advertising. The defendant: (a) must promote the supply or use of a product; (b) must promote the use or supply of the product for the purpose of promoting a business interest; (c) and for those purposes, the defendant knowing or reckless makes a representation to the public that is false or misleading in a material respect.

[341] It is notable that pursuant to s. 52 (1.1), it is not necessary to prove that any person was deceived or misled. In other words, reliance is not a constituent element of a breach of s. 52 of the *Competition Act*. That said, a claim under s. 36 of the *Competition Act* still requires a plaintiff to establish causation, i.e., a connection between the defendant's breach of s. 52 and the plaintiff's loss.[127]

[342] The Manufacturer Defendants who obviously are discerning, perceptive, and knowledgeable are feigning being deaf, blind, and dumb in submitting that Dr. Gebien's 182-paragraph pleading is devoid of material facts to establish a misrepresentation.

[343] In my opinion, in a prolix and polemical way, Dr. Gebien has pleaded the constituent elements of a misrepresentation claim under the *Competition Act.* Typically, a misrepresentation is constituted by a statement that is untrue. Dr. Gebien presents the New Narrative as a matrix of misstatements that conveyed a false story about the safe use of Opioids. A story is made up of statements that have a theme.

[344] In the factum submitted by Mylan on behalf of the Manufacturer Defendants, it submits that to establish a misrepresentation, a pleading must comply with rule 25.06(8) of the *Rules of Civil Procedure* by specifying: (a) the words used by the defendant; (b) the identity of the representor and the representee; (c) when the words were used; (d) where the words were used; and (e) how the words were communicated.[128] Mylan then submits that Dr. Gebien's claim does not plead any of these materials fact and therefore is defective and should be struck.

[345] In the immediate case, this submission is without merit. All that rule 25.06 (8) requires is that where a misrepresentation is alleged, the pleading shall contain full particulars. Dr. Gebien's pleading adequately particularizes the material misrepresentations and the Manufacturer Defendants are feigning ignorance of the what, the who, the when, the where, and the how of the material misrepresentations that are spelled out in Dr. Gebien's verbose pleading.

[346] I agree with Justice Brundrett's pithy observation on the pleadings motion in *British Columbia v. Apotex Inc. et al.*[129] at paragraph 90 that: "Specificity is vital, but conciseness is important too." Justice Brundrett continued:

> 90. […] While the plaintiff's claims are many, the defendants numerous, and the scope of the wrongful conduct substantial, the pleadings must maintain a balance between being sufficiently

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[127] *WN Pharmaceuticals Ltd v. Krishnan*, 2023 BCCA 72; *British Columbia v. Apotex et al*, 2022 BCCA 366, leave to appeal to S.C.C. refused, [2023] S.C.C.A. No. 13; *Drynan v. Bausch Health Companies Inc*., 2021 ONSC 7423; *Rebuck v. Ford Motor Company*, 2018 ONSC 7405; *Pro-Sys Consultants Ltd v. Microsoft Corporation*, 2013 SCC 57; *Singer v. Schering-Plough Canada Inc*., 2010 ONSC 42; *Go Travel Direct Inc. v. Maritime Travel Inc*., 2009 NSCA 42; *Matoni v. CBS Interactive Multimedia Inc. (Canadian Business College)*, [2008] O.J. No. 197 (S.C.J.).
[128] *Hamilton v. Osborne*, 2009 ONCA 684; *EnerWorks Inc. v. Glenbarra Energy Solutions Inc*., 2012 ONSC 414; *Lana International Ltd v. Menasco Aerospace Ltd.*, (1996), 28 O.R. (3d) 343 (Gen. Div.).
[129] 2022 BCSC 1, aff'd 2022 BCCA 366, leave to appeal to S.C.C. refused, [2023] S.C.C.A. No. 13.

> informative and not overly cumbersome. As noted in *Sahyoun* 2013 at para. 23, pleadings need to "set out a concise summary of the legal basis for the relief sought." This represents a mandate for clarity and brevity. Moreover, I would not assess the [plaintiff's pleading] to determine whether the correct balance between precision and brevity has been struck, but rather to determine whether the pleadings are so deficient that they must necessarily be struck.

[347] Mylan in its factum submits that third party statements do not count for material misrepresentations and cannot save Dr. Gebien's defective misrepresentation claim. This submission takes aim at the allegation that the Manufacturer Defendants "created, funded and controlled" third-party organizations that made statements about opioid use. Mylan submits that such an allegation would require a pleading that the third-party organization had actual or ostensible authority as an agent of the manufacturer and in the immediate case Dr. Gebien has not pleaded the necessary facts to establish agency.

[348] This submission may have merit, but it does not provide a reason to strike Dr. Gebien's pleading. This submission is a matter of defence and not a deficiency in the Fresh as Amended Statement of Claim.

[349] In the immediate case, the Manufacturer Defendants submit that Dr. Gebien's Fresh as Amended Statement of Claim is devoid of material facts to establish a causal connection between any misrepresentation and the losses allegedly suffered by him and the Class Members.

