

# SUPERIOR COURT

CANADA  
PROVINCE OF QUÉBEC  
DISTRICT OF MONTRÉAL

N° : 500-06-000906-186

DATE : November 23, 2022

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**IN THE PRESENCE OF THE HONOURABLE DONALD BISSON, J.S.C. (JB4644)**

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**STEVEN VARNAI**  
and  
**JOANNE GIROUX**  
Applicants

v.  
**JANSSEN INC.**  
and  
**JANSSEN PHARMACEUTICALS INC.**  
and  
**JANSSEN ORTHO LLC.**  
and  
**JOHNSON & JOHNSON INC.**  
and  
**JOHNSON & JOHNSON**  
Defendants

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## **JUDGMENT**

(on a motion for settlement approval)

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- [1] **WHEREAS** the parties are involved in a dispute of the nature of a class action;
- [2] **WHEREAS** on November 29, 2021, a national settlement agreement has been reached between the Applicants and the Defendants (the "Settlement Agreement", Exhibit RT-1, which includes a French version);

[3] **WHEREAS**, in their *Demande pour obtenir l'approbation d'une transaction* (the "Application"), the Applicants have asked the Court to:

- a) Approve the Settlement Agreement;
- b) Substantially approve the form and the content of the notices to inform class members, among other things, of the approval of the Settlement Agreement;
- c) Substantially approve the form and the content of the notice plan and the press release;
- d) Substantially approve the form and the content of the claim form; and
- e) Substantially approve the form of the compensation protocol.

[4] **CONSIDERING** the Judgment rendered on June 21, 2022<sup>1</sup> by which the Court authorized the class action for settlement purposes and approved the content and ordered the publication of the notices to Class Members;

[5] **CONSIDERING** that the Class Action authorized for settlement purposes is the following:

All persons, resident in Québec (at the time of the authorization), who were prescribed and used Invokana, Invokamet, and/or Invokamet XR in Québec at any time on or before the date of the authorization order; and

All persons, who by virtue of a personal relationship to one or more of such persons described in (i) above have claims for common law or statutory damages.

[6] **CONSIDERING** that notices to Class Members were disseminated in a timely manner in both English and French languages;

[7] **CONSIDERING** the expiry of the deadline set for objecting to the Settlement Agreement without a written objection to the Settlement Agreement;

[8] **CONSIDERING** that no Québec Class Member has appeared before this Court to oppose the approval of the Settlement;

[9] **CONSIDERING** that the Opt-Out Deadline was November 21, 2022 and no Québec Class Member has exercised his or her right to opt-out and none has mentioned any opposition;

[10] **CONSIDERING** the sworn declarations of the two Applicants and of Me Provencher, as well as Exhibits RT-1 to RT-6, and **CONSIDERING** the sworn of Me Jill McCartney, attorney at Siskinds LLP, along with Exhibits A to R;

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<sup>1</sup> *Varnai c. Janssen inc.*, 2022 QCCS 2212.

[11] **CONSIDERING** Article 590 of the *Code of Civil Procedure*, which requires the Court to approve the Settlement if it is just, reasonable and fair, and if it corresponds to the best interests of all class members, and not only the Applicants;

[12] **CONSIDERING** that the following criteria must guide the Court in this exercise<sup>2</sup>:

- Probabilities of success of the class action;
- Anticipated cost and duration of the litigation;
- Importance and nature of the evidence to be presented;
- Modalities, terms and conditions of the proposed settlement agreement;
- The agreement of the Applicant;
- Nature and number of objections to the settlement;
- Number of opting-out;
- Recommendation of the attorneys and their experience;
- Good faith of the parties and absence of collusion; and
- The recommendation of a third neutral person.

