

SUPERIOR COURT
(Class Actions Division)

CANADA
PROVINCE OF QUEBEC
DISTRICT OF MONTREAL

N° : 500-06-000906-186

DATE : December 2, 2019

PRESIDING: THE HONOURABLE DONALD BISSON, J.S.C.

STEVEN VARNAI

and

JOANNE GIROUX

Applicants

v.

JANSSEN INC.

JANSSEN PHARMACEUTICALS INC.

JANSSEN ORTHO LLC

JOHNSON & JOHNSON INC.

and

JOHNSON & JOHNSON

Defendants

JUDGMENT ON APPLICATION TO STAY THE CLASS ACTION

INTRODUCTION

[1] On February 1, 2018, the Applicants Steven Varnai and Joanne Giroux (the "Quebec Applicants"), through their lawyers Siskinds, Desmeules, Avocats s.e.n.c.r.l., instituted the Quebec Action on behalf of the following proposed class:

1. [...] "All individuals residing in Quebec who have used canagliflozin marketed under the brand names Invokana and Invokamet; and

All individuals residing in Quebec, who suffered damages from the use of canagliflozin marketed under the brand names Invokana and Invokamet, by one of

the persons concerned in the preceding paragraph, notably, their spouse, father, mother or other ascendants, their children, their legal mandataries, their close relatives, other relatives and/or their estate (hereinafter the "Class" or "Class Members")."

[2] The Respondents Janssen Inc., Janssen Pharmaceuticals Inc., Janssen Ortho LLC, Johnson & Johnson Inc. and Johnson & Johnson (collectively hereinafter referred to as the "Respondents") seek a stay of the *Application for Authorization to Institute a Class Action and to Appoint the Status of Representative Plaintiffs* (the "Quebec Action") on the basis of *lis pendens*. This application is presented under Art. 18 and 577 of the *Code of Civil Procedure* (CCP) and Art. 3137 of the *Civil Code of Quebec* (CcQ). Applicants do not challenge this application.

[3] In the Courts view, the *Application of the Respondents to Stay the Quebec Action* should be granted, as it is intended to achieve judicial economy, cost-efficiency and the avoidance of foreseeable legal issues created by a multiplicity of proceedings, due to the existence of the following overlapping class actions:

- a) The present Quebec Action; and
- b) The multi-jurisdictional class action filed in Saskatchewan: *Buffie Tarr and Ronald Allen Fiddler v Janssen Inc., Janssen Pharmaceuticals, Inc., Janssen Ortho LLC, Johnson & Johnson and Johnson & Johnson Inc.*, Court of Queen's Bench for Saskatchewan File No. QBG 2809 of 2015, a copy of the Second Amended Statement of Claim dated March 13, 2019 being Exhibit R-1 (the "Saskatchewan Action").

[4] Furthermore, there are three additional national class actions filed in Ontario (the "Ontario Actions"):

- a) *Rosalba Joudry v Janssen Inc., Janssen Pharmaceuticals, Inc., Janssen Ortho LLC, Johnson & Johnson, and Johnson & Johnson Inc.*, Ontario Superior Court of Justice File No. CV-15-536111, a copy of the Statement of Claim dated September 10, 2015 being Exhibit R-2A;
- b) *Amanda Evelyn Rosevear v Janssen Inc., Janssen Pharmaceuticals, Inc., Janssen Ortho LLC, and Johnson & Johnson*, Ontario Superior Court of Justice File No. CV-16-551201, a copy of the Statement of Claim dated April 19, 2016 being Exhibit R-2B;
- c) *Raymond Duck v Janssen Inc., Janssen Pharmaceuticals, Inc., Johnson & Johnson Inc. and Johnson & Johnson*, Ontario Superior Court of Justice File No. CV-18-00000570, a copy of the Statement of Claim dated March 15, 2018 being Exhibit R-2C;

[5] All of these actions pursue the same objectives and raise the same or substantially similar issues stemming namely from the Respondents' manufacturing and marketing of canagliflozin under the brand names Invokana and Invokamet.