[350] There is no merit to the Manufacturer Defendants' submission. It may immediately be observed that a causal connection, which is to say reliance or proof that any Class Member was deceived or misled, need not be proven to make out a breach of s. 52 of the *Competition Act*, but, in any event, the Fresh as Amended Statement of Claim adequately describes the material facts of a misrepresentation claim that does involve reliance and the suffering of harm.

[351] Mylan in its factum submits that Dr. Gebien in his factum admits that he has not pleaded sufficient material facts and then offers three pathetic excuses for his failure to particularize his claim. The impugned feeble excuses are that: (a) the misrepresentations are unknowable without discovery; (b) it is unrealistic and not feasible to plead the misrepresentations; and (c) identifying the misrepresentations is unnecessary because the Manufacturer Defendants can identify them.

[352] I agree that these are pathetic and unacceptable excuses for an inadequate pleading. However, a pleadings motion is not decided on the basis of the plaintiff's ham-fisted factum. A pleadings motion is decided on the pleading, and in the immediate case, it is the Manufacturer Defendants who are feigning ignorance about knowing the case that they are expected to meet.

[353] I conclude that Dr. Gebien satisfies the cause of action criterion for a claim based on a breach of the *Competition Act.*

### 6. Negligent and Fraudulent Misrepresentation or Deceit

[354] The elements of a claim of negligent misrepresentation are: (1) duty of care based on a special relationship between the plaintiff and the defendant; (2) an untrue, inaccurate, or misleading representation; (3) the defendant making the representation negligently; (4) the plaintiff having reasonably relied on the misrepresentation; and, (5) the plaintiff suffering damages as a consequence of relying on the misrepresentation.[130]

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[130] *Queen v. Cognos*, [1993] 1 S.C.R. 87; *Hercules Management Ltd. v. Ernst & Young*, [1997] 2 S.C.R. 165.

[355] Dr. Gebien alleges that the Manufacturer Defendants created the New Narrative and aggressively promoted it despite knowing that it was false, materially misleading, and deficient. They were reckless as to whether the New Narrative was true or false. He alleges that the New Narrative included the Opioid Misrepresentations, which were fraudulent misrepresentations.

[356] Dr. Gebien pleads that the Manufacturer Defendants intended to induce healthcare professionals to believe the misrepresentations to be true and that they knew that the professionals would repeat the misrepresentations to patients. He pleads that the Defendants intended the public, including him and the Class Members, to rely on the Defendants' misrepresentations in making personal healthcare decisions and that the Defendants' representations were relied upon. He pleads that he and the Class Members suffered damages caused by relying on the false misrepresentations of the Defendants.

[357] The Manufacturer Defendants argue that the pleaded misrepresentations fail to disclose sufficient information about any specific statement that ought reasonably to have been foreseen that Class Members would rely on any specific statement and therefore Dr. Gebien has not pleaded the material facts for a negligent misrepresentation claim.

[358] This submission is mistaken. A duty of care relationship for statements is not established by a specific statement. It is established when there is a sufficiently proximate relationship when a person must take care in what he or she says. A duty of care analysis is not required when the relationship falls within a recognized category or type of relationship that has been found to entail a duty of care. There are hundreds of cases in which a pharmaceutical company has been recognized as having a duty of care in what it says or does not say about its products. Negligent misrepresentation actions against pharmaceutical companies are just a sub-genre of products liability cases of which there have been thousands if not hundreds of thousands of cases.

[359] Once the duty of care relationship constituent element has been established, then the other elements of the tort can be assessed. In the immediate case, there is, in any event, sufficient specificity about the material facts of the allegations of false statements (plural) by the Manufacturer Defendants, although for reasons already expressed above the claims against the Manufacturer Defendants are several not joint and several claims and the Fresh as Amended Statement of Claim wants for representative plaintiffs.

[360] There is no novelty in the legal viability of the case at bar. The factual uniqueness in the immediate case is that Dr. Gebien pleads a "story". A story is a chronologically set of facts with a theme. The so-called New Narrative is a precisely-enough set of alleged misrepresentations. Once a representative plaintiff is identified to tell the story personally, then the Manufacturer Defendants will know - once again - the case they have to meet for which they now feign ignorance.

[361] The uniqueness in the immediate case is that Dr. Gebien does not plead a single misrepresentation. Rather, he pleads that severally the Defendants spoke the same false theory about the safe use of opioids. This may be unique factually, but it is not plain and obvious that it is a pleading doomed to fail. It will be a very difficult case to prove, particularly the element that a Manufacturer Defendant made the representation negligently. The Defendants have the other well-known defences to a product liability claim but this uniqueness and these difficulties do not negate that there is a viable cause of action for negligent misrepresentation.

[362] In another argument that distorts and mistakes the law associated with pleading a claim for negligent misrepresentation, the Manufacturer Defendants argue that causation is a necessary

component of a misrepresentation cause of action and since Dr. Gebien has neither law nor pleaded material facts to support a viable theory of causation, it is plain and obvious that the misrepresentation claims have no prospect of success.

[363] It is true that causation is a constituent element of the tort or negligent misrepresentation. It is an aspect of the fourth and fifth "reliance" constituent elements of tort; namely: (4) the plaintiff having reasonably relied on the misrepresentation; and, (5) the plaintiff suffering damages as a consequence of relying on the misrepresentation.[131]

[364] In the immediate case, contrary to submissions of the Manufacturer Defendants, Dr. Gebien does plead the law – normative product liability law – and he does plead sufficient material facts about reliance and, therefore, it is not plain and obvious that his claim and the claims of the other necessary plaintiffs are doomed to failure.

