SUPREME COURT
OF BRITISH COLUMBIA
VANCOUVER REGISTRY
NOV 1 2 2004

S046294

No.
Vancouver Registry

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

MARCEL LAJEUNESSE

Plaintiff

AND:

MERCK FROSST CANADA LTD./MERCK FROSST CANADA LTEE, MERCK FROSST CANADA & CO. and MERCK & CO., INC.

Defendants

Brought under the *Class Proceedings Act*, R.S.B.C. 1996, C. 50

WRIT OF SUMMONS

(Name and address of each Plaintiff)	MARCEL LAJEUNESSE c/o Klein Lyons 1100 - 1333 West Broadway VANCOUVER, B.C. V6H 4C1
(Name and address of each Defendant)	MERCK FROSST CANADA LTD./ MERCK FROSST CANADA LTEE PO Box 10026, Pacific Centre South 2600 – 700 West Georgia Street Vancouver, BC V7Y 1B4 - and - 11131 Hammersmith Gate Richmond, BC V7A 5E6 MERCK FROSST CANADA & CO. 1959 Upper Water Street PO Box 997 Halifax, NS B3J 2X2 MERCK & CO., INC. PO Box 100 1 Merck Drive Whitehouse Station, NJ 08889-0100 USA

ELIZABETH THE SECOND, by the Grace of God, of the United Kingdom, Canada and Her other Realms and Territories, Queen, Head of the Commonwealth, Defender of the Faith.

TO the Defendant(s): MERCK FROSST CANADA LTD./MERCK FROSST CANADA LTEE, MERCK FROSST CANADA & CO. and MERCK & CO., INC.

TAKE NOTICE that this action has been commenced against you by the Plaintiff(s) for the claim(s) set out in this writ.

IF YOU INTEND TO DEFEND this action, or if you have a set-off or counterclaim which you wish to have taken into account at the trial, **YOU MUST**

(a) **GIVE NOTICE** of your intention by filing a form entitled "Appearance" in the above registry of this Court within the Time of Appearance provided for below and **YOU MUST ALSO DELIVER** a copy of the "Appearance" to the Plaintiff's address for delivery, which is set out in this writ, and

(b) if a Statement of Claim is provided with this writ of summons or is later served on or delivered to you, FILE a Statement of Defence in the above registry of this court within the Time for Defence provided for below and DELIVER a copy of the Statement of Defence to the Plaintiff's address for delivery.

YOU OR YOUR SOLICITOR may file the Appearance and the Statement of Defence. You may obtain a form of Appearance at the Registry.

JUDGMENT MAY BE TAKEN AGAINST YOU IF

(a) **YOU FAIL** to file the Appearance within the Time for Appearance provided for below, or

(b) **YOU FAIL** to file the Statement of Defence within the Time for Defence provided for below.

TIME FOR APPEARANCE

If this Writ is served on a person in British Columbia, the time for appearance by that person is 7 days from the service (not including day of service).

If this Writ is served on a person outside British Columbia, the time for appearance by that person after service, is 21 days in the case of a person residing anywhere within Canada, 28 days in the case of a person residing in the United States of America, and 42 days in the case of a person residing elsewhere.

(or, where the time for appearance has been set by order of the court, within that time.)

TIME FOR DEFENCE

A Statement of Defence must be filed and delivered to the plaintiff with 14 days after the later of

(a) the time that the Statement of Claim is served on you (whether with this writ of

summons or otherwise) or is delivered to you in accordance with the Rules of Court, and

(b) the end of the Time for Appearance provided for above.

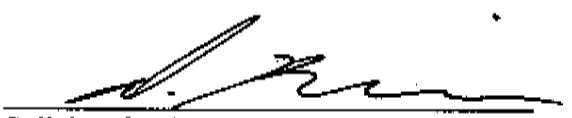
(or, if the time for defence has been set by order of the court, within that time.)