[6] Outside of the province of Quebec, only the Saskatchewan Action is proceeding.

[7] The Court thinks that it is in the interest of proportionality, judicial economy, cost-efficiency and the proper administration of justice that the Quebec Action be stayed until a final judgment is rendered in the Saskatchewan Action.

[8] The Applicants Steven Varnai and Joanne Giroux do not oppose this application.

THE QUEBEC ACTION

[9] As indicated above, on February 1, 2018, the Quebec Applicants instituted the Quebec Action on behalf of the following proposed class:

1. [...] "All individuals residing in Quebec who have used canagliflozin marketed under the brand names Invokana and Invokamet; and

All individuals residing in Quebec, who suffered damages from the use of canagliflozin marketed under the brand names Invokana and Invokamet, by one of the persons concerned in the preceding paragraph, notably, their spouse, father, mother or other ascendants, their children, their legal mandataries, their close relatives, other relatives and/or their estate (hereinafter the "Class" or "Class Members")."

[10] Invokana and/or Invokamet are sodium-glucose cotransporter 2 (SGLT2) inhibitors used in the treatment of patients with type 2 diabetes.

[11] The Quebec Applicants claim that the Respondents were negligent and misrepresented that Invokana and/or Invokamet are safe and effective while they supposedly cause serious injuries and complications such as increased risk of lower limb amputations, diabetic ketoacidosis, acute kidney injuries and the need for further surgeries.

[12] As appears from paragraphs 59 and 60 of the Quebec Action, the Quebec Applicants therefore claim that the Respondents designed, researched, tested, developed, manufactured, prepared, processed, inspected, packaged, labelled, sold, promoted, distributed and/or marketed Invokana and/or Invokamet, without duly warning them against the risks and dangers involved.

[13] On behalf of the proposed class members, the Quebec Applicants are seeking:

(a) an amount up to a maximum of \$500,000 in compensatory damages for bodily, moral and/or material injuries for all members who have used Invokana or Invokamet;

(b) an amount up to a maximum of \$100,000 in compensatory damages for all members who have suffered damages as a result of someone close (spouse, father, mother, parents, children, legal representatives, other relatives or their estate) who has used Invokana or Invokamet;

(c) punitive damages in an amount of \$20,000,000;

(d) all costs and expenses related to the distribution of money to members of the class.

[14] On June 19, 2018, the Respondents filed an *Application of the Defendants for Leave to Examine the Applicants and for Communication of Documents*, which has not yet been heard.

THE ONTARIO ACTIONS

[15] The *Joudry* action (Exhibit R-2A), filed by Merchant Law Group on September 10, 2015, proposed the following national class:

3. [...] all persons in Canada who have purchased or ingested Invokana (hereinafter the "Class" or "Class Members"), and all persons who are family members of the Class who are entitled to assert a claim pursuant to section 61 of the Family Law Act, R.S.O. 1990, c. F.3, as amended, and equivalent provincial legislation (hereinafter the "Family Class" or "Family Class Members")

[16] The *Rosevear* action (Exhibit R-2B), filed by McPhadden, Samac, Tuovi LLP on April 19, 2016, proposed the following national class:

16. [...] a. All persons throughout Canada who purchased and/or ingested Invokana and their estates, administrators or other legal representatives ("the Class"); and

b. All persons who have a derivative claim on account of a family relationship with a person in (a.) (the "Family Class")

[17] The *Duck* action (Exhibit R-2C), filed by Siskinds LLP on March 15, 2018, proposed the following national class:

15. [...] all persons resident in Canada who were implanted with Invokana Products at any time on or before the date of the certification order, which as (sic) manufactured, marketed and/or sold or otherwise placed into the stream of commerce in Canada by one or more of the Defendants [...] all persons resident

in Canada entitled to claim by virtue of a personal or familial relationship to any one or more of the persons described above, and plead and rely upon the Ontario *Family Law Act*, RSO 1990, C F.3 and regulations thereunder, and any analogous provincial legislation.