[13] **CONSIDERING** the Application has been duly notified to the Fonds d'aide aux actions collectives, which does not oppose to the present Application;

[14] **CONSIDERING** that the Settlement Agreement provides for a total payment of \$1,500,000 in capital, interest and fees, of which 10% will be allocated to the provincial health care insurers, and **CONSIDERING** that there is collective recovery;

[15] **CONSIDERING** the text of the Compensation Protocol (Exhibit RT-2), and that, under this text, to be eligible to receive a settlement payment pursuant to the Settlement Agreement, a Settling Claimant must:

- 1) Be, or if acting in a representative capacity, be representing the interest of a Canadian resident;
- 2) Provide Injury Evidence for at least one Eligible Injury, "Eligible Injury(s)" meaning:
  - A diagnosis of acute kidney injury or acute renal failure occurring on or before April 25, 2016;
  - A diagnosis of diabetic ketoacidosis occurring on or before August 31, 2016;or

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<sup>2</sup> *Pellemans c. Lacroix*, 2011 QCCS 1345, par. 20; *Gillich c. Mercedes-Benz West Island*, 2020 QCCS 1602, par. 10. Voir également : *Schneider (Succession de Schneider) c. Centre d'hébergement et de soins de longue durée Herron inc.*, 2021 QCCS 1808; *Dufour c. Compagnie d'aviation Cubana*, 2021 QCCS 5226.

- Amputation of a lower limb (i.e. leg, foot, or toe(s)) occurring on or before December 6, 2017;
- 3) Provide Prescription Evidence of use of an Invokana Product at the time of, or prior to, such Eligible Injury;
- 4) Approved Claimants will be assigned points under a detailed chart;
- 5) The amount of the Settlement Agreement will be distributed among the Approved Claimants in proportion to the accumulated points that will be awarded to them under the Compensation Protocol;
- 6) The Compensation Protocol provides a mechanism for class members to correct irregularities in the filed claim (notably when the medical file is still missing at the deadline) as well as a process for appealing the Claims Administrator's decision;
- 7) No proof of causation is required to be made by the claimants, which is favorable to claimants and to the settlement agreement approval, especially in light of new studies published after the filing of the class action which tend to show that there are finally fewer risks or even no risks at all with the taking of Invokana, Invokamet, and/or Invokamet XR;

[16] **UPON REVIEW**, and **CONSIDERING** paragraphs 20 to 44 of the sworn of Me Jill McCartney as if they were reproduced here in their entirety, the Court is of the opinion that the Application should be granted as the Settlement Agreement meets all the criteria mentioned above;

[17] **CONSIDERING** that Me Provencher has indicated that the team of class counsel anticipates that between 45 and 90 persons will make a claim, which therefore provides for individual awards that can range from \$10,000.00 to \$22,000.00 per member on average, there being a very limited number of adverse reports ever made to Health Canada in the past regarding Invokana, Invokamet, and/or Invokamet XR;

[18] **CONSIDERING** that the Court will not issue the following conclusions sought, as they contain conditional conclusions and annulation conclusions that the Court cannot render in advance, being understood that the issue can be raised by any party before the Court if the underlying facts happen:

**DECLARES** that the Settlement Agreement provides that it is contingent upon Settlement approval Orders being made by the Saskatchewan Court of King's Bench and the Ontario Superior Court of Justice and that the terms of this Order shall have no force or effect unless and until such judgments are rendered;

**ORDERS** that this Order shall be null and void in the event the Settlement Agreement is terminated in accordance with its terms;

[19] **CONSIDERING** the conclusions of the present judgment must be in French and English languages;

**FOR THESE REASONS, THE COURT:**

**ENGLISH VERSION (see French version below):**

[20] **GRANTS** the *Demande pour obtenir l'approbation d'une transaction*;

**Settlement Agreement Approval**

[21] **DECLARES** that for the purposes of this Order, the definitions set out in the Settlement Agreement, attached as Schedule "A" to this Order, are incorporated into and shall be applied in interpreting this Order;

[22] **DECLARES** that in the event of a conflict between the terms of this Order and the Settlement Agreement, the terms of this Order shall prevail;

[23] **DECLARES** that the Settlement Agreement is fair, reasonable and in the best interests of Québec Class Members and constitutes a transaction within the meaning of article 2631 of the *Civil Code of Québec*;

[24] **APPROVES** the Settlement Agreement in accordance with article 590 of the *Code of Civil Procedure* and **ORDERS** that it be implemented in accordance with its terms;