(1)	The address of the registry is: 800 SMITHE STREET VANCOUVER BC V6Z 2E1
(2)	The plaintiff's address for delivery is: KLEIN, LYONS #1100 – 1333 WEST BROADWAY VANCOUVER BC V6H 4C1 Fax number for delivery: 874-7180
(3)	The name and office address of the plaintiff's solicitor is: David A. Klein KLEIN, LYONS #1100 – 1333 WEST BROADWAY VANCOUVER BC V6H 4C1

The plaintiff's claim is

SEE ATTACHED STATEMENT OF CLAIM

Dated: November 12, 2004



Solicitor for the Plaintiff

ENDORSEMENT ON ORIGINATING PROCESS FOR SERVICE OUTSIDE OF BRITISH COLUMBIA

The plaintiff claims the right to serve the defendants who are outside British Columbia, without leave, pursuant to Rules 13(1)(h), (j) and (o) of the British Columbia Rules of Court on the grounds that the proceeding is founded on a tort committed in British Columbia, the defendants outside British Columbia are necessary or proper parties to a proceeding properly brought against a defendant duly served in British Columbia, and the claim arises out of goods or merchandise sold or delivered in British Columbia.

THIS WRIT OF SUMMONS is filed and served by David A. Klein of the firm of Klein, Lyons, Barristers and Solicitors, whose place of business and address for service and delivery is at 1100 – 1333 West Broadway, Vancouver, B.C. V6H 4C1. Telephone: (604) 874-7171. Fax: (604) 874-7180, and their co-counsel, Harvey Pollock, Q.C. of the firm of Pollock & Company, Barristers and Solicitors, Winnipeg, MB.

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Vancouver Registry

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

MARCEL LAJEUNESSE

Plaintiff

AND:

MERCK FROSST CANADA LTD./MERCK FROSST CANADA LTEE,
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Defendants

Brought under the *Class Proceedings Act*, R.S.B.C. 1996, c. 50

STATEMENT OF CLAIM

1. The plaintiff, Marcel LaJeunesse, is a resident of Nanaimo, British Columbia.

2. The plaintiff brings this action on his own behalf, and on behalf of a proposed class of similarly situated residents of British Columbia to be further defined in the plaintiff's application for class certification.

3. The defendant, Merck Frosst Canada & Co. ("Merck Canada & Co.") is a corporation incorporated pursuant to the laws of Canada with its headquarters in Halifax, Nova Scotia. At all times material, Merck Canada & Co. was involved in and/or was responsible for the research, development, testing, manufacture, marketing, distribution and sale of the drug, VIOXX, known generically as Rofecoxib in Canada and in

particular in British Columbia. At all material times, Merck Canada & Co. was an affiliate of the defendant, Merck & Co., Inc.

4. The defendant, Merck Frosst Canada Ltd./Merck Frosst Canada Ltee ("Merck Canada Ltd.") is a corporation incorporated pursuant to the laws of Canada, with its registered head office in Kirkland, Quebec. Merck Canada Ltd. is registered to carry on business in British Columbia and carries on business in British Columbia with a mailing address in Vancouver, British Columbia and a business office in Richmond, British Columbia. At all times material, Merck Canada Ltd. was involved in and/or was responsible for the research, development, testing, manufacture, marketing, distribution and sale of the drug, VIOXX, known generically as Rofecoxib in Canada and in particular in British Columbia. At all material times, Merck Canada Ltd. was an affiliate of the defendant, Merck & Co., Inc.

5. The defendant, Merck & Co., Inc. ("Merck USA") is a corporation incorporated pursuant to the law of the United States of America, with its corporate headquarters at Whitehouse Station, New Jersey, USA. At all material times, Merck USA was involved in and/or was responsible for the research, development, testing, manufacture, marketing, distribution and sale of VIOXX in Canada and in particular in British Columbia. Merck USA researched, developed, tested, manufactured, marketed, distributed and/or sold VIOXX in British Columbia directly or indirectly through an agent, affiliate, or subsidiary, and has as it affiliates, Merck Canada & Co. and Merck Canada Ltd.

6. At all times material, Merck Canada & Co., Merck Canada Ltd. and Merck USA carried on the research, development, testing, manufacture, marketing, distribution and sale of VIOXX in Canada, including British Columbia, as a joint enterprise for their mutual benefit and profit. As such, the defendants are referred to collectively herein as "Merck".

7. With respect to claims asserted herein, each defendant is responsible for the acts and omissions of the others for the following reasons:

(a) Each was the agent of the other;

(b) Each defendant's business with respect to the research, development, testing, manufacturing, marketing, distribution and sale of VIOXX was operated so that it was inextricably interwoven with the business of the others;

(c) The defendants entered into a common business plan for the shared purpose of researching, developing, testing, manufacturing, marketing, distributing, and selling VIOXX in Canada and British Columbia for profit;

(d) The defendants shared the common purpose of concealing the adverse effects of VIOXX from Canadian regulatory authorities including Health Canada, the medical community and class members;

8. VIOXX is a non-steroidal, anti-inflammatory drug prescribed to relieve pain and swelling. VIOXX is a member of a class of painkilling drugs known as COX-2 inhibitors.