[18] The Ontario Actions claim that Respondents failed to warn users and medical professionals (in the product monograph or otherwise) about the short and long-term side effects of using Invokana or Invokamet¹, namely the increased risk of diabetic ketoacidosis, kidney failure, heart attack or death.

[19] Plaintiffs put forward causes of action based *inter alia* on negligence, breach of warranty, breach of the Ontario *Consumer Protection Act 2002*, SO 2002, c 30, Sch. A, *the Sale of Goods Act* and the *Competition Act*, and waiver of tort.

[20] The Ontario Actions allege the Plaintiffs and the respective classes have suffered and continue to suffer damages resulting from the Respondents' acts and omissions, namely:

- (a) personal injuries, emotional distress, pain, suffering, loss of quality and enjoyment of life, and loss of life expectancy;
- (b) special damages for medical expenses and out of pocket expenses;
- (c) loss of income and earning capacity; and
- (d) damages for cost of care;

[21] The Ontario Actions are also claiming for disgorgement of revenue, punitive or exemplary damages, interest and costs.

[22] The Ontario Actions have not proceeded since they were served onto the Respondents, and there is no case timetable in place to move these cases towards a certification hearing.

THE SASKATCHEWAN ACTION

[23] The Saskatchewan Action was initially instituted on behalf of a limited class of users by Merchant Law Group on December 2, 2015, as appears from a copy of the original proceeding being Exhibit R-3.

[24] The original claim (Exhibit R-3) was very similar to the *Joudry* action filed in Ontario by Merchant Law Group (Exhibit R-1A).

¹ Invokamet is not included in the proposed class definition or in the claims made by the Plaintiffs in the *Joudry* and *Rosevear* actions.

[25] On March 13, 2019, the Saskatchewan Action (Exhibit R-2) was amended to add the Plaintiff Ronald Allen Fiddler, and include Invokamet in the subject "Products".

[26] The same day, the *Amended Notice of Application for Certification* by Merchant Law Group sought to certify the Saskatchewan Action as multi-jurisdictional class action on behalf of the following proposed national class, as appears from a copy of the Amended Notice bring Exhibit R-4:

"all individuals who were prescribed and ingested the Products in Canada or their executors, administrators, guardians, or personal representatives.

"Products" includes both Invokana and Invokamet."

[27] The claim now alleges that Respondents failed to warn users and medical professionals (in the product monograph or otherwise) about the short and long-term "Side Effects" of using Invokana and Invokamet, namely the increased risk of diabetic ketoacidosis, kidney failure from ketoacidosis, and limb loss.

[28] Plaintiffs Tarr and Fiddler put forward causes of action based on negligence (at para. 43-49), breach of the Saskatchewan *Consumer Protection Act*, SS 1996, c C-30.1 (at para. 50-52), and waiver of tort (at para. 45-47).

[29] The Plaintiffs also make subrogated insurance claims on behalf of the Health department of nine out of the ten Canadian provinces, including Quebec (at para. 53), and on behalf of the estates and families of class members (at para. 54);.

[30] The Saskatchewan Action alleges the Plaintiffs and the class members have suffered and continue to suffer damages resulting from the Respondents' acts and omissions, namely:

- (a) personal injuries, emotional distress, pain, suffering, loss of quality and enjoyment of life, and loss of life expectancy;
- (b) special damages for medical expenses and out of pocket expenses;
- (c) loss of income and earning capacity; and
- (d) damages for cost of care

[31] The Saskatchewan Action also claims for disgorgement of revenue, punitive or exemplary damages, interest and costs.

