

**ONTARIO
SUPERIOR COURT OF JUSTICE**

B E T W E E N:

NATALIA KARASIK and DANIEL BURTMAN

Plaintiffs

and

1945087 ONTARIO INC., 1945086 ONTARIO INC., LIBERTY
DEVELOPMENT CORPORATION and 1834371 ONTARIO INC.

Defendants

Proceeding under the *Class Proceedings Act*, 1992, S.O. 1992, c. 6

BOOK OF AUTHORITIES OF THE PLAINTIFFS

December 2, 2020

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LIST OF AUTHORITIES

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- 3 *Winter v. C.R. Bard*, 2020 ONSC 3532 at paras 19-20

2020 ONSC 1949
Ontario Superior Court of Justice

Arbuthnot v. Whirlpool Canada LP

2020 CarswellOnt 5680, 2020 ONSC 1949, 319 A.C.W.S. (3d) 26

**BEVERLEY ARBUTHNOT, ANGELE CHAREST AND DEBORAH
PLESTER, on behalf of themselves and all others similarly
situated (Plaintiffs) and WHIRLPOOL CANADA LP, WHIRLPOOL
CORPORATION, and WHIRLPOOL PROPERTIES, INC. (Defendant)**

Perell J.

Heard:
Judgment: April 22, 2020
Docket: CV-19-00616397-00CP

Counsel: Jia Wang, for Plaintiffs

Subject: Civil Practice and Procedure

Related Abridgment Classifications

Civil practice and procedure

V Class and representative proceedings

V.2 Representative or class proceedings under class proceedings legislation

V.2.d Orders, awards and related procedures

V.2.d.iii Termination of proceedings

Headnote

Civil practice and procedure --- Class and representative proceedings — Representative or class proceedings under class proceedings legislation — Orders, awards and related procedures — Termination of proceedings

In order to bring their proposed class action, plaintiffs signed contingency fee retainer agreement with law firm — Firm's retainer was contingent on plaintiffs obtaining after-the-event insurance coverage — Plaintiffs commenced action — Plaintiffs were unable to secure insurance or funding from Class Proceedings Fund, and had exhausted all other avenues for third-party funding — Pre-condition of firm's contingency fee agreement with plaintiffs could not be fulfilled — It was requirement of class proceedings regime that representative plaintiffs be represented by class counsel — Plaintiffs brought motion for leave to discontinue their action — Motion granted — There was no prospect of putative class members, who were oblivious of action even having been started, being prejudiced — There was no sense in which any putative class members could be said to have been relying upon this action.

Table of Authorities

Cases considered by Perell J.:

Logan v. Canada (Minister of Health) (2003), 2003 CarswellOnt 425, 36 C.P.C. (5th) 176 (Ont. S.C.J.) — referred to
Logan v. Canada (Minister of Health) (2004), 2004 CarswellOnt 2662, 47 C.P.C. (5th) 1, (sub nom. *Logan v. Canada (Minister of Health)*) 188 O.A.C. 294, 71 O.R. (3d) 451 (Ont. C.A.) — referred to

Statutes considered:

Class Proceedings Act, 1992, S.O. 1992, c. 6

Generally — referred to

s. 29 — considered

MOTION by plaintiffs for leave to discontinue their action.

Perell J.:

1 This is a proposed class action under the *Class Proceedings Act, 1992*.¹ The Plaintiffs, Beverley Arbuthnot, Angele Charest, and Deborah Plester bring a motion for leave to discontinue their action against Whirlpool Canada LP, Whirlpool Corporation, and Whirlpool Properties Inc.

2 In order to bring their proposed class action, the Plaintiffs signed a contingency fee retainer agreement with Hodder, Wang LLP. The firm's retained was contingent on the Plaintiffs obtaining After-the-Event insurance coverage.

3 The Plaintiffs commenced the action on March 18, 2019 to protect the putative Class Members' claims from being statute-barred and then set about to obtain After-the-Event insurance coverage.

4 The existence of the action was known only to the Plaintiffs. No announcement was made of the action. There was no communication with the putative Class Members. The action was never listed in the National Class Actions Database of the Canadian Bar Association.