[365] It is true, as the Manufacturer Defendants submit, that reliance is not a common issue and that the reliance element of a negligent misrepresentation claim must be proved on an individual basis and that reliance cannot be presumed to be established class-wide.[132] That truth, which will be pertinent to Phase Two of the Certification Motion, however, does not negate that Dr. Gebien has pleaded a viable products liability action for negligent misrepresentations by a pharmaceutical company.

[366] Turning to fraudulent misrepresentation, the elements of a claim of fraudulent misrepresentation or deceit are: (1) a false statement by the defendant; (2) the defendant knowing that the statement is false or being indifferent to its truth or falsity; (3) the defendant having an intent to deceive the plaintiff; (4) the false statement being material and the plaintiff having been induced to act; and, (5) the plaintiff suffering damages.[133]

[367] The Manufacturer Defendants repeat their arguments about the lack of specificity about the misrepresentations and the failure to adequately plead causation in the context of Dr. Gebien's fraudulent misrepresentation claim. They repeat their argument with the steroid boost of rule 25.06 (8), which requires that fraud be pleaded with particularity. For the reasons already expressed above about the negligent misrepresentation claim, there is no merit to the Defendants' argument about the deficiencies in the fraudulent misrepresentation claim, a type of claim frequently coupled with a negligent misrepresentation claim.

[368] In my opinion, Dr. Gebien has a legally viable claim for fraudulent misrepresentation and his prolix polemical pleading satisfies the cause of action criterion for certification and the pleading should not be struck without leave to amend to make it comply with the technical rules of pleading.

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[131] *Queen v. Cognos*, [1993] 1 S.C.R. 87; *Hercules Management Ltd. v. Ernst & Young*, [1997] 2 S.C.R. 165.
[132] *Peters v. SNC-Lavalin Group*, 2021 ONSC 5021; *Coffin v. Atlantic Power Corp*., 2015 ONSC 3686; *Musicians' Pension Fund of Canada (Trustees of) v. Kinross Gold Corp.*, 2013 ONSC 6864 aff'd 2014 ONCA 901; *Green v. Canadian Imperial Bank of Commerce*, 2012 ONSC 3637 var'd 2014 ONCA 90, aff'd 2015 SCC 60).
[133] *1999269 Ontario Limited v. Aguiar*, 2023 ONSC 787; *PP v. DD*, 2016 ONSC 258; *Bruno Appliance and Furniture Inc. v. Hryniak*, 2014 SCC 8; *Fiorillo v. Krispy Kreme Doughnuts, Inc.* (2010), 98 O.R. (3d) 103 (S.C.J.); *TWT Enterprises Ltd. v. Westgreen Developments (North) Ltd.* (1990), 78 Alta. L.R. (2d) 62 (Q.B.), aff'd (1992), 3 Alta. L.R. (3d) 124 (C.A.); *Parna v. G. & S. Properties Ltd.* (1970), 15 D.L.R. (3d) 336 (S.C.C.); *Derry v. Peek* (1889), 14 App. Cas. 925 (H.L.).

## 7. Negligence of the Manufacturer Defendants

### (a) Outline

[369] In the immediate case, the Manufacturer Defendants move to strike Dr. Gebien's common law negligence cause of action.

[370] Negligence law is based on the existence of a duty of care relationship. The Canadian approach to determining whether there is a duty of care has been developed in a series of Supreme Court of Canada decisions[134] that adapt and explaining the House of Lord's decision in *Anns v. Merton London Borough Council*,[135] and that derive from the seminal cases of *Donoghue v. Stevenson*[136] and *Hedley Byrne & Co. Ltd. v. Heller & Partners Ltd.*[137]

[371] Nine decades ago, in *Donoghue v. Stevenson*,[138] the House of Lords established the contemporary approach to determining whether a plaintiff has a common law negligence claim, and in *Cooper v. Hobart*,[139] Justices McLachlin and Major, for a unanimous Supreme Court of Canada, held that in determining whether there was a duty of care, in examining proximity, it will generally be established by reference to existing categories of relationships where a duty of care had been recognized, although new categories may be introduced to meet the needs of new circumstances.

[372] In the immediate case, Dr. Gebien disavows that his Fresh as Amended Statement of Claim, which pleads as its material facts the New Narrative, constitutes a new category of common law negligence.

[373] In the immediate case, Dr. Gebien advances his common law negligence cause of action as a products liability claim, which is a recognized category of common law negligence, indeed it derives from the seminal *Donoghue v. Stephenson*. In the immediate case, Dr. Gebien asserts that the Manufacturer Defendants were negligent in the research, development, manufacture, testing, regulatory licensing, sale and marketing of Opioids in Canada.

[374] However, on closer analysis, it is clear that the gravamen of Dr. Gebien's case in negligence is that the Manufacturer Defendants failed to provide accurate information and failed to adequately warn the users of their products about the risks inherent in using Opioids for other than to alleviate short-term acute pain or for palliative care.

