CITATION: Kuiper v. Cook (Canada) Inc. 2024 ONSC 2829
COURT FILE NO.: CV-17-578210-00CP
DATE: 20240517

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:	
ARIE KUIPER, WENDY KOPECK and GARRY KOPECK	*Daniel E. H. Bach* and *Katherine Shapiro* for the Plaintiffs
Plaintiffs	
- and –	
COOK (CANADA) INC., COOK INCORPORATED, and WILLIAM COOK EUROPE APS	*Sarah Armstong* for the Defendants
Defendants	**HEARD**: May 17, 2024
Proceeding under the *Class Proceedings Act, 1992*	

PERELL, J.

REASONS FOR DECISION

A. Introduction

[1] In this certified class action under the *Class Proceedings Act, 1992*,[1] a settlement has been reached between the Plaintiffs, Arie Kuiper, Wendy Kopeck and Garry Kopeck and the Defendants, Cook (Canada) Inc., Cook Incorporated, and William Cook Europe APS.

[2] The class action relates to optionally retrievable inferior vena cava filters, which are medical devices designed, manufactured, marketed, and sold by the Defendants in Canada.

[3] The Class Members are Canadian residents who were implanted with the Cook IVC Filter Products on or before January 8, 2020. They allege that the Defendants marketed and sold the IVC Filters without properly warning of the alleged increased risks of complications and injuries. The Defendants deny the allegations.

[4] The Plaintiffs seek approval of the settlement agreement and approval of the fees of: (a) Siskinds LLP, (b) Siskinds Desmeules Avocats, s.e.n.c.r.l., (c) McKenzie Lake Lawyers LLP, (d) Merchant Law Group LLP, and (e) and Koskie Minsky LLP, the consortium of law firms that comprise Class Counsel.

[1] S.O. 1992, c. 6.

B. Facts

[5] In January and February 2016, two actions were commenced against the Defendants by McKenzie Lake Lawyers LLP (the "Kopeck Action") and by Siskinds LLP (the "Kuiper Action"). Subsequently Class Counsel agreed to work together and brought a motion to consolidate the actions with an amended consolidated claim.

[6] The Kuiper Retainer Agreement stipulated that Class Counsel would be entitled to seek this Court's approval for a fee in the amount of 27.5% of the recovery achieved for the Class, plus disbursements and applicable taxes. The Kopeck Retainer Agreements allowed Class Counsel to seek a 30% fee, plus disbursements and applicable taxes.

[7] Class Counsel provided the Representative Plaintiffs with indemnity agreements to protect against any possible adverse cost awards. There was no application made to the Ontario Class Proceedings Fund or any private third-party funder for litigation support.

[8] There were parallel actions in British Columbia, Saskatchewan, and Québec.

[9] In the Ontario action, the Plaintiffs allege that, during the class period, the Defendants marketed and sold the Cook IVC Filter Products without properly warning of the alleged increased risks of complications and injuries.

[10] The Defendants defeated certification at first instance.[2]

[11] The Plaintiffs appealed and were partially successful.[3] On January 8, 2020, the Ontario Superior Court (Divisional Court) issued an Order which certified the action on the basis of a limited number of common issues related to the adequacy of the Defendants' warnings to physicians. The proposed design defect common issues were not certified.

[12] The certified class is comprised of:

> "[a]ll persons resident in Canada who were implanted with a Cook IVC Filter Product, at any time on or before January 8, 2020, which was manufactured, marketed, and/or sold or otherwise placed into the stream of commerce in Canada by the Defendants" (the "Primary Class") and "[a]ll persons resident in Canada who, by virtue of a personal relationship with one or more of such persons described in [the Primary class] have standing in this action pursuant to section 61(1) of the *Family Law Act*, R.S.O. 1990, c. F. 3 or analogous provincial legislation (the "Family Class")."

[13] After the decision of the Divisional Court, the certification notice was disseminated. The deadline to opt-out of the proceedings was March 16, 2021. No Class Member opted out of the action.

[14] In the summer of 2022, the parties began settlement discussions, and they reached an agreement in February 2024, memorialized in the form of the Settlement Agreement.

[15] Throughout the settlement negotiations, the Provincial and Territorial Health Insurers were kept up to date on developments, negotiations, and timing. They instructed Class Counsel to accept the final settlement.

[16] The terms of the settlement agreement include the following:

a. The Defendants will pay between $2,708,480 and $6,771,200, in two payments:

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[2] *Kuiper v. Cook (Canada) Inc*., 2018 ONSC 6487.
[3] *Kuiper v. Cook (Canada) Inc*., 2020 ONSC 128 (Div. Ct.).