5 On September 10, 2019, I granted an Order extending the time for service of the Statement of Claim to March 18, 2020, to allow time for the Plaintiffs to obtain funding, including applying to the Class Proceedings Fund.

6 In March 2020, the Plaintiffs served the Statement of Claim on the Defendants.

7 On March 16, 2020, Whirlpool Canada LP, served a Notice of Intent to Defend.

8 The Plaintiffs have been unable to secure insurance or funding from the Class Proceedings Fund. They have exhausted all other avenues for third-party funding. Consequently, the pre-condition of the law firm's contingency fee agreement with the Plaintiffs cannot be fulfilled.

9 It is a requirement of the class proceedings regime that the Representative Plaintiffs be represented by Class Counsel.

10 The Plaintiffs have instructed their counsel to discontinue the proceeding. The Defendants consent to the motion for discontinuance of the proposed class action, without costs.

11 The parties have consented to the following notice being distributed to putative Class Members:

NOTICE OF DISCONTINUANCE OF PROPOSED CLASS ACTION AGAINST

WHIRLPOOL REGARDING AQUALIFT OVENS

Please Read this Notice Carefully. It May Affect Your Legal Rights.

By Order of the Ontario Superior Court of Justice, persons resident in Canada who have purchased an oven designed, manufactured, and sold by Whirlpool Canada LP, Whirlpool Corporation, and Whirlpool Properties, Inc. (collectively the "Whirlpool Defendants") with its proprietary "AquaLift® Self-Cleaning Technology" ("AquaLift Oven") are advised that:

In May 2019, a proposed class proceeding was commenced in Ontario alleging that the Whirlpool Defendants have designed, manufactured, advertised, marketed, and sold a line of gas and electric stoves, ranges, and ovens with its proprietary "AquaLift® Self-Cleaning Technology" ("AquaLift Ovens") using marketing that is false, deceptive, and misleading to reasonable consumers. The plaintiffs allege that this false advertising resulted in damage to purchasers of AquaLift Ovens, contrary to provincial consumer protection legislations, the *Competition Act*, and the *Trade-marks Act*.

In March 2020, the plaintiffs and their legal counsel ("Hodder, Wang LLP") decided that the class action will no longer be pursued. They filed motion materials with the Ontario Superior Court of Justice to obtain approval of the discontinuance. The discontinuance was approved by the Court and took effect on [date of filing of discontinuance].

This discontinuance relates to the Whirlpool AquaLift Oven class action only. It does not relate to any of Whirlpool's other oven products.

YOU SHOULD TAKE NOTICE THAT THE limitation period for bringing a claim, if there is any time left within it, started to run again on [date of filing of discontinuance]. On the expiry of a limitation period a right to sue may be extinguished.

TAKE NOTICE THAT because the limitation period for bringing a claim has started to run again, if you wish to pursue a court claim against Whirlpool in relation to an AquaLift Oven, you should issue a Notice of Action or Statement of Claim forthwith, if you have not already done so,.

If you have any questions about the discontinuance or the recommencement of the running of the limitation period, please contact Hodder, Wang LLP at:

HODDER, WANG LLP

[address, phone number]

It is recommended that you obtain legal advice from Hodder, Wang LLP or a lawyer of your choice.

PUBLICATION OF THIS NOTICE HAS BEEN AUTHORIZED BY THE ONTARIO SUPERIOR COURT OF JUSTICE.

12 Hodder, Wang LLP intends to distribute the Notice of Discontinuance by (a) posting it on the firm website; and (b) providing it to any person who requests it.

13 Section 29 of the *Class Proceedings Act, 1992* requires court approval for the discontinuance, abandonment, or settlement of a class action. 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.

14 A motion for discontinuance 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 plaintiff, the putative Class Members, or the defendant will be prejudiced.²

15 In the immediate case, there is no prospect of the putative Class Members, who are oblivious of the action even having been started, being prejudiced. There is no sense in which any putative Class Members can be said to have been relying upon this action

16 I, therefore, grant the Plaintiffs' motion.

17 In the circumstances of the Covid-19 emergency, these Reasons for Decision are deemed to be an Order of the court that is operative and enforceable without any need for a signed or entered, formal, typed order. The form of the Order is set out as Schedule "A" to these Reasons for Decision.