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[134] *Haig v. Bamford*, [1976] 1 S.C.R. 466; *Kamloops (City) v. Nielsen*, [1984] 2 S.C.R. 2; *Rothfield v. Manolakos*, [1989] 2 S.C.R. 1259; *Canadian National Railway Co. v. Norsk Pacific Steamship Co*., [1992] 1 S.C.R. 1021; *Hercules Managements Ltd. v. Ernst & Young*, [1997] 2 S.C.R. 165; *Bow Valley Husky (Bermuda) Ltd. v. Saint John Shipbuilding Ltd*., [1997] 3 S.C.R. 1210; *Ingles v. Tutkaluk*, 2000 SCC 12; *Martel Building Ltd. v. Canada*, 2000 SCC 60; *Cooper v. Hobart*, 2001 SCC 79; *Edwards v. Law Society of Upper Canada*, 2001 SCC 80; *Odhavji Estate v. Woodhouse*, 2003 SCC 69; *Childs v. Desormeaux*, 2006 SCC 18; *Syl Apps Secure Treatment Centre v. D. (B.)*, 2007 SCC 38; *Hill v. Hamilton-Wentworth Regional Police Services Board*, 2007 SCC 41; *Design Services Ltd. v. Canada*, 2008 SCC 22; *Mustapha v. Culligan of Canada Ltd.*, 2008 SCC 27; *Fullowka v. Pinkerton's of Canada Ltd*., 2010 SCC 5; *R. v. Imperial Tobacco Canada Ltd.*, 2011 SCC 42; *Saadati v. Moorhead*, 2017 SCC 28; *Deloitte & Touche v. Livent Inc. (Receiver of)*, 2017 SCC 63; *Rankin (Rankin's Garage & Sales) v. J.J*., 2018 SCC 19.

[135] [1978] A.C. 728 (H.L.).

[136] [1932] A.C. 562 (H.L.).

[137] [1964] A.C. 465 (H.L.).

[138] [1932] A.C. 562 (H.L.).

[139] 2002 SCC 79.

[375] In the immediate case, the essential allegation of Dr. Gebien's New Narrative is that the Manufacturer Defendants persuaded doctors to prescribe Opioids for what should have been an unapproved off-label use. In other words, the Manufacturer Defendants persuaded Health Canada, prescribing physicians, and health care providers that Opioids could be used not only for short-term acute pain and for palliative care but for all types of serious pain.

[376] As I shall explain in the analysis below, Dr. Gebien has pled a reasonable products liability cause of action only for a breach of a duty to warn. It is plain and obvious that a duty to warn cause of action is the only products liability cause of action that fits with the material facts of the New Narrative. Upon analysis, Dr. Gebien's only viable products liability cause of action is similar but not identical to the products liability actions in which a drug manufacturer is liable for marketing its goods for an off-label use.

[377] The more fulsome analysis of Dr. Gebien's common law negligence claim follows.

### (b) Analysis and Discussion

[378] The elements of a claim in negligence are: (1) the defendant owes the plaintiff a duty of care; (2) the defendant's behaviour breached the standard of care; (3) the plaintiff suffered compensable damages; (4) the damages were caused in fact by the defendant's breach; and, (5) the damages are not too remote in law.[140]

[379] Dr. Gebien submits that separate and apart from his tort causes of action based on misrepresentation, he has a common law negligence claim. He disavows that the claim in negligence is a novel claim.

[380] *Duty of care*: Dr. Gebien pleads that the Manufacturer Defendants owed a duty of care to him and the Class Members: (a) to properly develop, manufacture, test, license, sell and market Opioids; (b) to properly label, market, and sell Opioids; (c) to ensure that Opioids were labelled, marketed, and sold for their intended or reasonably foreseeable use; (d) to adequately test their Opioid drugs in a manner that would fully disclose the magnitude of the risks associated with their use, particularly the risk of addiction; (e) to monitor, investigate, evaluate and follow up on improper or adverse reaction to the use of Opioids in Canada; (f) to properly supervise their employees and consultants; (g) to warn the Plaintiff and Class Members that Opioids carried a significant risk of addiction, tolerance, abuse; (h) to provide adequate, updated and current warnings and information on the risks associated with the use of Opioids as such information became available; (i) to ensure that healthcare professionals were kept fully and completely informed of all risks associated with use of Opioids, including their addictive properties; (j) to properly and promptly inform Health Canada and other regulatory agencies of the changing and increasing risks associated with Opioid use; and (k) to provide clear and proper instructions to healthcare professionals and patients, including precautions to be taken, so as to avoid injury or damage from Opioids.