(a) the claims-made pool, for the more significant claims, and (b) a second pool for administration expenses, notice, legal fees and disbursements and certain other claims.

b. The Defendants will pay up to $4,062,720.00 for the class members with more significant claims.

c. The Defendants shall only be required to pay for these claims up to the Claims-Made Settlement amount. If the total of the Qualifying Claimant claims exceeds the Claims-Made Settlement Amount, the payment to each Qualifying Claimant shall be reduced on a *pro rata* basis.

d. The Defendants will also make a payment in the amount of $2,708,480 to Class Counsel to pay costs, including administration costs, Class Counsel fees not associated with Qualifying Claimants, notice plan costs, interest, applicable taxes, and certain other qualified claims as provided in the Settlement Agreement.

e. In exchange for a release, provincial and territorial health insurers are entitled to payment on agreed-to percentages. The Claims Administrator will distribute payment to each province and territory within ten days of receipt of the entire Preliminary Settlement Amount.

f. The Compensation Protocol sets out the claims administration process and provides instruction on the adjudication of claims and distribution of proceeds pursuant to the Settlement Agreement.

g. The key elements of the proposed Compensation Protocol include:

i. Claims-made distribution. "Qualifying Claimants" have more significant claims than Other Qualifying Claimants. The Claims-Made Settlement Amount will be distributed to these Class Members in accordance with the severity of injury, allocating up to $54,000 for each Qualifying Fracture Claimant, up to $81,000 for each Qualifying Death Claimant, and up to $169,500 for each Qualifying Open Surgery Claimant.

ii. Point system distribution. For "Other Qualifying Claimants" i.e., those with less significant claims, the Claims Administrator will assign points according to a point system and value that was determined by Class Counsel, based on information from similar litigation in Canada and parallel litigation. The points are based on an understanding of the mechanism and severity of the injuries, as well as a review of the medical records. The Preliminary Settlement Proceeds, net of various expenses and fees, as approved, will be distributed among these claims on a *pro rata* basis pursuant to the points allocated.

iii. Each claim must be accompanied by evidence of implantation with the Cook IVC Filter Product and evidence of an "Event" (symptom or injury) having occurred.

iv. Rejected Claimants will have thirty days to appeal a rejected claim to a Referee.

h. The distribution protocol provides that any excess funds remaining six months after

> final distribution of all Settlement Proceeds (from uncashed cheques, unused tax holdbacks, *etc*.) should be distributed *cy près* to the Heart and Stroke Foundation of Canada. The Foundation proposes to apportion any *cy près* money to research which will assist with advancing treatments that impact individuals like the Class Members.

[17] As part of negotiations, the Defendants reviewed the records of certain Class Members. Where the parties agreed that the Class Members met the eligibility criteria for a Qualifying Event, they were approved as Qualifying Claimants. These class members will not need to file claims, and these claims will not be adjudicated.

[18] The court approved a notice to the class of the settlement approval hearing.[4] The Approval Hearing Notice described the settlement and set out that Class Counsel would seek payment of its fees up to $1,355,740.00, plus taxes, and disbursements in the amount of $336,036.39, plus taxes.

[19] The deadline for filing an objection to the Settlement Agreement, including the fee request, was May 3, 2024, and one objection was received.

[20] The objector, Dr. David Coates, raised three concerns with the Settlement: (1) that there is no holdback for future claims that arise; (2) that a cap is placed on the total number of payments; and (3) that there is no compensation for psychological trauma faced by patients and families. Dr. Coates also objected to Class Counsel Fees relative to the compensation Class Members would receive.

[21] Class Counsel recommends the settlement as fair, reasonable, and in the best interests of the Class.

[22] The Representative Plaintiffs approve of the settlement and of Class Counsel's fee request.

[23] Pending approval of the Settlement by this Honourable Court, the Plaintiff in the proceeding in Québec will seek an order from the Québec Superior Court to recognize and enforce the Ontario order and discontinue the Québec Proceeding. The Plaintiff in the Québec proceeding has sworn an affidavit in support of this motion in Québec.

[24] The actions in Saskatchewan and British Columbia were discontinued on June 1, 2023, and March 19, 2021, respectively.

[25] RicePoint was provisionally appointed as Claims Administrator in accordance with the Settlement Hearing Notice Order granted by this Court on March 1, 2024. In choosing a claims administrator, Class Counsel sought competing proposals from claims administrators in both Canada and the U.S.

[26] RicePoint will establish an online claims portal in both English and French that Class Members can use to file a claim. Claims assistance will also be available to claimants in both languages.