9. VIOXX was approved for sale in Canada on or about October 25, 1999. The defendants promoted VIOXX as being less likely to cause gastric bleeding and therefore superior to other arthritis and pain control drugs on the Canadian market.

10. VIOXX has been associated with an increased risk of serious adverse reactions including, but not limited to, cardiovascular complications such as heart attack, stroke, unstable angina, pulmonary embolism, palpitations, irregular heartbeat and congestive heart failure.

11. The defendants knew, or ought to have known, of the significant risk of adverse cardiovascular complications from ingesting VIOXX. The defendants failed to inform or adequately inform the British Columbia health care community and the British Columbia public of those risks.

12. Neither the patient information pamphlet nor the prescribing information provided to physicians and pharmacists in Canada warned of the adverse cardiovascular risks associated with taking VIOXX. However, the patient information pamphlet available to consumers in the United States contained a warning that heart attacks and other serious

cardiovascular conditions such as blood clots, had been reported by patients taking VIOXX.

13. On September 30, 2004, Merck announced a voluntary worldwide withdrawal of VIOXX due to the increased risk of cardiovascular events such as heart attack and stroke.

14. The defendants knew, or ought to have known that VIOXX caused or materially contributed to an increased risk of harm to consumers' cardiovascular health, particularly heart attack and stroke. The defendants ought not to have proceeded to manufacture, market, distribute or sell VIOXX in British Columbia, particularly given the presence of other safer drugs available in the marketplace.

15. On or about May 16, 2001, the plaintiff was first prescribed VIOXX by his family physician at a dose of 25mg per day for back pain and arthritis. The plaintiff consumed VIOXX daily as directed and in accordance with the package label and consumer information provided to him.

16. On our about April 20, 2004, the plaintiff's family physician increased the plaintiff's prescription for VIOXX to 50 mg per day. The plaintiff consumed VIOXX daily at this higher dose.

17. The plaintiff continued to take VIOXX until on or about September 30, 2004.

18. On or about May 30, 2004, the plaintiff began to suffer severe chest pain and was taken to Royal Jubilee Hospital in Victoria where he was diagnosed as having suffered a heart attack.

19. As a result of the plaintiff's ingestion of VIOXX and subsequent heart attack, the plaintiff has received and will continue to receive medical treatment and medications for his heart condition for the rest of his life. Additionally, the plaintiff will require medical follow-up, testing and monitoring in relation to his heart condition for the rest of his life.

20. The plaintiff received no warning from the defendants prior to his ingesting VIOXX as to the risk of adverse cardiovascular complications. Had the plaintiff been warned of those risks, he would have declined VIOXX.

21. Prior to ingesting VIOXX, the plaintiff was physically active and in good health. As a result of ingesting VIOXX pursuant to the defendants' recommended and allowable dosages, the plaintiff has experienced, and will continue to experience weakness, pain, and fatigue, which have impaired and interfered with his enjoyment of life and regular daily activities.

22. At all material time, Merck owed the plaintiff and class members a duty of care to:

(a) Ensure that VIOXX was fit for its intended purpose;

(b) Conduct appropriate testing to ensure that VIOXX was safe for human ingestion before releasing VIOXX onto the British Columbia market;

(c) Conduct ongoing clinical trials and tests as to the safety and efficacy of VIOXX after releasing VIOXX to the British Columbia market;

(d) Adequately monitor and investigate reports of adverse reactions to VIOXX in British Columbia, in Canada, and throughout the world, as well as to adequately monitor studies investigating the efficacy and safety of VIOXX, and to act promptly to protect the British Columbia public in view of rising controversy regarding adverse reactions to VIOXX and questions concerning VIOXX's safety;

(e) Warn the plaintiff, British Columbia consumers, physicians and the health care community as to the serious health risks caused by ingesting VIOXX including, but not limited to, an increased risk of serious cardiovascular complications such as heart attack and stroke.