18 The parties may submit formal orders for signing and entry once the court re-opens; however, these Reasons for Decision are an effective and binding Order from the time of release.

Motion granted.

Appendix

Court File No. CV-19-00616397-00CP

ONTARIO

SUPERIOR COURT OF JUSTICE

THE HONOURABLE MR. JUSTICE PERELL ---, THE --- DAY OF APRIL 2020

BETWEEN:

BEVERLEY ARBUTHNOT, ANGELE CHAREST AND DEBORAH PLESTER, on behalf of themselves and all others similarly situated

Plaintiffs

- and —

WHIRLPOOL CANADA LP, WHIRLPOOL CORPORATION, and WHIRLPOOL PROPERTIES, INC.

Defendants

Proceeding under the *Class Proceedings Act, 1992*

ORDER

THIS MOTION, made by the plaintiffs was read this day at Toronto.

ON READING the plaintiffs' notice of motion, the affidavit of J. Gardner Hodder, sworn April 3, 2020, and the consent of the counsels,

1. THIS COURT ORDERS that leave to discontinue the within proposed class action is granted.

2. THIS COURT ORDERS that Hodder, Wang LLP distribute a Notice of Intent to Discontinue the proposed class action, in the form of Schedule "A" annexed hereto, to any person who requests it.

Footnotes

[1](#) S.O. 1990, c. 6.

[2](#) *Logan v. Canada (Minister of Health)*, [2003] O.J. No. 418 (Ont. S.C.J.), aff'd (2004), 71 O.R. (3d) 451 (Ont. C.A.).

2020 ONSC 740
Ontario Superior Court of Justice

Barrett v. 390996 Ontario Limited

2020 CarswellOnt 1468, 2020 ONSC 740, 314 A.C.W.S. (3d) 693

**CLIVE BARRETT (Plaintiff) and 390996 ONTARIO
LIMITED o/a WOODCRAFT (Defendant)**

Perell J.

Heard:

Judgment: February 3, 2020

Docket: CV-19-627581

Counsel: Ryan Kornblum, for Plaintiffs

Subject: Civil Practice and Procedure

Related Abridgment Classifications

Civil practice and procedure

V Class and representative proceedings

V.2 Representative or class proceedings under class proceedings legislation

V.2.d Orders, awards and related procedures

V.2.d.iii Termination of proceedings

Headnote

Civil practice and procedure --- Class and representative proceedings — Representative or class proceedings under class proceedings legislation — Orders, awards and related procedures — Termination of proceedings

Plaintiff brought proposed class action against defendant for its alleged failure to pay overtime and also brought personal wrongful dismissal action — Plaintiff settled his wrongful dismissal action and in course of settling proceeding, became satisfied that there was no viable class action — Plaintiff's fellow employees were not aware that he had commenced class action on their behalf — Plaintiff brought motion to withdraw proposed class action on consent — Motion granted — There was no prospect of putative class members being prejudiced — There was no sense in which any putative class members could be said to have been relying on action.

Table of Authorities

Cases considered by Perell J.:

Logan v. Canada (Minister of Health) (2003), 2003 CarswellOnt 425, 36 C.P.C. (5th) 176 (Ont. S.C.J.) — referred to

Logan v. Canada (Minister of Health) (2004), 2004 CarswellOnt 2662, 47 C.P.C. (5th) 1, (sub nom. *Logan v. Canada (Minister of Health)*) 188 O.A.C. 294, 71 O.R. (3d) 451 (Ont. C.A.) — referred to

Statutes considered:

Class Proceedings Act, 1992, S.O. 1992, c. 6

Generally — referred to

s. 29 — considered

MOTION by plaintiff to withdraw proposed class action on consent.

Perell J.:

1 Pursuant to the *Class Proceedings Act, 1992*,¹ Clive Barrett brought a proposed class action against 390996 Ontario Limited, which carried on business as Woodcraft. He now brings a motion to withdraw the action on consent and without costs.