[381] *Standard of care*: Dr. Gebien pleads that the Manufacturer Defendants breached the standard of care owed to him and the Class Members and caused them foreseeable harm. Dr. Gebien pleads that the Manufacturer Defendants' standard of care is informed by statutory

[140] *Mustapha v. Culligan of Canada Ltd.*, 2008 SCC 27 at para. 3.

requirements under the *Food and Drugs Act*,[141] the *Food and Drug Regulations*,[142] the *Controlled Drugs and Substances Act*,[143] and the *Narcotic Control Regulations*.[144]

[382] *Breach of the Standard of Care*: Dr. Gebien pleads that the Manufacturer Defendants' breaches of the standard of care included: (a) asserting false statements and omitting material facts regarding the benefits of and evidence for the use of Opioids for chronic pain, while understating their very serious risks, including the risk of addiction; (b) marketing and promoting Opioids for the treatment of long-term pain without any or adequate research proving that such use is safe and effective, and/or that the benefits of such use outweigh the risks; (c) failing to monitor feedback from the market, including reports as early as in or around 1997-1998 that Opioids were being abused and were associated with the high risk of addiction; (d) failing to warn doctors and the general public about the risks associated with Opioid use, even after it became apparent that the New Narrative was false and misleading; (e) failing to conduct the necessary research and testing to determine the risks associated with Opioid use, particularly for the treatment of long-term pain; (f) failing to conduct follow up testing or monitor Opioid use once Opioids began to be consistently prescribed for long-term pain; (g) failing to adequately train sales representatives to provide accurate information regarding appropriate use of Opioids and risks associated with their use; (h) deliberately or recklessly misstating research findings regarding the risks and benefits of Opioids; and (i) knowingly misstating research findings, knowing that the Plaintiff would rely on their misrepresentations and omissions, and knowing that such reliance would cause the Plaintiff to suffer damages.

[383] *Compensable Damages and Causation*: Dr. Gebien pleads that the patients who ought not to have been prescribed Opioids suffered because they became addicted and they suffered from Opioid Use Disorder. He pleads that this suffering was caused by the Manufacturer Defendants' breach of the standard of care and the damages are not too remote in law.[145]

[384] There is no doubt that Dr. Gebien has pleaded the constituent elements of a common law products liability negligence claim.

[385] There are four established genres of product liability causes of action.[146]

[386] First, there is design negligence; manufacturers have a duty of care in designing the product to avoid safety risks and to make the product reasonably safe for its intended purposes.[147] In the

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[141] R.S.C. 1985, c. F-27.
[142] C.R.C., c. 870.
[143] S.C. 1996, c.19.
[144] C.R.C, c. 1041.
[145] *Mustapha v. Culligan of Canada Ltd.*, 2008 SCC 27 at para. 3.
[146] *Price v. Smith & Wesson Corp.*, 2021 ONSC 1114; *Harris v. Bayerische Motoren Werke Aktiengesellschaft*, 2020 ONSC 1647; *Vester v. Boston Scientific Ltd.*, 2015 ONSC 7950; *Arora v. Whirlpool Canada LP*, 2012 ONSC 4642 at paras. 264-67, aff'd 2013 ONCA 657, leave to appeal ref'd [2013] S.C.C.A. No. 498; *Goodridge v. Pfizer Canada Inc*., 2010 ONSC 1095; *Hollis v. Dow Corning Corp*., [1995] 4 S.C.R. 634; *Rentway Canada Ltd. v. Laidlaw Transport Ltd.*, [1989] O.J. No. 786 (H.C.J.), aff'd [1994] O.J. No. 50 (C.A.).
[147] *Price v. Smith & Wesson Corp.*, 2021 ONSC 1114; *Williamson v. Johnson & Johnson*, 2020 BCSC 1746; *Vester v. Boston Scientific Ltd.*, 2015 ONSC 7950; *O'Brien v. Bard Canada Inc*., 2015 ONSC 2470; *Andersen v. St. Jude Medical Inc*., 2012 ONSC 3660; *Martin v. Astrazeneca Pharmaceuticals Plc*, 2012 ONSC 2744; *Ragoonanan v. Imperial Tobacco Canada Ltd.* (2000), 51 O.R. (3d) 603 (S.C.J.); *Kreutner v. Waterloo Oxford Co-operative Inc*. (2000), 50 O.R. (3d) 140 (C.A.); *Rentway Canada Ltd. v. Laidlaw Transport Ltd.*, [1989] O.J. No. 786 (H.C.J.), aff'd [1994] O.J. No. 50 (C.A.); *Nicholson v. John Deere Ltd*. (1986), 58 O.R. (2d) 53 (H.C.J.), aff'd [1989] O.J. No. 495 (C.A); *Gallant v. Beitz* (1983), 42 O.R. (2d) 86 (H.C.J.).

case of negligence in designing a product, the defendant is blamed for not designing its product in a safer manner. The manufacturer's duty of care not to design a product negligently is based on the theory that the manufacturer should be held responsible for the choices it makes that affect the safety of the product. The manufacturer has a duty to make reasonable efforts to reduce any risk to life and limb that may be inherent in its design. Whether a manufacturer breaches its duty of care in designing a product is determined by a risk-utility analysis that measures whether the utility of the chosen design outweighs the foreseeable risks associated with the chosen design.[148]

[387] In the immediate case, upon analysis, it becomes clear that the material facts of the New Narrative do not establish, nor could they establish a design negligence products liability claim.

[388] Opioids are inherently a dangerous drug. There are no material facts to suggest that Opioids could be designed to be less dangerous. Design negligence involves a product developer making negligent design choices, and there are no material facts to suggest that a negligent choice was made. In the immediate case, Dr. Gebien does not plead any material facts to identify a defect in designing an Opioid drug. There are no material facts pleaded as to how a design defect caused harm. He does not plead that a safer and economically feasible alternative design of an Opioid exists. He does not plead how the Manufacturer Defendants made a design mistake in developing their Opioid products.