C. Settlement Approval

[27] Section 27.1 (1) of the *Class Proceedings Act*, *1992*, provides that a settlement of a class proceeding is not binding unless approved by the court. To approve a settlement of a class proceeding, the court must find that, in all the circumstances, the settlement is fair, reasonable, and

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[4] *Kuiper v. Cook (Canada) Inc.*, 2024 ONSC 1306.

in the best interests of the class.[5]

[28] In determining whether a settlement is reasonable and in the best interests of the class, the following factors may be considered: (a) the likelihood of recovery or likelihood of success; (b) the amount and nature of discovery, evidence or investigation; (c) the proposed settlement terms and conditions; (d) the recommendation and experience of counsel; (e) the future expense and likely duration of the litigation; (f) the number of objectors and nature of objections; (g) the presence of good faith, arm's-length bargaining and the absence of collusion; (h) the information conveying to the court the dynamics of, and the positions taken by, the parties during the negotiations; and (i) the nature of communications by counsel and the representative plaintiff with class members during the litigation.[6]

[29] The case law establishes that a settlement must fall within a zone of reasonableness. Reasonableness allows for a range of possible resolutions and is an objective standard that allows for variation depending upon the subject-matter of the litigation and the nature of the damages for which the settlement is to provide compensation.[7] A settlement does not have to be perfect, nor is it necessary for a settlement to treat everybody equally.[8]

[30] The test for approving a distribution Plan is analogous to the test that the Court applies when deciding whether to approve a settlement.[9] A settlement must fall within a zone of reasonableness to be approved.[10] The zone of reasonableness assessment allows for variation between settlements depending upon the subject matter of the litigation and the nature of the damages for which settlement provides compensation.[11] A settlement is to be reviewed on an objective standard which accounts for the inherent difficulty in crafting a universally satisfactory settlement.[12]

[31] The Plaintiffs have satisfied me that the settlement agreement should be approved in the immediate case. The litigation was hard fought from the outset with no assurances of a favourable outcome at any time during the lengthy course of the proceedings. It has been ongoing for over eight years and has at all times involved issues of considerable legal and medical complexity. The Defendants defeated the certification motion at first instance, underscoring the complexity of the issues. Class Counsel conducted extensive legal and factual research in support of the claim and worked closely with an expert in preparing for certification and appeal, and in conducting the settlement negotiations that ultimately resulted in the Settlement Agreement. Having regard to the

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[5] *Kidd v. Canada Life Assurance Company*, 2013 ONSC 1868; *Farkas v. Sunnybrook and Women's Health Sciences Centre*, [2009] O.J. No. 3533 at para. 43 (S.C.J.); *Fantl v. Transamerica Life Canada*, [2009] O.J. No. 3366 at para. 57 (S.C.J.).

[6] *Kidd v. Canada Life Assurance Company*, 2013 ONSC 1868; *Farkas v. Sunnybrook and Women's Health Sciences Centre*, [2009] O.J. No. 3533 at para. 45 (S.C.J.); *Fantl v. Transamerica Life Canada*, [2009] O.J. No. 3366 at para. 59 (S.C.J.); *Corless v. KPMG LLP*, [2008] O.J. No. 3092 at para. 38 (S.C.J.).

[7] *Dabbs v. Sun Life Assurance Company of Canada* (1998), 40 O.R. (3d) 429 (Gen. Div.); *Parsons v. Canadian Red Cross Society*, [1999] O.J. No. 3572 at para. 70 (S.C.J.).

[8] *McCarthy v. Canadian Red Cross Society* (2007), 158 ACWS (3d) 12 at para. 17 (Ont. S.C.J.); *Fraser v. Falconbridge Ltd*., [2002] O.J. No. 2383 at para. 13 (S.C.J.).

[9] *Zaniewicz v. Zungui Haixi Corporation*, 2013 ONSC 5490 at para. 59; *Eidoo v. Infineon Technologies AG*, 2014 ONSC 6082; *Eidoo v. Infineon Technologies AG*, 2015 ONSC 5493 at para. 74.

[10] *Rosen v. BMO Nesbitt Burns Inc.*, 2016 ONSC 4752 at para. 12; *Leslie v. Agnico-Eagle Mines*, 2016 ONSC 532 at para. 8.

[11] *Parsons v. Canadian Red Cross Society*, [1999] O.J. No. 3572 at para. 70 (S.C.J.).

[12] *Parsons v. Canadian Red Cross Society,* [1999] O.J. No. 3572 at para. 80 (S.C.J).

litigation risks and the Defendants' vigorous defence of the allegations that they were negligent, the recovery in the immediate case is very good.