2 Mr. Barrett was employed by Woodcraft for approximately 18 years until he was dismissed on April 13, 2018. He commenced a wrongful dismissal action and he also commenced a proposed class action for Woodcraft's alleged failure to pay overtime.

3 Mr. Barrett's fellow employees were not aware that he had commenced a class action on their behalf.

4 Mr. Barrett settled his personal wrongful dismissal action. In the course of settling the action, Mr. Barrett became satisfied that save possibly for a very few fellow-employees, Woodcraft had fulfilled its obligations to pay for overtime. There was no viable class action.

5 With Woodcraft's consent, Mr. Barrett now wishes to discontinue the proposed class action without costs.

6 Section 29 of the *Class Proceedings Act, 1992* requires court approval for the discontinuance, abandonment, or settlement of a class action. 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.

7 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.²

8 In the immediate case, there is no prospect of the putative Class Members, who are oblivious of the action even having been started, being prejudiced. There is no sense in which any putative Class Members can be said to have been relying upon this action I, therefore, grant Mr. Barrett's motion.

9 Order accordingly.

Motion granted.

Footnotes

¹ S.O. 1992, c. 6.

2 *Logan v. Canada (Minister of Health)*, [2003] O.J. No. 418 (Ont. S.C.J.), aff'd (2004), 71 O.R. (3d) 451 (Ont. C.A.).

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Most Negative Treatment: Check subsequent history and related treatments.

2020 ONSC 3532
Ontario Superior Court of Justice

Winter v. C.R. Bard

2020 CarswellOnt 8058, 2020 ONSC 3532, 320 A.C.W.S. (3d) 565

**KENNETH A. WINTER, JACQUELINE WINTER and BARBARA
KENNEDY (Plaintiffs) and C.R. BARD, INC., BARD PERIPHERAL
VASCULAR, INC. and BARD CANADA INC. (Defendants)**

Perell J.

Heard:
Judgment: June 9, 2020
Docket: CV-16-560054-00CP

Counsel: Charles M. Wright, for Plaintiffs
Michael A. Eizenga, for Defendants

Subject: Civil Practice and Procedure
Related Abridgment Classifications

Civil practice and procedure

[XVI](#) Disposition without trial

[XVI.5](#) Discontinuance of action

[XVI.5.a](#) With leave

[XVI.5.a.ii](#) Miscellaneous

Headnote

Civil practice and procedure --- Disposition without trial — Discontinuance of action — With leave — Miscellaneous

Proposed class action under Class Proceedings Act, 1992 related to optionally retrievable inferior vena cava (IVC) filters manufactured and sold by defendants — IVC filters were medical devices that were implanted into inferior vena cava, major vein, to intercept blood clots before they travelled to lungs — Plaintiffs alleged that defendants were negligent in causing injuries and harm to proposed class members who were implanted with defendants' optionally retrievable IVC filters — Similar actions were commenced in Quebec, British Columbia and Saskatchewan — In Ontario and Quebec actions, parties had reached agreement to discontinue proposed class action to settle 11 individual claims — Parties brought motion for approval of discontinuance of class action — Motion granted — Motion for discontinuance should be carefully scrutinized, and factors for court to consider included whether proceeding was commenced for improper purpose, whether there was viable replacement party, if necessary, so that putative class members were not prejudiced or whether parties would be prejudiced — Fundamental concern on motion for court approval of discontinuance was that interests of putative class members would not be prejudiced or that any prejudice was mitigated — Plaintiffs met test for discontinuance — In circumstances of case for putative class members who settled claims, discontinuance was beneficial and in their best interests — For other putative class members, they were not prejudiced by discontinuance — It was unclear whether there were putative class members beyond putative class members who contacted putative class counsel that might be relying on proposed class action in Ontario, but it was known that putative class members were few in number — Discontinuance would not prejudice non-settling class members as they may resort to similar class proceedings commenced in Saskatchewan and British Columbia against defendants — Limitation periods for putative class members had been suspended — Each of putative class counsel firms would post discontinuance notice on its website.

