

CITATION: Winter v. C.R. Bard, 2020 ONSC 3532
COURT FILE NO.: CV-16-560054-00CP
DATE: 2020/06/09

**ONTARIO
SUPERIOR COURT OF JUSTICE**

BETWEEN:)
)
KENNETH A. WINTER, JACQUELINE) *Charles M. Wright* for the Plaintiffs
WINTER and BARBARA KENNEDY)
)
Plaintiffs)
)
- and -)
)
C.R. BARD, INC., BARD PERIPHERAL) *Michael A. Eizenga* for the Defendants
VASCULAR, INC. and BARD CANADA)
INC.)
Defendants)
)
Class Proceedings Act, 1992) **HEARD:** In writing

PERELL, J.

REASONS FOR DECISION

[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

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

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.*, 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 facts. 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

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.

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 Corporation*.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

⁵ *Logan v. Canada (Minister of Health)*, [2003] O.J. No. 418 (S.C.J.), aff'd (2004), 71 O.R. (3d) 451 (C.A.).

⁶ *Drywall Acoustic Lathing and Insulation Local 675 Pension Fund (Trustees of) v. SNC-Lavalin Group Inc*, 2012 ONSC 5288; *Frank v. Farlie, Turner & Co, LLC*, 2011 ONSC 7137; *Hudson v. Austin*, 2010 ONSC 2789.

⁷ *Frank v. Farlie, Turner & Co, LLC*, 2011 ONSC 7137

⁸ 2016 ONSC 1294. See also *Kouyoumjian v. Johnson & Johnson*, 2020 ONSC1948.

Class Members can no longer rely on the proposed class action in Ontario, as noted above they have alternatives.

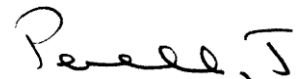
[24] The *Class Proceedings Act, 1992* requires the court to consider whether a notice of discontinuance should include: (a) an account of the conduct of the proceeding; and (b) a statement of the result of the proceeding. In the immediate case, putative Class Members who research the IVC Filters class 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.

A handwritten signature in black ink, appearing to read "Perell, J.", written in a cursive style.

Perell, J.

Schedule "A"

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

ONTARIO
SUPERIOR COURT OF JUSTICE

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

B E T W E E N:

**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.

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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 x 2406 (English) or x 2409 (French) [or a McKenzie Lake phone number]

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Plaintiffs

- and -

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

Defendants

REASONS FOR DECISION

PERELL J.

Released: June 9, 2020