

CITATION: Gebien v. Apotex Inc., 2024 ONSC 3777  
COURT FILE NO.: CV-19-00620048-00CP  
DATE: 20240703

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 )

*Kirk Baert, Adam Tanel, Vlad  
Calina, Caitlin Leach, and Alec  
Angle for the Plaintiff*

*Nicholas T. Hooge for the  
Defendants Hikma Labs Inc.,  
Hikma Pharmaceuticals PLC and  
West-Ward Columbus Inc.*

HEARD: In writing

**DISTRIBUTION INC., NU-QUEST** )  
**DISTRIBUTION INC., ABBOTT** )  
**LABORATORIES, LIMITED, and PROCURITY** )  
**INC.** )  
) )  
Defendants )

**PERELL, J.**

### REASONS FOR DECISION

[1] In this multi-billion dollar action pursuant to the *Class Proceedings Act, 1992*,<sup>1</sup> the Plaintiff, Darryl Gebien, seeks an order for the discontinuance of his action as against the Defendants, Hikma Labs Inc., Hikma Pharmaceuticals PLC, and West-Ward Columbus Inc. (the “Roxane Defendants”).

[2] The discontinuance is unopposed, and I have been advised that the defendants, Hikma Labs Inc., West-Ward Columbus Inc., and Hikma Pharmaceuticals PLC and the plaintiff, Dr. Gebien, have resolved costs for the all-in amount of \$35,000.

[3] The request for a discontinuance arises because Dr. Gebien has been unable to recruit a co-plaintiff as a potential representative plaintiff to sue the Roxane Defendants in accordance with the so-called “*Ragoonanan* Principle,”<sup>2</sup> which is authority that in a proposed class action, there must be a representative plaintiff with a claim against each defendant.

[4] The need to join a co-plaintiff arose after Dr. Darryl Gebien, moved for certification of his action as a class proceeding. His certification motion was bifurcated into phases. Dr. Gebien’s proposed class action is about the Opioid epidemic, and the Defendants, which are described in his Fresh as Amended Statement of Claim as comprising two groups, i.e., the “Manufacturer Defendants” and the “Distributor Defendants”, brought motions to have his Statement of Claim struck for failure to disclose a reasonable cause of action or for violating the rules of pleading.

[5] On the Phase 1 Certification motion, I concluded, among other things, that the Ontario Court does not have jurisdiction *simpliciter* and it is *forum non conveniens* with respect to Dr. Gebien’s claims against Pro Doc Limitée.

[6] On the certification motion,<sup>3</sup> I concluded, among other things, that there are no reasonable causes of action as against the “Distributor Defendants”.

[7] On the certification motion, I concluded there were, however, causes of action against the Manufacturer Defendants - which include the Roxane Defendants. At paragraph 26 of my certification Reasons for Decision, I stated:

Subject to the joinder of Representative Plaintiffs and compliance with the *Ragoonanan* Principle, which is authority that in a proposed class action, there must be a representative plaintiff with a

<sup>1</sup> S.O. 1992, c. 6.

<sup>2</sup> *Poirer v. Silver Wheaton Corp*, 2022 ONSC 80; *Vecchio Longo Consulting Services Inc v. Aphria Inc.*, 2021 ONSC 5405; *Hughes v. Sunbeam Corp (Canada)* (2002), 61 O.R. (3d) 433 (C.A.); *Ragoonanan Estate v. Imperial Tobacco Canada Ltd* (2000), 51 O.R. 3d 603 (S.C.J.).

<sup>3</sup> *Gebien v. Apotex Inc.*, 2034 ONSC 6792.

claim against each defendant, 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*; (2) negligent misrepresentation; (3) fraudulent misrepresentation or deceit; and (4) products liability negligence for breach of a duty to warn.

[8] On the Phase 1 Certification motion, I concluded, among other things, that the 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 because it is not a manufacturer of Opioids and hence is not a Manufacturer Defendant.

[9] On the Phase 1 Certification Motion, I held that subject to the following exceptions, the costs of Dr. Gebien's Phase 1 Certification Motion and the costs of the Defendants' Motion to Strike shall be costs in the cause of the Certification Motion, which could proceed to a Phase 2 for a determination of the other certification criteria. The exceptions were that Pro Doc Limitée, the Jean Coutu Group, and the Distributor Defendants may make costs submissions. I did not limit the scope of their costs submissions to the costs of Phase 1. All of these defendants were being let out of the proposed class action; they were entitled to their costs of being joined as parties.

[10] After the Phase 1 Certification Motion, Dr. Gebien was unable to recruit a co-plaintiff to sue the Roxanne Defendants, and on April 2, 2024, Dr. Gebien served a Second Fresh as Amended Statement of Claim that omitted any reference to or allegations against the Roxane Defendants.