Table of Authorities

Cases considered by *Perell J.*:

Drywall Acoustic Lathing and Insulation, Local 675 Pension Fund (Trustees of) v. SNC-Lavalin Group Inc. (2012), 2012 ONSC 5288, 2012 CarswellOnt 11520, 112 O.R. (3d) 569, 41 C.P.C. (7th) 375 (Ont. S.C.J.) — referred to

Frank v. Farlie, Turner & Co., LLC (2011), 2011 ONSC 7137, 2011 CarswellOnt 13816, 38 C.P.C. (7th) 266 (Ont. S.C.J.) — referred to

Hudson v. Austin (2010), 2010 ONSC 2789, 2010 CarswellOnt 3211, 96 C.P.C. (6th) 121 (Ont. S.C.J.) — referred to

Kouyoumjian v. Johnson & Johnson (2020), 2020 ONSC 1948, 2020 CarswellOnt 4795 (Ont. S.C.J.) — referred to

Kuiper v. Cook (Canada) Inc. (2020), 2020 ONSC 128, 2020 CarswellOnt 96, 149 O.R. (3d) 521 (Ont. Div. Ct.) — considered

Logan v. Canada (Minister of Health) (2003), 2003 CarswellOnt 425, 36 C.P.C. (5th) 176 (Ont. S.C.J.) — referred to

Logan v. Canada (Minister of Health) (2004), 2004 CarswellOnt 2662, 47 C.P.C. (5th) 1, (sub nom. *Logan v. Canada (Minister of Health)*) 188 O.A.C. 294, 71 O.R. (3d) 451 (Ont. C.A.) — referred to

Naylor v. Coloplast Canada Corp. (2016), 2016 ONSC 1294, 2016 CarswellOnt 2648, 87 C.P.C. (7th) 409 (Ont. S.C.J.) — considered

Statutes considered:

Class Proceedings Act, 1992, S.O. 1992, c. 6

Generally — referred to

s. 19 — referred to

s. 29 — considered

Emergency Management and Civil Protection Act, R.S.O. 1990, c. E.9

s. 7.1(2) [en. 2002, c. 14, s. 11] — referred to

Family Law Act, R.S.O. 1990, c. F.3

Generally — referred to

MOTION by parties for approval of discontinuance of class action.

Perell J.:

1 This proposed class action in Ontario under the *Class Proceedings Act*, 1992,¹ relates to optionally retrievable inferior vena cava filters ("IVC Filters") manufactured and sold by the Defendants, C.R. Bard, Inc., Bard Peripheral Vascular, Inc., and Bard Canada Inc. The IVC Filters are medical devices that are implanted into the inferior vena cava, a major vein, to intercept blood clots before they travel to the lungs.

2 Siskinds LLP and McKenzie Lake Lawyers LLP (putative Class Counsel) represent the Plaintiffs. The proposed class action was one of two Bard IVC Filters class actions commenced by putative Class Counsel. A similar proceeding was commenced in Québec by McKenzie Lake Lawyers LLP and Siskinds LLP's affiliate law firm Siskinds Desmeules Avocats s.e.n.c.r.l.

3 There are similar actions in British Columbia² and in Saskatchewan³ on behalf of people in Canada who were implanted with the Defendants' Retrievable IVC Filters.

4 In the Ontario action and in the Québec action, the parties have reached an agreement to discontinue this proposed class action to settle 11 individual claims. The discontinuance will not prejudice the putative Class Members whose claims have not been settled. The putative Class Members may have resort to the similar class proceedings commenced in Saskatchewan and British Columbia against the Defendants. Limitation periods for putative Class Members will remain suspended due to the actions in British Columbia and Saskatchewan. Putative Class Members may be able to resort to individual actions. In Ontario, at the moment, because of the state of emergency associated with the COVID-19 pandemic, limitation periods have been suspended retroactive to March 16, 2020 and the suspension will last for the duration of the state of emergency.⁴

5 The Ontario action was commenced on April 22, 2016. The Plaintiffs are Kenneth A. Winter, Jacqueline Winter, and Barbara Kennedy. They allege that the Defendants were negligent in causing injuries and harm to the proposed Class Members who were implanted with the Defendants' optionally Retrievable IVC Filters.