[32] On October 7, 2019, the Honorable Mr. Justice G.G. Mitchell of the Court of Queen's Bench of Saskatchewan directed the following certification schedule, as appears from paragraph 15 of a copy of the order issued by Mitchell J. , being Exhibit R-5:

- (a) Cross-examinations on plaintiff's materials to be completed by defence counsel no later than January 31, 2020;
- (b) All defence materials, the jurisdictional motion, and any other motions shall be filed no later than April 17, 2020;
- (c) A further case management telephone conference call with counsel will be convened on April 24, 2020. The purpose of this call will be to set a schedule for questioning by plaintiff's counsel in the event that they should chose to do so, as well as finalizing the filing schedule for written briefs and related materials;
- (d) Should matters arise prior to the April 2020 telephone conference call which require immediate resolution, counsel may request the scheduling of an earlier case management telephone call;
- (e) The hearing of the certification application is scheduled to begin on October 19, 2020 and continue for the balance of that week;

STAY REQUESTED ON THE BASIS OF LIS PENDENS (ARTICLE 3137 CCQ)

[33] If all the conditions of Article 3137 CCQ are met, the Court has the discretion to stay the local proceedings if it concludes that these proceedings and the foreign proceedings create a situation of *lis pendens*.

[34] Here, in the Court's view, the Quebec Action and the Saskatchewan Action are proposed to involve the same parties (through the representation of the class applicants in each jurisdiction), are based on the same facts and have the same object—thereby creating a situation of *lis pendens*.

[35] There is juridical identity of the parties by representation:

- (a) The class proposed in the Quebec Action proposes a provincial class composed of Quebec residents only;
- (b) The class proposed in the Saskatchewan Action is a national class (all individuals in Canada), which includes all residents of Quebec;

[36] The Respondents, Janssen Inc., Janssen Pharmaceuticals Inc., Janssen Ortho LLC, Johnson & Johnson Inc. and Johnson & Johnson, are the same in the Quebec Action and the Saskatchewan Action;

[37] Both proceedings stem from the use of canagliflozin manufactured and marketed under the brand names Invokana and Invokamet by the Respondents, and the alleged damages suffered by class members.

[38] The object of these proceedings is also similar, namely the payment of damages to class members for alleged injuries and complications that followed the use of Invokana or Invokamet.

[39] Notwithstanding the procedural differences between the Quebec Action and the Saskatchewan Action, the Court concludes that the conclusions and the ultimate objective of the proposed class actions are similar.

[40] As a result, the Court thinks that the interest of justice and of the parties favour the avoidance of multiple proceedings and the possibility of contradictory judgments.

[41] The multiplicity of proceedings would also run contrary to the “spirit of mutual comity” that is required between the courts of the different provinces in Canada, as declared by the Supreme Court of Canada in *Canada Post Corp. v Lépine*, [2009] 1 SCR 549, at par. 43, 57.

[42] Forcing the Respondents to defend themselves in multiple and overlapping proceedings in two or three different jurisdictions would impose on them an unfair and significant additional financial burden.

[43] The Respondents referred this Court to the Canadian Bar Association’s *Canadian Judicial Protocol for the Management of MultiJurisdictional Class Actions and the Provision of Class Action Notice* (Exhibit R-6) (the “Protocol”).

[44] This Protocol aims to prevent and deal with the challenges caused by multiple overlapping class action filings in different jurisdictions, as appears from paragraphs 7, 8, 9 and 10 of the Protocol.

[45] Finally, the guiding principle of proportionality and the proper administration of justice favour the staying of the Quebec Action pending final judgment in the Saskatchewan Action, given that the Quebec Applicants do not oppose this application.

PROTECTION OF THE RIGHTS AND INTERESTS OF QUEBEC RESIDENTS (ARTICLE 577 CCP)

[46] This Court has the discretion to stay these proceedings on the consideration of whether or not the rights of Quebec residents (or class members) are better served and protected by the Quebec Action, rather than the Saskatchewan Action.