[389] The issue in the immediate case is not about designing a safer drug for pain, in which case the argument might be that opium-based ingredients are a bad design decision. However, the issue in the immediate case is about enlarging the market for the use of Opioids and that alleged misdeed has nothing to do with the design of the some 50 or so Opioids marketed by 15 groups of pharmaceutical companies. It is plain and obvious that Dr. Gebien does not have a design negligence products liability claim.

[390] Second, there is manufacturing negligence; manufacturers have a duty of care to consumers to see that there are no defects in manufacture that are likely to give rise to injury in the ordinary course of use.[149]

[391] In the immediate case, upon analysis, it becomes plain and obvious that the material facts of the New Narrative do not establish, nor could they establish, a manufacturing negligence claim.[150] Treating Opioids as a manufactured product, no defect is identified in the manufacturing process or in the product itself.

[392] None of Apo-Tramadol, Apo-Fentanyl Matrix, Apo-Hydromorphone, Apo-Oxycodone CR, Endocet, Percocet, Percocet-DEMI, Percodan, Percodan-Demi, Opana ER, Abstral, Metadol, Statex, Tridural, pms-Methadone, Nucynta, Duragesic, Tramacet, Ultram, Nucynta CR, PAT-Tramadol/Acet, Tylenol with Codeine No. 2, Tylenol with Codeine No. 3, Tylenol with Codeine No. 4, Tylenol with Codeine Elixir, Mylan-Fentanyl Matrix Patch, Mylan-Tramadol/Acet, PMS-Butorphanol, PMS-Oxycodone CR, PMS-Fentanyl MTX, PMSHydromorphone, PMS-Morphine Sulfate SR, PDP-Hydrocodone, Fentanyl Patch, Oxycodone. Oxycodone-Acet, Tramadol-Acet, Belbuca, BuTrans, Targin, MS Contin, Hydromorph Contin, Oxycontin, OxyNEO, RAN-Fentanyl Matrix Patch, RAN-Oxycodone CR, Hydromorphone HCL, Oramorph SR, Roxicet, Oxycodone/Acet, Tramadol/Acet, Morphine SR, Sandoz Fentanyl Patch, Sandoz Oxycodone,

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[148] *Ragoonanan v. Imperial Tobacco Canada Ltd.* (2000)**,** 51 O.R. (3d) 603 (S.C.J.); *Rentway Canada Ltd. v. Laidlaw Transport Ltd.*, [1989] O.J. No. 786 (H.C.J.), aff'd [1994] O.J. No. 50 (C.A.).
[149] *Donoghue v. Stevenson*, [1932] A.C. 562 (H.L.).
[150] *Williamson v. Johnson & Johnson*, 2020 BCSC 1746.

Fentanyl Citrate Injection SDZ, Morphine HP 25, Morphine HP 50, Sandoz Opium & Belladonna, Sandoz Methadone, Sandoz Morphine SR, Morphine Sulfate Injection USP, Meperidine Hydrochloride Injection USP, Teva-Oxycocet, Teva-Tramadol/Acetaminophen, Teva-Fentanyl, Teva-Hydromorphone, Teva-Morphine SR, and ACT Oxycodone CR, CO Fentanyl, M.O.S.-SR (Morphine Hydrochloride), Cophylac, and Cophylac Drops are alleged to have been manufactured with a defect.

[393] Third, manufacturers have a duty of care to compensate consumers for the cost of repairing a dangerous product that presents a real and substantial danger.[151] The immediate case is a personal injury products liability claim. It is not a pure economic loss products liability claim.

[394] Fourth, there is a duty to warn; manufacturers have a duty of care to warn consumers of dangers inherent in the use of the product of which the manufacturer has knowledge or ought to have knowledge. Upon analysis, in the immediate case, Dr. Gebien has pled, and based on the New Narrative, he could only have pleaded a duty to warn products liability cause of action. Subject to satisfying all of the certification criteria, duty to warn products liability cases have been certified as class proceedings.[152]

[395] In *Hollis v. Dow Corning Corp.*,[153] at paragraph 21, Justice La Forest explained the rationale for a manufacturer's duty of care to warn. He stated:

> 21. The rationale for the manufacturer's duty to warn can be traced to the "neighbour principle", which lies at the heart of the law of negligence and was set down in its classic form by Lord Atkin in *Donoghue v. Stevenson*, [1932] A.C. 562 (H.L.). When manufacturers place products into the flow of commerce, they create a relationship of reliance with consumers, who have far less knowledge than the manufacturers concerning the dangers inherent in the use of the products, and are therefore put at risk if the product is not safe. The duty to warn serves to correct the knowledge imbalance between manufacturers and consumers by alerting consumers to any dangers and allowing them to make informed decisions concerning the safe use of the product.