[11] On May 13, 2024, Dr. Gebien delivered a Notice of Motion to discontinue its claim against the Roxane Defendants. By his notice of motion, Dr. Gebien sought the following relief:

THE MOTION IS FOR AN ORDER:

(a) Pursuant to s. 29 of the *Class Proceedings Act, 1992*, S.O. 1992, c. 6, granting discontinuance of this proceeding solely as against the Roxane Defendants, subject to the remaining terms of this Order;

(b) Notice is required under ss. 29 and 19 of the *Class Proceedings Act, 1992*, to discontinue this action as against the Roxane Defendants;

(c) Notice of the discontinuance of this action as against the Roxane Defendants shall be provided in the following form:

(i) Class Counsel shall post the Discontinuance Order on their website, with a statement explaining that the action was discontinued as against the Roxane Defendants due to the lack of a representative plaintiff;

(ii) Class Counsel shall distribute a similar explanation, and the Discontinuance Order, to all potential class members that have contacted them in relation to this action; and

(iii) Class Counsel shall distribute a nationwide Press Release explaining that this action is being discontinued as against the Roxane Defendants due to the lack of a representative plaintiff.

(d) Class Counsel shall bear the cost of providing Notice of the discontinuance of this action as against the Roxane Defendants;

(e) The discontinuance of this proceeding as against the Roxane Defendants will become effective 120 days after the date of this Order;

(f) The discontinuance of this proceeding as against the Roxane Defendants is without costs; and

(g) Such further and other relief as counsel may advise and this Court may permit.

[12] Section 29 of the *Class Proceedings Act, 1992* requires court approval for the discontinuance, abandonment, dismissal, or settlement of a proceeding commenced under the Act. Section 29 states:

*Discontinuance, abandonment and settlement*

29. (1) A proceeding commenced under this Act and a proceeding certified as a class proceeding under this Act may be discontinued or abandoned only with the approval of the court, on such terms as the court considers appropriate.

*Settlement without court approval not binding*

(2) A settlement of a class proceeding is not binding unless approved by the court.

*Effect of settlement*

(3) A settlement of a class proceeding that is approved by the court binds all class members.

*Notice: dismissal, discontinuance, abandonment or settlement*

(4) In dismissing a proceeding for delay or in approving a discontinuance, abandonment or settlement, the court shall consider whether notice should be given under section 19 and whether any notice should include,

- (a) an account of the conduct of the proceeding;
- (b) a statement of the result of the proceeding; and
- (c) a description of any plan for distributing settlement funds.

[13] A motion for discontinuance or abandonment should be carefully scrutinized, and the court should consider, among other things: whether the proceeding was commenced for an improper purpose; whether, if necessary, there is a viable replacement party so that putative class members are not prejudiced; or whether the defendant will be prejudiced.<sup>4</sup>

[14] As already mentioned, the Roxanne Defendants do not oppose the discontinuance and they obviously are not prejudiced by the discontinuance.

[15] On a motion for discontinuance, the court's chief concern is that the putative Class Members who may have been relying on the proposed class action not be prejudiced by the discontinuance. A major prejudice that putative Class Members may experience from a discontinuance or a dismissal of a class action is that the limitation periods for commencing an individual claim will resume running and may expire before the putative class member can prosecute his or her own claim against the defendant.

[16] As appears from the terms of Dr. Gebien's proposed discontinuance order, this potential

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<sup>4</sup> *Green v. The Hospital for Sick Children*, 2021 ONSC 8237; *Batten v. Boehringer Ingelheim*, 2021 ONSC 6606; *Johnson v. North American Palladium Ltd*, 2021 ONSC 3346; *Bardoul v. Novartis Pharmaceuticals Canada Inc.*, 2021 ONSC 2261; *Winter v. C.R. Bard*, 2020 ONSC 3532; *Naylor v. Coloplast Canada Corporation*, 2016 ONSC 1294; *Drywall Acoustic Lathing and Insulation Local 675 Pension Fund (Trustees of) v. SNC-Lavalin Group Inc.*, 2012 ONSC 5288; *Frank v. Farlie, Turner & Co, LLC*, 2011 ONSC 7137; *Hudson v Austin*, 2010 ONSC 2789; *Sollen v. Pfizer*, [2008] O.J. No 4787 (C.A.), aff'd [2008] O.J. No. 866 (S.C.J.); *Logan v. Canada (Minister of Health)*, [2003] O.J. No. 418 (S.C.J.), aff'd (2004), 71 O.R. (3d) 451 (C.A.).

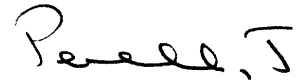
prejudice is addressed by Class Counsel giving notice of the discontinuance and by the discontinuance only becoming effective 120 days after the date of the Order.

[17] Pursuant to s. 28(1) of the *Class Proceedings Act, 1992*, the limitation periods applicable to the causes of action asserted in this proposed class action have been suspended in favour of the proposed Class since the commencement of this Action, and the limitation periods will remain suspended as against the Roxanne Defendants for 120 more days; therefore, any putative Class Members who wish to commence an individual action is not prejudiced.<sup>5</sup>

[18] I therefore approve the discontinuance of the proposed class action as against the Roxanne Defendants.

[19] As agreed, I fix costs in the amount of \$35,000 payable within 30 days of this order.

[20] Order accordingly.



Perell, J.

Released: July 3, 2024

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<sup>5</sup> *Chopik v. Mitsubishi Paper Mills Ltd*, 2003 CanLII 23605 at para. 13 (Ont. S.C.J.).

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**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.