

# SUPERIOR COURT Class Action

CANADA  
PROVINCE OF QUEBEC  
DISTRICT OF MONTREAL

No: 500-06-000807-160

DATE: December 21, 2020

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BY THE HONOURABLE SUZANNE COURCHESNE, J.S.C.

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**MERCEDES ELIZABETH CARRIGAN**

Applicant

v.

**GLAXOSMITHKLINE, INC.**

and

**GLAXO WELLCOME INC.**

and

**NOVARTIS PHARMA CANADA INC.**

Defendants

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## JUDGMENT

(joint application to temporarily stay the class action)

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[1] **CONSIDERING** the parties' *Joint Application to Temporarily Stay the Class Action* and the Exhibits in support thereof (the **Joint Application**);

[2] **CONSIDERING** that on or about November 10, 2015, the Applicant Mercedes Elizabeth Carrigan (the **Applicant**) filed a class action in Québec against the Defendants (the **Québec Action**) on behalf of the class more fully described as:

« 1) Toute personne physique qui, au Canada, est née avec des malformations congénitales (telles que définies au paragraphe 59), en raison de la consommation par leur mère, pendant le premier trimestre

de sa grossesse, du médicament chlorhydrate d'ondansétron dihydraté ou ondansétron commercialisés sous la marque ZOFRAN®, ZOFRAN® ODT ou son équivalent générique (ci-après «ZOFRAN»).

2) Toutes les femmes au Canada qui ont ingéré le médicament ZOFRAN pendant le premier trimestre de leur grossesse et ont fait une fausse couche ou ont accouché d'un enfant mort-né.

ET

3) Toutes les personnes physiques, qui sont des proches des personnes visées aux paragraphes précédents et qui ont subi des dommages causés par cette médication, notamment les conjoints, pères et mères, tuteurs, frères et sœurs, leurs autres parents, leurs mandataires légaux, leurs autres proches et/ou leur succession.

ou tout autre Groupe qui sera déterminé par le Tribunal;»

[3] **CONSIDERING** the existence of a parallel national class action commenced on or about November 10, 2015 in Ontario before the Ontario Superior Court of Justice in *Aaleyah Small-Mercer and Terra Mercer v. GlaxosmithKline Inc., and al.*, bearing the court docket number CV-15-5062-00CP (the **Ontario Action**);

[4] **CONSIDERING** that the Ontario Action was commenced on behalf of the class more fully described as:

« 7. Terra Mercer, in her capacity as Litigation Gardian to Aaleyah Small-Mercer, seeks to represent the following class (the "Proposed Class"):

a) Persons in Canada, born with Birth Defects ( as defined in paragraph 36), to women who ingested Zofran, or its generic form, during the first trimester of pregnancy, and any person who can claim on their behalf.

b) Persons in Canada, who ingested Zofran, or its generic form, during the first trimester of pregnancy and experienced a third trimester miscarriage or still birth.

8. Terra Mercer seeks to represent the following class (the "Proposed Family Class"):

Persons who, by reason of his or her relationship to a member of the Proposed Class, are entitled to make claims under the Family Law Act, RSO 1990, c F.3, s 61 and similar legislation and common law in other provinces as a result of *the death or personal injury of a member of the Proposed Class.* »

[5] **CONSIDERING** that by their Joint Application the parties ask that the Québec Action be stayed until a final judgment is rendered in the Ontario Action;

[6] **CONSIDERING** that the Ontario Action proposes a national class that would include persons from Québec who are the subject of the Québec Action and that the definition of the putative class proposed in the Ontario Action is essentially identical to the definition of the class proposed in the Québec Action;

[7] **CONSIDERING** that the Ontario Action asserts similar causes of action as the Québec Action and seeks the same types of remedies;

[8] **CONSIDERING** the representations of counsel that the Ontario action is proceeding diligently;

[9] **CONSIDERING** the existence of two other putative class actions, drafted in similar terms to the Québec Action and the Ontario Action, pending in other Canadian provinces, namely:

- a) The putative class action filed on October 18, 2015, before the Supreme Court of British Columbia, in *Amy Cutting and Allan Arsenault vs. GlaxosmithKline Inc., and al.*, in the case bearing court docket number S-15470 (the **BC Action**)
- b) The putative class action filed November 16, 2015, before the Court of Queen's Bench of Alberta, in *Catherine Hogan vs. GlaxosmithKline Inc., and al.*, in the case bearing court docket number 1501-13634 (the **Alberta Action**);