[396] A manufacturer of a product has a duty to warn consumers of dangers inherent in the use of the product of which the manufacturer has knowledge or ought to have knowledge.[154] The warnings must be reasonably communicated and detailed to give the consumer a full indication of each of the specific dangers that arise from the ordinary use of the product.[155]

[397] The manufacturer's duty to alert consumers about dangers associated with the use of a product is a continuing duty, requiring manufacturers to warn not only of dangers known at the time of sale, but also of dangers discovered after the product has been sold and delivered.[156]

[398] In the case of medical products, given their substantial risk of harm from improper use, the

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[151] *Arora v. Whirlpool Canada LP*, 2012 ONSC 4642 at paras. 264-67, aff'd 2013 ONCA 657, leave to appeal ref'd [2013] S.C.C.A. No. 498; *Winnipeg Condominium Corporation No. 36 v. Bird Construction Co*., [1995] 1 S.C.R. 85.
[152] *Parker v. Pfizer*, 2012 ONSC 361, leave to appeal refused 2012 ONSC 6604 (Div. Ct.); *Goodridge v. Pfizer Canada Inc*., 2010 ONSC 1095; *Heward v. Eli Lilly & Co*., [2007] O.J. No. 404 (S.C.J.), leave to appeal to Div. Ct. granted [2007] O.J. No. 2709 (Div. Ct.), appeal dismissed [2008] O.J. No. 2610 (Div. Ct.).
[153] [1995] 4 S.C.R. 634.
[154] *Batten v. Boehringer Ingelheim*, 2017 ONSC 53, aff'd 2017 ONSC 6098 (Div. Ct.); Andersen v. St. Jude Medical, Inc., 2012 ONSC 3660; *Bow Valley Husky (Bermuda) Ltd. v. Saint John Shipbuilding* [1997] 3 S.C.R. 1210; *Hollis v. Dow Corning Corp.*, [1995] 4 S.C.R. 634; *Lambert v. Lastoplex Chemicals Co.*, [1972] S.C.R. 569.
[155] *Hollis v. Dow Corning Corp.*, [1995] 4 S.C.R. 634; *Lambert v. Lastoplex Chemicals Co.*, [1972] S.C.R. 569.
[156] *Hollis v. Dow Corning Corp.*, [1995] 4 S.C.R. 634 at para. 20; *Rivtow Marine Ltd. v. Washington Iron Works*, [1974] S.C.R. 1189 at p. 1200.

standard of care is correspondingly high and there will almost always be a heavy onus on the manufacturer to provide clear, complete and current information concerning the dangers inherent in the ordinary use of its product.[157]

[399] There is a high standard of care. In *Buchan v. Ortho Pharmaceutical (Can.) Ltd.*[158] Justice Robins stated at para. 18:

> 18. Once a duty to warn is recognized, it is manifest that the warning must be adequate. It should be communicated clearly and understandably in a manner calculated to inform the user of the nature of the risk and the extent of the danger; it should be in terms commensurate with the gravity of the potential hazard; and it should not be neutralized or negated by collateral efforts on the part of the manufacturer. The nature and extent of any given warning will depend on what is reasonable having regard to all the facts and the circumstances relevant to the product in question.

[400] In cases involving highly technical products intended to be used under the supervision of experts or where the nature of the product is such that the consumer will not realistically receive information directly from the manufacturer without the intervention of a learned intermediary, the duty of the manufacturer is discharged if the manufacturer provides the learned intermediary (for example, physicians or surgeons), rather than the consumers, with an adequate warning of the potential dangers associated with the use of its product.[159]

[401] In the immediate case, the duty to warn products liability cause of action is closely linked to the negligent and fraudulent misrepresentation claims of the New Narrative. The nature of Dr. Gebien's products liability cause of action is that by misrepresenting the safe uses to be made of Opioids, the Manufacturer Defendants failed to warn or failed to adequately warn about the dangers associated with an already dangerous product. It is not a matter of what any of the Opioids product monographs said, it is about what the monographs and any marketing materials did not say to caution the expanded use of Opioids. It is about what the Manufacturer Defendants learned after their products entered the marketplace about the effects of the expanded use of Opioids and it is about why the Opioid Manufacturers omitted to shout out a warning or to seek to amend the warnings in the product monographs. It is not plain and obvious that this claim will not succeed.

### 8. Negligence of the Distributor Defendants

[402] The "Distributor Defendants" are: (1) Abbott Laboratories Inc. (formerly, Abbott Laboratories, Limited); (2) AmerisourceBergen Canada Corporation; (3) Kohl & Frisch Distribution Inc.; (4) Nu-Quest Distribution Inc.; (5) Pro Doc; and (6) Procurity Inc.; and (7) The Jean Coutu Group (PJC) Inc. I am including Pro Doc in this group on the assumption that my conclusion about jurisdiction *simpliciter* is incorrect.

[403] Dr. Gebien alleges that as licensed dealers permitted to distribute Opioids in Canada, given the foreseeability of harm associated with the use of Opioids, the Distributor Defendants owed a duty of care to him, the Class Members and the general public in the safe distribution and sale of Opioids to pharmacies and hospitals. Dr. Gebien pleads that reasonably prudent Distributors would know that failing to report suspicious orders would exacerbate problems of diversion and

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[157] *Hollis v. Dow Corning Corp.*, [1995] 4 S.C.R. 634 at para. 23.
[158] (1986), 54 O.R. (2d) 92 (C.A.).
[159] *Batten v. Boehringer Ingelheim*, 2017 ONSC 53, aff'd 2017 ONSC 6098 (Div. Ct.); *Buchan v. Ortho Pharmaceutical (Canada) Ltd.* (1986), 54 O.R. (2d) 92 (C.A.) at paras. 23, 59.

nonmedical use of Opioids, and thus the proliferation of the black market in Opioids.