23. Merck breached the above duties of care and failed to meet the standards or care expected of them in the circumstances. In so doing, Merck caused or materially contributed to the injuries and subsequent losses sustained by the plaintiff and class members. Those injuries and losses were reasonably foreseeable.

24. Merck, their servants and agents, were negligent in the design, development, testing, licensing, distribution, monitoring, marketing and sale of VIOXX, particulars of which, include the following:

(a) Placing VIOXX on the market, when they knew, or ought to have known, that the drug was unsafe, unfit for human consumption and defective, and that it caused serious and potentially life threatening side effects including, but not limited to, heart attack and stroke;

(b) Failing to conduct adequate studies and tests on the safety of VIOXX;

(c) Failing to adequately appreciate the significance of data from clinical trials in patients who ingested VIOXX which revealed an increased risk of cardiovascular complications including heart attack and stroke;

(d) Ignoring data from clinical trials in patients who ingested VIOXX which revealed an increased risk of cardiovascular complications including heart attack and stroke;

(e) Failing to warn or to adequately warn in a timely fashion, class members and their physicians, pharmacists and health care providers of the risk of serious adverse effects of VIOXX, including heart attack and stroke, after they became aware of those serious adverse effects;

(f) Failing to warn or adequately warn in a timely fashion, the class members and their physicians, pharmacists and health care professionals of these adverse effects of VIOXX, including heart attack and stroke that are associated with increased dosage levels of VIOXX;

(g) Failing to instruct their employees, servants and agents to properly evaluate, record and advise on complaints of side effects of VIOXX;

(h) Failing to accurately and candidly disclose consumer complaints and the serious side effects of the ingestion of VIOXX to Health Canada in a timely manner, or at all;

(i) Failing to initiate timely review, evaluation and investigation of the side effects of VIOXX following complaints of injury, death and/or hazard to safety;

(j) Failing to properly assess and investigate complaints of VIOXX adequately upon receiving them;

(k) Refraining from reporting , in a timely manner, the serious side effects of VIOXX to regulators, doctors, health care providers, the public and class members in order to retain market value and maximize profits;

(l) Failing to conform with acceptable disclosure and reporting requirements under the *Food and Drugs Act* of Canada;

(m) Employing incompetent personnel;

(n) Failing to instruct their servants, agents, and officers to act ethically and responsibly;

(o) Failing to properly supervise their employees, and their subsidiaries and affiliating corporations;

(p) Encouraging their employees to increase sales volumes while neglecting to inform consumers, retailers, hospitals, physicians and pharmacists of the side effects of VIOXX;

(q) Failing to recall VIOXX in a timely manner;

(r) Introducing VIOXX onto the marketplace when they knew, or ought to have known that there were other drugs in the marketplace which were safer;

(s) Failing to provide warnings of the potential hazards of ingesting VIOXX on package inserts and package labels;

(t) Failing to warn the plaintiff, class members, their physicians and their health care providers about the need for comprehensive regular medical monitoring to ensure early discovery of serious cardiovascular complications arising from the use of VIOXX; and

(u) Encouraging and participating in the aggressive marketing and promotion of VIOXX, including the providing of free samples of VIOXX to physicians to give to their patients, when they knew or ought to have known of the serious adverse cardiovascular complications caused by the ingestion of VIOXX.

25. The risks of serious adverse cardiovascular complication associated with VIOXX ingestion, including but not limited to, heart attack and stroke, were in the exclusive knowledge and control of the defendants. The plaintiff was prescribed VIOXX by his doctor, filled his prescription at a licensed pharmacy, and followed the instructions for consumption. The plaintiff followed the VIOXX refill regime and repeatedly ingested VIOXX prior to its recall and removal from the Canadian marketplace.

26. The plaintiff's injuries would not have occurred but for the negligence of the defendants in failing to ensure that VIOXX was safe for use or, alternatively, in providing an adequate warning of the risks to the plaintiff, his physician and his pharmacist.

27. As a result of ingesting VIOXX in accordance with Merck's recommended and allowable dosage, the plaintiff and class members have sustained personal injury with pain and suffering, and loss of enjoyment of life including but not limited to, adverse cardiovascular complications, stroke, heart attack and death. The plaintiff and class members who remain alive will continue to experience the effects of their VIOXX ingestion with associated pain, suffering, loss of enjoyment of life. As a result of ingesting VIOXX, the plaintiff and other class members will continue to have pain and suffering which will impair and interfere with their enjoyment of life and regular daily activities.