[10] **CONSIDERING** the representations of Applicant's counsel that plaintiffs' counsel in Alberta and BC confirmed they will not move forward given the national class action being pursued in Ontario;

[11] **CONSIDERING** that the Defendants named in the Ontario Action and in the Québec Action are the same;

[12] **CONSIDERING** that the Québec Action and the Ontario Action are based on the same key allegations of fact and assert the same causes of action, namely (i) that the Defendants were negligent in the design, development, testing, research, manufacture, licensing, labelling, warning, marketing, distribution and sale of Zofran, and (ii) that they misled pregnant women and their physicians regarding Zofran's safety and efficacy during pregnancy, resulting in children suffering serious negative health consequences in utero;

[13] **CONSIDERING** that the object of the Québec Action and the Ontario Action is the same, both seeking the recovery of damages allegedly suffered as a result of the Defendants' impugned conduct;

[14] **CONSIDERING** that, *prima facie*, the Ontario Superior Court of Justice has jurisdiction over the Applicant and the Defendants;

[15] **CONSIDERING** that the Court is satisfied that the Ontario Superior Court of Justice will uphold the fundamental principles of procedure and public order;

- [16] **CONSIDERING** the Affidavit of Madeline McKinnon, dated November 13, 2020;
- [17] **CONSIDERING** the cooperation between counsel for the Applicant and the Defendants, both in the Ontario Action and the Québec Action;
- [18] **CONSIDERING** that any notices, important communications, or documents, will be made available to Class members and published, both in English and French.
- [19] **CONSIDERING** that counsel for the Applicant both in the Ontario Action and the Québec Action are staffed with individuals who can also provide information and answers to Class members to assist them in English and French.
- [20] **CONSIDERING** that a stay of the Québec Action in favor of a national class action proceeding in Ontario serves and protects the rights and interests of Quebec residents under the circumstances;
- [21] **CONSIDERING** that the prosecution of the Zofran class actions in a single proceedings will allow Québec residents to benefit from judicial economy since their counsel will not be required to invest time and costs simultaneously in two jurisdictions;
- [22] **CONSIDERING** that Québec residents will not suffer any prejudice because the Québec Action is not dismissed but is only stayed pending a final judgment in the Ontario Action, and in the event that the Ontario Superior Court of Justice makes a decision which causes prejudice to the Québec residents or where certification is not successful in the Ontario Action, the Applicant will be able to promote the rights and interests of Québec residents by seeking a lift of the stay of the proceedings in the Québec Action;
- [23] **CONSIDERING** articles 18, 49, 158 and 577 C.C.P. and the relevant case law;<sup>1</sup>
- [24] **CONSIDERING** that counsel for the parties have undertaken to provide this Court with an update on the status of the Ontario Action on a semiannual basis, and to advise this Court within 30 days of any significant development in the Ontario Action that may affect the course of the Québec Action;
- [25] **CONSIDERING** that granting a temporary stay of the Québec Action is consistent with the principle of proportionality;
- [26] **CONSIDERING** a temporary stay will likewise avoid contradictory judgments and multiple proceedings;
- [27] **CONSIDERING** that it is in the best interests of the Quebec putative class members to stay the Québec Action for a period ending 60 days after the final certification judgment to be rendered in the Ontario Action;

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<sup>1</sup> *FCA Canada inc. c. Garage Poirier & Poirier inc.*, 2019 QCCA 2213; *Blackette c. Blackberry Limited*, 2020 QCCS 2447.

[28] **FOR THESE REASONS**, the Court:

[29] **GRANTS** the temporary stay sought by the parties;

[30] **STAYS** the Application for Authorization to Institute a Class Action and to Appoint the Status of Representative filed by Applicant Mercedes Elizabeth Carrigan for a period ending sixty (60) days after the final certification judgment to be rendered in the Ontario Action (court docket number CV-15-5062-00CP), or such later date as may be further ordered by the Court or as requested by the parties;

[31] **PRAYS ACT** of the parties undertaking to provide this Court with an update on the Ontario Action on a semiannual basis and to advise this Court within thirty (30) days of any significant development in the Ontario Action that may affect the course of the Quebec Action, and **ORDERS** the parties to comply with said undertaking;

[32] **WITHOUT COSTS.**



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SUZANNE COURCHESNE, S.C.J.

**Me Karim Diallo**

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