[32] The Settlement Agreement is fair and reasonable under all of the circumstances. It is consistent with both the purpose and spirit of the *Class Proceedings Act*, which encourages settlement after a reasonable investigation and careful consideration of the merits, costs, and risks of continuing litigation.

[33] This settlement in the immediate case compares favourably to the approved settlement in *O'Brien v. Bard*[13] (a medical product class action concerning transvaginal mesh). There, approved claims were expected to receive sums "ranging from a few thousand to around $100,000" based on a point system.

[34] Dr. Coates' objections are insufficient to disturb the reasonableness of the settlement agreement which is a very good settlement having regard to the litigation risks and the results achieved. The settlement agreement is fair and in the best interests of the class. The settlement amounts, particularly for the Qualified Claimants, were the product of arm's-length bargaining. As part of that process, Class Counsel assessed the magnitude of each type of payments based on the current state of the science and related liability and causation issues and determined that they fall within the range of reasonableness and are in the best interests of the Class Members. In addition, Class Counsel crafted the point structure with reference to information from similar litigation in Canada and other parallel litigation, as well as a review of the medical records available from some of the Class Members.

[35] I approve the Settlement, the Distribution Plan, and the ancillary Orders.

D. Fee Approval

[36] Section 32 (2) of the *Class Proceedings Act, 1992* stipulates that an agreement respecting fees and disbursements between class counsel and a representative plaintiff is not enforceable unless approved by the court.

[37] Factors relevant in assessing the reasonableness of the fees of class counsel include: (a) the factual and legal complexities of the matters dealt with; (b) the risk undertaken, including the risk that the matter might not be certified; (c) the degree of responsibility assumed by class counsel; (d) the monetary value of the matters in issue; (e) the importance of the matter to the class; (f) the degree of skill and competence demonstrated by class counsel; (g) the results achieved; (h) the ability of the class to pay; (i) the expectations of the class as to the amount of the fees; and (j) the opportunity cost to class counsel in the expenditure of time in pursuit of the litigation and settlement.[14]

[38] Class Counsel's docketed time, as of May 13, 2024 is $2,963,895.33 plus applicable taxes of $377,172.61. Class Counsel incurred disbursements in the amount of $332,676.10 plus applicable taxes of $36,753.50 (as of May 13, 2024). In addition, Class Counsel has substantial

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[13] *O'Brien v Bard*, 2016 ONSC 3076.

[14] *Smith v. National Money Mart,* 2010 ONSC 1334, var'd 2011 ONCA 233; *Fischer v. I.G. Investment Management Ltd.*, [2010] O.J. No. 5649 at para. 28 (S.C.J.).

future work yet to do arising from the administration of the Settlement.

[39] Class Counsel seeks the approval of fees and disbursements, plus applicable taxes on both, as follows:

a. legal fees of no more than $1,354,240.00 plus applicable taxes, specifically:

b. legal fees in the amount of $744,832.00 (plus applicable taxes of $96,828.16) payable from the Preliminary Settlement Amount;

c. individual legal fees of 15% plus applicable taxes applied to successful claims awarded to Qualifying Claimants, in the amount of *up to* $609,408.00 (plus applicable taxes of *up to* $79,223.04) payable from the Claims-Made Settlement Amount; and

d. Disbursements in the amount of $332,676.10 (plus applicable taxes of $36,753.50) payable from the Preliminary Settlement Amount.

[40] As there are two payment pools, one of which is claims-made, the proposed contingency fee is in two tranches: first, a request of $744,832 which is 27.5% of the Preliminary Settlement Amount ($2,708,480); and, second, *up to* $609,408, which is 15% of the successful claims from the Claims-Made Settlement Amount (maximum of $4,062,720).

[41] Class Counsel have undertaken to limit their retainers with individual class members to 15%, so the total that Qualifying Claimants will pay is no more than 30%.

[42] Class Counsel propose that the fees on the Claims-Made Settlement Amount will be paid when the Claims-Made Settlement Amount is paid without further order of the Court.

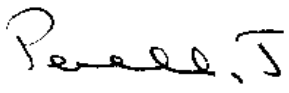
[43] In this case, the requested fee is less than the docketed time. If the maximum fee request is granted, it would reflect a multiplier of 0.46, *i.e.*, less than half of the docketed time. This estimate does not include additional time Class Counsel will spend as part of the administration process.

[44] In the immediate case, the fee is very reasonable when compared with the results and with the quality of the legal services provided, which were both good. The fee was also reasonable having regard to the risks assumed and the time expended in the conduct of the litigation.

[45] I approve the Fee Request.

E. Conclusion

[46] Orders to go as requested.



Perell, J.

Released: May 17, 2024

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