28. Particulars of the past and ongoing loss or damage suffered by the plaintiff and class members includes

(a) Pain, suffering, loss of quality and enjoyment of life, and reduction of life expectancy;

(b) Past loss of income;

(c) Diminishment of earning capacity resulting in a loss of future income;

(d) Past and future costs of care;

(e) Past and future medical and other expenses, including the costs of diagnosis and treatment of VIOXX side effects; and

(f) Out-of-pocket expenses.

29. Merck intentionally withheld information about the serious health risks of using VIOXX during periods of risk of harm to the plaintiff and class members, and maintained secrecy for a considerable period of time to build profit and protect their financial interests.

30. Merck's conduct in bringing VIOXX to Canadian and British Columbia pharmacies for distribution to, and consumption by the plaintiff and the class members, and their failure to recall VIOXX in a timely fashion was high-handed, arrogant, devoid of care and a wanton disregard for the class members' health and safety. Furthermore, the defendants' conduct was indifferent to the consequences and motivated by economic considerations to capture market control, build cash flow, and earn profit. For such disreputable and deliberately injurious conduct, the plaintiff claims on behalf of himself and the class members, punitive damages, in amounts to be determined at the trial of this action by this Honourable Court.

31. In addition, the plaintiff seeks recovery of any medical expenses and hospital costs paid or required to be paid on his behalf or on behalf of class members.

32. The plaintiff pleads and relies upon the *Business Practices and Consumer Protection Act*, S.B.C. 2004, c.2 ("BPCPA"). The defendants are "suppliers" within the meaning of s.1 the BPCPA. The plaintiff and class members are consumers within the

meaning of s. 1 of the BPCPA. The defendants' sales of VIOXX in British Columbia to the plaintiff and class members are "consumer transactions" within the meaning of s.1 of the BPCPA.

33. The defendants' sale brochures, advertisements and other forms of representations to the public regarding VIOXX, are "representations" within the meaning of s.4(1) of the BPCPA. These representations had the capability, tendency or effect of misleading or deceiving a consumer such that they constituted deceptive conduct contrary to s.4 of the BPCPA. In particular, the defendants failed to disclose material facts concerning the risks of VIOXX contrary to s.4(3)(b)(vi) of the BPCPA, where the effect of such non-disclosure was misleading.

34. As a result of the defendants' breaches of the BPCPA, the plaintiff and class members have suffered damage and injury and are entitled to statutory remedies provided by s.171 and 172 of the BPCPA.

35. The plaintiff therefore claims on his own behalf and on behalf of class members:

(a) an order certifying this action as a class proceeding and appointing them representative plaintiffs under the *Class Proceedings Act*, R.S.B.C. 1996, c. 50;

(b) general damages;

(c) special damages;

(d) punitive damages;

(e) relief pursuant to the *Business Practices and Consumer Protection Act*, S.B.C. 2004, c.2;

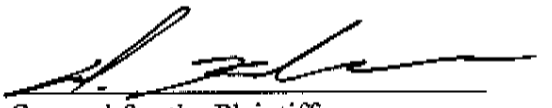
(f) interest pursuant to the *Court Order Interest Act*, R.S.B.C. 1996, c.79;

(g) such further and other relief as this Honourable Court may deem just.

36. The plaintiff claims the right to serve the defendants who are outside British Columbia, without leave, pursuant to Rules 13(1)(h), (j) and (o) of the British Columbia Rules of Court on the grounds that the proceeding is founded on a tort committed in British Columbia, the defendants outside British Columbia are necessary or proper parties to a proceeding properly brought against a defendant duly served in British Columbia, and the claim arises out of goods or merchandise sold or delivered in British Columbia.

PLACE OF TRIAL: Vancouver, British Columbia

DATED at Vancouver, November 12, 2004.



Counsel for the Plaintiff

THIS STATEMENT OF CLAIM is filed and served by David A. Klein of the firm of Klein, Lyons, Barristers and Solicitors, whose place of business and address for service and delivery is at 1100 – 1333 West Broadway, Vancouver, B.C. V6H 4C1. Telephone: (604) 874-7171. Fax: (604) 874-7180, and their co-counsel, Harvey Pollock, Q.C. of the firm of Pollock & Company, Barristers and Solicitors, Winnipeg, Manitoba.