[25] **DECLARES** that all provisions of the Settlement (including its recitals and definitions) form part of this Order and are binding upon the Québec Class Members who did not opt-out of this action in accordance with the authorization Order issued on June 21, 2022, including those persons who are mentally incapable, Class Counsel, the provincial health Insurers and the Defendants;

**Notices**

[26] **APPROVES** substantially the form and the content of the abbreviated and long-form notices to Class Members, in English and in French (Exhibit RT-3);

[27] **APPROVES** substantially the form and the content of the Notice Plan and Press Release (Exhibit RT-4) **ORDERS** that the dissemination of the notices to Class Members be made in accordance with the notice plan;

[28] **APPROVES** substantially the form and content of the Claim Form, in English and in French (Exhibit RT-5);

**Compensation protocol**

[29] **APPROVES** substantially the form of the compensation protocol, in English and in French (Exhibit RT-2);

**Release**

[30] **DECLARES** that the release as provided at section 8 of the Settlement Agreement is approved and will take effect upon the Effective Date;

[31] **DECLARES** that the Settlement Agreement and this Order are binding upon Québec Class Members, whether or not such Class Members receive or claim compensation, including persons who are minors or are mentally incapable;

[32] **DECLARES** that upon the Effective Date, each Releasor has released and shall be conclusively deemed to have forever and absolutely released the Released Parties from the Released Claims;

[33] **DECLARES** that upon the Effective Date, each Class Member shall consent to and shall be deemed to have consented to the dismissal as against the Released Parties of any other action or proceedings he or she may have commenced in respect of the Released Claims;

[34] **DECLARES** that upon the Effective Date, each Québec Class Member, except those deemed excluded pursuant to article 580(2) of the *Code of Civil Procedure*, who files a claim under the Settlement shall be deemed to have consented to the dismissal, against the Released Parties, of all other actions he commenced, without costs and without prejudice;

[35] **DECLARES** that upon the Effective Date, Class Members shall not institute, continue, maintain or assert, either directly or indirectly, whether in Canada or elsewhere, on their own behalf or on behalf of any class or any other Person, any action, suit, cause of action, claim or demand against any Released Party, or against any other person that is entitled to claim contribution or indemnity from any Released Party, in respect of any Released Claim;

[36] **DECLARES** that the parties may, without further notice to Class Members or further Order of the Court, amend, modify or expand the terms and provisions of the Settlement Agreement by written agreement, provided any such changes are consistent with this Order and do not limit the rights of the Québec Class Members under the Settlement Agreement;

[37] **DECLARES** that neither the Settlement Agreement (including all terms thereof), nor its performance and implementation, shall be construed as any admission by the Defendants, including but not limited as to: (1) the validity of any claim, theory, or fact; (2) any liability, fault, or responsibility; or (3) the existence, cause, or extent of any damages or losses alleged or suffered by any Québec Class Member;

[38] **DECLARES** that upon the Effective Date, this matter is settled out of court and without costs against the Defendants;

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

#### **VERSION FRANÇAISE:**

[12] **ACCUEILLE** la *Demande pour obtenir l'approbation d'une transaction*;

#### **Entente de règlement**

[13] **DÉCLARE** qu'aux fins du présent jugement, les définitions contenues dans l'Entente, jointe en annexe « A » au présent jugement, s'appliquent et forment partie intégrante du présent jugement;

[14] **DÉCLARE** qu'en cas de conflit entre le présent jugement et l'Entente, le présent jugement prévaudra;

[15] **DÉCLARE** que l'Entente est équitable, raisonnable et dans le meilleur intérêt des Membres du Groupe du Québec et constitue une transaction au sens de l'article 2631 du *Code civil du Québec*;

[16] **APPROUVE** l'Entente conformément à l'article 590 du Code de procédure civile et **ORDONNE** qu'elle soit mise en œuvre en conformité avec ses termes;

[17] **DÉCLARE** que toutes les dispositions de l'Entente (incluant le préambule et les définitions) forment partie intégrante du présent jugement et lient chaque Membre du Groupe du Québec qui ne s'est pas exclu conformément au jugement d'autorisation rendu le 21 juin 2022, incluant les personnes inaptes, les avocats du groupe, les assureurs de soins de santé provinciaux et les défenderesses;