[404] Dr. Gebien pleads that the scope of the Distributor Defendants' duty of care to the Plaintiff and the Class Members was informed by statutory requirements imposed on them by the *Food and Drug Act,* the *Food and Drug Regulations,* the *Narcotic Control Act,* and the *Narcotic Control Regulations*.

[405] Dr. Gebien pleads that the Distributor Defendants breached the standard of care owed to the plaintiff and Class Members and that the resulting harm was foreseeable.

[406] Dr. Gebien pleads that the Distributor Defendants' negligence includes: (a) failing to exercise proper judgment in reporting the loss and/or theft of units; (b) failing to provide effective controls and procedures to guard against theft and diversion of Opioids; (c) failing to exercise proper judgment in reporting suspicious orders or refusing to fill them; (d) failing to report orders from customers which deviated from previous order patterns or ordering methods, which they knew or ought to have known could lead to the diversion of Opioids; (e) using unsafe distribution practices; (f) failing to acquire or utilize special knowledge or skills that relate to the dangerous activity of selling opioids in order to prevent or ameliorate such significant dangers; and, (g) failing to review prescription orders for red flags.

[407] However, during argument, Dr. Gebien's counsel conceded that if there was no cause of action "for enabling the expansion of the black market, paving the way for the public health crisis" there was no negligence claim against the Distributor Defendants. I repeat because of its significance Dr. Gebien abandoned his far wider allegations of distribution negligence.

[408] Turning to the analysis, the elements of a common law negligence cause of action are set out above. The Distributor Defendants seek Orders pursuant to rules 21.01(1)(b), 21.01(3d), and/or 25.11 of the *Rules of Civil Procedure* striking the Fresh as Amended Statement of Claim against the Distributors, without leave to amend.

[409] The negligence claim against the Distributor Defendants should be struck out on any of these grounds, but for present purposes, I shall discuss Dr. Gebien's failure to plead a reasonable cause of action against the Distributor Defendants.

[410] It is plain and obvious that there is no duty of care not to enable the expansion of the black market. The gap in foreseeability and proximity in the test for a duty of care is unbridgeable and there are policy reasons why distributors should not be asked or expected to police the illegal trade in pharmaceuticals.

[411] It is plain and obvious that even if there was such a duty of care there are no material facts pleaded to establish what the standard of care might be. It is plain and obvious that if there was such a duty and a standard of care of the reasonable distributor not to enable the expansion of the black market could be articulated then there are no material facts pleaded that would establish a breach of the duty of care.

[412] It is plain and obvious that there are no material facts pleaded nor could material facts be pleaded connecting Dr. Gebien's and the Class Members' harms to the expansion of the black market since their grievances are about being lawfully subscribed opioids.

[413] The Fresh as Amended Statement of Claim does not identify a single tortious act or omission by the Distributors to ground any cause of action pleaded against them. It does not identify what the Distributors are alleged to have done to harm Dr. Gebien and the patients who

were lawfully prescribed opioids and obtained them. There are no material facts pleaded that the Distributor Defendants acting in their role as distributors made any representations. There are no material facts pleaded that the Distributor Defendants had any role in the so-called New Narrative.

[414] There are no reasonable causes of action at all as against the "Distributor Defendants" and Dr. Gebien's action should be dismissed as against them.

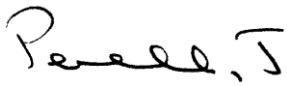
## M. Conclusion

[415] For the above reasons: (a) Pro Doc's Jurisdiction motion is granted; (b) the Defendants' Motions to Strike is granted in part and dismissed in part; and (c) Dr. Gebien's Certification Motion, Phase One, is granted.

[416] Dr. Gebien shall have 120 days to deliver a Second Fresh as Amended Statement of Claim joining representative plaintiffs and pleading in accordance with these Reasons for Decision, failing which his proposed class action will be dismissed.

[417] If Dr. Gebien delivers a Second Fresh as Amended Statement of Claim, the cause of action criterion for certification will have been satisfied and Phase Two of the Certification Motion may be scheduled.

[418] Subject to the following exceptions, the costs of Dr. Gebien's Phase One Certification Motion and the costs of the Defendants' Motion to Strike shall be costs in the cause of the Certification Motion. The exceptions are Pro Doc and the Distributor Defendants may make costs submissions within twenty days of the release of these Reasons for Decision followed by Dr. Gebien's submissions within a further twenty days.



Perell, J.

Released: December 1, 2023

**CITATION:** Gebien v. Apotex Inc., 2023 ONSC 6792
**COURT FILE NO.:** CV-19-00620048-00CP
**DATE:** 20231201

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

Defendants

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## REASONS FOR DECISION

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PERELL J.

**Released:** December 1, 2023