6 Putative Class Counsel will also be seeking a discontinuance of the Québec action as condition of the resolutions of the claims in the immediate case.

7 In the four years since the litigation began, Class Counsel have only been contacted by approximately 14 Canadians implanted with the Defendants' IVC Filters.

8 It should also be noted that the putative Class Counsel in this case are also the lawyers in *Kuiper v. Cook (Canada) Inc.* [2020 ONSC 128 (Ont. Div. Ct.)], another class proceeding about optionally retrievable IVC filters. In that case, putative Class Counsel have been contacted by approximately 37 Canadians implanted with IVC filters.

9 This action has been actively litigated. Voluminous certification materials have been filed by both parties, including four Motion Records and multiple facta. Each party has cross-examined multiple affiants of the opposing party. The parties have been before the court (in person, writing, or telephone) on at least three occasions. The certification motion in this action, however, has yet to be heard. If certification were to be granted, it is anticipated that establishing liability will be a serious challenge.

10 Based on the circumstances of these cases, including the small number of known putative Class Members, putative Class Counsel saw merit in pursuing the resolution of the individual claims of the persons who had reached out to them.

11 The parties engaged in discussions to settle individual cases. Settlement discussions included a fulsome evaluation of the individual cases. Putative Class Counsel achieved settlements in 11 cases.

12 Three additional cases became known to putative Class Counsel after the resolution of the initial 11 cases.

13 The two proposed Representative Plaintiffs in Ontario and the Representative Plaintiff in Québec have given their instructions to settle their cases on an individual basis. The eight other individuals have given instructions to settle their individual cases. The proposed *Family Law Act* Representative Plaintiff has given her approval to the discontinuance.

14 Non-settling Class Members will not be prejudiced by the discontinuance of this uncertified class action. As noted above, there are similar class proceedings in Saskatchewan and British Columbia that have been initiated on behalf of people implanted with Bard IVC Filters, and the putative Class Members in this action remain putative Class Members in those actions. Limitation periods for putative Class Members have been suspended since April 22, 2016, when the Statement of Claim was issued in the within action, and limitation periods will remain suspended due to the existence of those similar actions. As noted above, limitation periods are currently suspended in Ontario.

15 The parties have agreed on the form and the manner of distribution of a notice of the discontinuance. The notice states:

A proposed class action was commenced in Ontario alleging that Bard retrievable IVC Filters, designed to trap blood clots passing through the IVC (a large vein that returns blood from the lower body to the heart), were negligently designed, manufactured, and distributed, resulting in increased complications as compared to other treatment options. Bard denies these allegations.

The parties have reached an agreement to discontinue the Ontario class action. The discontinuance was approved by the Ontario Superior Court of Justice. The discontinuance relates to the Bard IVC Filters class action only. It does not relate to claims against other manufacturers.

If you received a Bard IVC Filter and wish to pursue legal action, you may still be able to do so either through currently pending class actions in Saskatchewan and British Columbia or by way of an individual action. Siskinds [or McKenzie

Lake Lawyers] can provide you with further information regarding your options. If you were implanted with an IVC Filter, we encourage you to email IVCFilters@siskinds.com [or a McKenzie Lake email address] or call us toll-free, at [...].

16 Each of the putative Class Counsel firms in the immediate action and in the Québec action will post the Discontinuance Notice on its website. The Discontinuance Notice informs individuals that other class actions are pending and that they may contact Class Counsel for free advice on their options. It would appear that the putative Class Members may be able to negotiate individual settlements or commence individual actions or participate in the actions in British Columbia or Saskatchewan.

17 The parties have agreed that the discontinuance is on a without costs basis.

18 Section 29 of the *Class Proceedings Act, 1992* requires court approval for the discontinuance, abandonment, or settlement of a class action. 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.