#### **Avis aux membres**

[18] **APPROUVE** substantiellement la forme et le contenu des avis aux membres, en versions détaillée et abrégée, en français et en anglais (Pièce RT-3);

[19] **APPROUVE** substantiellement la forme et le contenu du plan de diffusion des avis aux membres et le communiqué de presse (Pièce RT-4) et **ORDONNE** que la diffusion des avis aux membres soit effectuée conformément à ce plan;

[20] **APPROUVE** substantiellement la forme et le contenu du formulaire de réclamation, en français et en anglais (Pièce RT-5);

#### **Protocole d'indemnisation**

[21] **APPROUVE** substantiellement la forme et le contenu du protocole d'indemnisation, en français et en anglais (Pièce RT-2);

**Quittance**

[22] **DÉCLARE** que la quittance prévue à la section 8 de l'Entente est approuvée et prendra effet à la Date d'entrée en vigueur;

[23] **DÉCLARE** que l'Entente et le présent jugement lient les Membres du Groupe du Québec, que ceux-ci reçoivent ou non une indemnité ou la réclament, incluant les personnes mineures ou inaptes;

[24] **DÉCLARE** qu'à compter de la Date d'entrée en vigueur, chaque Partie donnant quittance a quittancé et sera réputée avoir donné une quittance complète, générale et finale aux Parties Quittancées eu égard aux Réclamations Quittancées;

[25] **DÉCLARE** qu'à compter de la Date d'entrée en vigueur, chaque Membre du Groupe aura consenti et sera réputé avoir consenti au rejet, à l'encontre des Parties Quittancées, de tout recours ou procédure qui pourrait avoir été débuté relativement aux Réclamations Quittancées;

[26] **DÉCLARE** qu'à compter de la Date d'entrée en vigueur, chaque Membre du Groupe du Québec, à l'exception de ceux réputés exclus en vertu de l'article 580(2) du *Code de procédure civile*, qui déposera une réclamation en vertu de l'Entente sera réputé avoir consenti au rejet, contre les Parties Quittancées, de toutes autres actions qu'il aurait commencées, sans frais de justice et sans réserves;

[27] **DÉCLARE** qu'à compter de la Date d'entrée en vigueur, les Membres du Groupe ne devront pas intenter, poursuivre, maintenir ou faire valoir, directement ou indirectement, que ce soit au Canada ou ailleurs, en leur propre nom ou au nom de tout groupe ou de toute autre personne, toute action, poursuite, cause d'action, réclamation ou demande contre toute Partie Quittancée, ou contre toute autre personne qui a le droit de réclamer une contribution ou une indemnité de toute Partie Quittancée, relativement à toute Réclamation Quittancée;

[28] **DÉCLARE** que les Parties peuvent, sans autre avis aux Membres du Groupe du Québec ou autre ordonnance du Tribunal, amender, modifier ou étendre les termes et les dispositions de l'Entente par un accord écrit, à condition que ces changements soient conformes au présent jugement et ne limitent pas les droits des Membres du Groupe du Québec en vertu de l'Entente;

[29] **DÉCLARE** que ni l'Entente (incluant tous ses termes), ni son exécution et sa mise en œuvre, ne doivent être interprétées comme une admission de la part des Défenderesses, incluant, mais sans s'y limiter, en ce qui concerne : (1) la validité de toute réclamation, théorie ou fait; (2) toute responsabilité ou faute; ou (3) l'existence, la cause ou l'étendue de tout dommage ou perte allégués ou subis par tout Membre du Groupe du Québec;



[30] **DÉCLARE** que par le présent jugement, le présent dossier est réglé hors Cour et sans frais contre les défenderesses;

[31] **LE TOUT** sans frais de justice.



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DONALD BISSON, J.S.C.

M<sup>e</sup> Erika Provencher  
SISKINDS, DESMEULES, AVOCATS S.E.N.C.R.L.

M<sup>e</sup> Marianne Ignacz  
INF S.E.N.C.R.L.  
Lawyers for the Defendants

M<sup>e</sup> Frikia Belogbi and M<sup>e</sup> Nathalie Guilbert  
FONDS D'AIDE AUX ACTIONS COLLECTIVES

Hearing date: November 14, 2022