[47] The current jurisprudential debate surrounding the “first to file” rule, originating in the decision of *Chasles v Bell Canada inc.*, 2017 QCCS 5200, and currently pending before the Court of Appeal in *FCA Canada Inc. v Garage Poirier & Poirier Inc.*, 2018 QCCA 490, has limited implications for this case:

(a) Here, there is no “first to file” or timing issue between the Quebec Action and the Saskatchewan Action;

(b) The Saskatchewan Action, which seeks the certification of a national class from the outset, was clearly filed before the Quebec Action;

(c) The Saskatchewan Action was underway since December 2015, more than two years before the Quebec Action was filed by the Quebec Applicants.

[48] Although it took some time to get scheduled (due to reasons explained in the order issued by Mitchell J., Exhibit R-4), the Saskatchewan Action has now been scheduled for a certification hearing beginning on October 19, 2020.

[49] In the spirit of mutual comity between the courts of the Canadian provinces, this Court can assume that any superior court in Canada, such as the Court of Queen’s Bench of Saskatchewan will protect the rights and interests of Quebec class members in the same way a Quebec court would.

[50] The laws and rules of procedure applicable to the Saskatchewan Action are similar to the Quebec laws and rules of procedure applicable to the Quebec Action and do not create a serious risk that the adequate representation of the interest of Quebec class members would be compromised.

[51] The facts and circumstances alleged in the Quebec Action and the Saskatchewan Action, which give rise to the proposed recourse, are very similar and almost identical. Therefore, the Saskatchewan Plaintiffs can represent adequately the proposed class members in the Quebec Action.

[52] The causes of action in the Saskatchewan Action are also grounded on the equivalent of Quebec’s product liability law under the *Civil Code of Québec* and the *Quebec Consumer Protection Act*.

[53] The Respondents only ask that the Quebec Action be stayed, not discontinued or dismissed, in order for the Quebec Action to resume at a later date, if necessary.

[54] Again, the Quebec Applicants do not oppose the application of Respondents,

[55] By pursuing the class actions in only one jurisdiction, the Quebec class members will benefit from judicial economy and their counsel will not invest time and legal fees simultaneously in two or more jurisdictions.

[56] Thus, in the Court’s view, the stay of the Quebec Action causes no prejudice to the Quebec class members and benefits all parties. It saves time, fees and resources, while avoiding the possibility of having contradictory judgments.

[57] The Respondents also submit that the Protocol also provides guidelines to ensure this Court (and the Ontario court, to the extent it is necessary) would remain apprised of any developments in the certification process of the Saskatchewan Action and until final judgment is rendered.

[58] Considering the foregoing, the Court concludes that the Quebec class members would suffer no prejudice from the stay of the present proceedings.

CONCLUSION

[59] The Court therefore accepts the request of Respondents to stay of the Quebec Action until a final judgment is rendered in the Saskatchewan Action.

[60] The Court will order the Respondents to keep the Court informed of the status of the Saskatchewan Action and of the procedural steps have been taken to move the litigation forward.

[61] Again, the Quebec Applicants do not oppose this Application of the Respondents to Stay the Quebec Action.

FOR THESE REASONS, THE COURT:

[62] **GRANTS** the Application of the Respondents to Stay the Quebec Action;

[63] **STAYS** the present file until a final judgment is rendered in the *Buffie Tarr v Janssen Inc., Janssen Pharmaceuticals, Inc., Janssen Ortho LLC, Johnson & Johnson and Johnson & Johnson Inc.* proceedings instituted before the Saskatchewan Court of Queen's Bench;

[64] **ORDERS** the Respondents to keep the Court informed of the status of the Saskatchewan Action and of the procedural steps that have been taken to move the litigation forward, at a minimum of every 6 months;

[65] **THE WHOLE**, without judicial costs.



DONALD BISSON, J.S.C.

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Dates of hearing November 29 2019 (in writing)