19 A motion for discontinuance 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 plaintiff or the defendant will be prejudiced.⁵

20 The fundamental concern on a motion for court approval of a discontinuance is that the interests of putative Class Members will not be prejudiced or that any prejudice is mitigated.⁶ The test for approving a discontinuance is different from the test for approving a settlement. A discontinuance of a class action does not have to be beneficial or in the best interests of the putative class members; whereas, a settlement must, in all circumstances, be fair, reasonable, and in the best interests of the class.⁷

21 The proposed discontinuance of this action is similar to the approved discontinuance of *Naylor v. Coloplast Canada Corp.*⁸ Like the situation in *Naylor*, the immediate class action is a product liability claim where a resolution has been reached for the known members of a relatively small number of claimants. There is no evidence that suggests that the proposed class action was brought for an improper purpose.

22 In the immediate case, I am satisfied that the Plaintiffs have met the test for a discontinuance. In the circumstances of the immediate case for those putative Class Members who have settled claims, this discontinuance is beneficial and in their best interests. For the other putative Class Members, they are not prejudiced by the discontinuance.

23 In the immediate case, it is unclear whether there are putative Class Members beyond the putative Class Members who contacted putative Class Counsel that might be relying on the proposed class action in Ontario. What is known is that the putative Class Members are few in number. That there may be other putative Class Members possibly relying on the proposed class action, however, does not mean that they are necessarily prejudiced by its discontinuance apart from the effect of a discontinuance on the running of limitation periods. Putative Class Members have no absolute entitlement to a class proceeding. In the immediate case, although the putative Class Members can no longer rely on the proposed class action in Ontario, as noted above they have alternatives.

24 The *Class Proceedings Act, 1992* requires the court to consider whether a notice of discontinuance should include: (a) an account of the conduct of the proceeding; and (b) a statement of the result of the proceeding. In the immediate case, putative Class Members who research the IVC Filters class actions will find the notice of discontinuance on the websites of each of putative Class Counsel's websites. The proposed notice contains an account of the proceeding, the fact of the discontinuance, and options available to putative Class Members for continuing to pursue claims. I am satisfied that the notice is appropriate and satisfies the requirements of the *Class Proceedings Act, 1992*.

25 Therefore, pursuant to sections 19 and 29 of the *Class Proceedings Act, 1992*, I approve the discontinuance of this action and the Notice of Discontinuance, and I order that the Notice of Discontinuance be posted on the website of each putative Class Counsel firm.

26 I shall make an Order in the form of the Order attached as Schedule "A" to these Reasons for Decision.

27 In the circumstances of the Covid-19 emergency, these Reasons for Decision are deemed to be an Order of the court that is operative and enforceable without any need for a signed or entered, formal, typed order.

28 The parties may submit formal orders for signing and entry once the court re-opens; however, these Reasons for Decision are an effective and binding Order from the time of release.

Schedule "A"

Court File No.: CV-16-560054-00CP

ONTARIO SUPERIOR COURT OF JUSTICE

THE HONOURABLE) DAY, THE
)	
JUSTICE P. PERELL)	DAY OF, 2020

BETWEEN:

KENNETH A. WINTER, JACQUELINE
WINTER and BARBARA KENNEDY

Plaintiffs

- and -

C.R. BARD, INC., BARD PERIPHERAL
VASCULAR, INC. and BARD CANADA INC.

Defendants

Proceeding under the *Class Proceedings Act, 1992*

ORDER

THIS MOTION made by the Plaintiffs for an Order that the within proceeding be discontinued was heard in writing at the Superior Court of Justice, 361 University Avenue, Toronto, Ontario.

WHEREAS, putative class members in this action whose claims are not being settled on an individual basis will remain putative class members in similar class proceedings that have been commenced in British Columbia (*Irene Fraser v. Cook Group, Inc., Cook, Inc. Cook Medical, LLC, William Cook Europe ApS, C.R. Bard, Inc. and Bard Peripheral Vascular, Inc.*, Court file number 178129) and Saskatchewan (*Douglas Bussey v. Cook Group, Inc., Cook, Inc. Cook Medical, LLC, William Cook Europe APS, C.R. Bard Inc. And Bard Peripheral Vascular, Inc.*, Court file number QBG 2729 of 2016) on behalf of people in Canada who were implanted with the Defendants' Retrievable IVC Filters;

WHEREAS, limitation periods for putative class members have been suspended since April 22, 2016, when the Statement of Claim in this action was issued, and will remain suspended due to the existence of the similar actions in Saskatchewan and British Columbia; and

ON READING the materials filed by counsel for the Plaintiffs and on being advised that the Defendants take no position on the motion:

1. *THIS COURT ORDERS* that the within proceeding be and hereby is discontinued, effective as of the date of this Order.
2. *THIS COURT ORDERS* that a Discontinuance Notice, substantially in the form of the attached Schedule "A", is approved pursuant to section 19 and section 29 of the *Class Proceedings Act, 1992*, SO 1992, c 6 ("*CPA*").
3. *THIS COURT ORDERS* that the Discontinuance Notice shall be posted on the website of each Class Counsel firm.
4. *THIS COURT ORDERS* that the motion to discontinue this action is granted without costs to either party.

Date:

.....

The Honourable Justice Perell

SCHEDULE "A": DISCONTINUANCE NOTICE

A proposed class action was commenced in Ontario alleging that Bard retrievable IVC Filters, designed to trap blood clots passing through the IVC (a large vein that returns blood from the lower body to the heart), were negligently designed, manufactured, and distributed, resulting in increased complications as compared to other treatment options. Bard denies these allegations.

The parties have reached an agreement to discontinue the Ontario class action. The discontinuance was approved by the Ontario Superior Court of Justice. The discontinuance relates to the Bard IVC Filters class action only. It does not relate to claims against other manufacturers.

If you received a Bard IVC Filter and wish to pursue legal action, you may still be able to do so either through currently pending class actions in Saskatchewan and British Columbia or by way of an individual action. Siskinds [or McKenzie Lake Lawyers] can provide you with further information regarding your options. If you were implanted with an IVC Filter, we encourage you to email IVCFilters@siskinds.com [or a McKenzie Lake email address] or call us toll-free, at (800) 461-6166 ?? 2406 (English) or ?? 2409 (French) [or a McKenzie Lake phone number]

Motion granted.

Footnotes

- 1 S.O. 1992, c. 6.
- 2 *Irene Fraser v. Cook Group, Inc., Cook, Inc. Cook Medical, LLC, William Cook Europe ApS, C.R. Bard, Inc. and Bard Peripheral Vascular, Inc.*, Court file number 178129
- 3 *Douglas Bussey v. Cook Group, Inc., Cook, Inc. Cook Medical, LLC, William Cook Europe APS, C.R. Bard Inc. And Bard Peripheral Vascular, Inc.*, Court file number QBG 2729 of 2016
- 4 The Order was made on March 20, 2020 under subsection 7.1(2) of the *Emergency Management and Civil Protection Act* R.S.O. 1990, c E.9.
- 5 *Logan v. Canada (Minister of Health)*, [2003] O.J. No. 418 (Ont. S.C.J.), aff'd, (2004), 71 O.R. (3d) 451 (Ont. C.A.).
- 6 *Drywall Acoustic Lathing and Insulation, Local 675 Pension Fund (Trustees of) v. SNC-Lavalin Group Inc.*, 2012 ONSC 5288 (Ont. S.C.J.); *Frank v. Farlie, Turner & Co., LLC*, 2011 ONSC 7137 (Ont. S.C.J.); *Hudson v. Austin*, 2010 ONSC 2789 (Ont. S.C.J.).
- 7 *Frank v. Farlie, Turner & Co., LLC*, 2011 ONSC 7137 (Ont. S.C.J.)
- 8 2016 ONSC 1294 (Ont. S.C.J.). See also *Kouyoumjian v. Johnson & Johnson*, 2020 ONSC 1948 (Ont. S.C.J.).

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NATALIA KARASIK et al.
Plaintiffs

-and- 1945087 ONTARIO INC. et al.
Defendants

Court File No. CV-19-630024-00CP

ONTARIO
SUPERIOR COURT OF JUSTICE

PROCEEDING COMMENCED AT
TORONTO

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RCP-E 4C (May 1, 2016)