

**SUPERIOR COURT**  
(Class Actions)

CANADA  
PROVINCE OF QUÉBEC  
DISTRICT OF MONTREAL

No: 500-06-000786-166

DATE: September 29, 2016

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**PRESENT: THE HONOURABLE PIERRE-C. GAGNON, J.S.C.**

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**ARTHUR JOHN BOEHMER**

Applicant

v.

**BARD CANADA INC.**

and

**C.R. BARD INC.**

and

**BARD PERIPHERAL VASCULAR INC.**

Defendants

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**JUDGMENT OF TEMPORARY STAY**

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**I. INTRODUCTION**

[1] The Court is seized of a Joint Application to Temporarily Stay the Class Action ("**Joint Application**") brought concurrently by all of the parties.

[2] By their Joint Application, the parties ask that the class action filed by Applicant Arthur John Boehmer (the "**Applicant**") against Bard Canada Inc., C.R. Bard Inc. and Bard Peripheral Vascular, Inc. (the "**Québec Action**") be stayed for a 120-day period.

[3] The parties to the Joint Application wish to reserve their right to seek a further temporary stay, or a permanent stay, prior to the end of any stay granted by this Court, and have already advised the Court of their intention to do so.

[4] The basis of the Joint Application is the existence of a parallel national class action commenced in Ontario: *Kenneth A. Winter and Jacqueline Winter v. C.R. Bard, Inc., Bard Peripheral Vascular, Inc., and Bard Canada Inc.*, bearing court file number 1068/16CP (the "**Ontario Action**").

## II. BACKGROUND

[5] On March 31, 2016, the Applicant filed the Québec Action on behalf of Québec residents who have been implanted with a retrievable inferior vena cava filter product ("**Retrievable IVC Filter Product**") alleged to have been marketed, manufactured and/or sold by the Defendants, and which allegedly caused the Applicant harm because of safety defects and/or breach of the Defendants' duty to warn.

[6] The Applicant describes the proposed class as being composed of:

All natural persons residing in Quebec who were implanted with a Retrievable IVC Filter Product which was manufactured, marketed and/or sold or otherwise placed into the stream of commerce in Québec by one or more of the Defendants, and/or their family members, assigns and heirs.

[7] On April 22, 2016, the Statement of Claim in the Ontario Action was issued.

[8] The Ontario Action is also related to Retrievable IVC Filter Products allegedly manufactured, marketed and/or sold by the Defendants.

[9] The Ontario Action proposes a national class that would include the Québec residents who are the subject of the Québec Action. As specified in the Statement of Claim, the Ontario Action has been commenced "on behalf of a class of people in Canada who were implanted with the Defendants' IVC Filters, to be further defined in the motion for certification."

[10] The Ontario Action also seeks recovery on behalf of family members who have suffered, among other things, loss of care, guidance, companionship, consortium, financial expenses and special damages arising from the implantation of the Defendants' Retrievable IVC Filter Products.

[11] On May 13, 2016, an Amended Notice of Civil Claim commencing a class proceeding against the Defendants in British Columbia was filed: *Irene Fraser v. Cook Group, Inc., Cook, Inc., Cook Medical, LLC, William Cook Europe ApS, C.R. Bard, Inc., and Bard Peripheral Vascular, Inc.*, bearing court file number 178129 (the "**B.C. Action**").

[12] The class proposed in the B.C. Action is composed of all residents of (a) British Columbia and (b) Canada who were implanted with the IVC filters of Cook (as defined therein) and with the Defendants' Recovery and G2 line of IVC filters, as stated in the Amended Notice of Civil Claim.

[13] Counsel for the parties have provided the Court with the Applicant's written confirmation that he agrees the Québec Action should be stayed in favour of the Ontario Action.

[14] Counsel for the parties have also informed the Court that the Ontario Action is to be case managed by Mr. Justice Paul Perell of the Ontario Superior Court of Justice. This Court has since corresponded with the Ontario Superior Court of Justice with respect to the present file. Simple arrangements have been made for the two courts to communicate and cooperate whenever advisable.

[15] No case management judge has yet been assigned to hear the B.C. Action.

### III. LIS PENDENS

[16] The Court is satisfied that there is *lis pendens* between the Québec Action and the Ontario Action.

[17] According to article 3137 C.C.Q.:

**3137.** On the application of a party, a Québec authority may stay its ruling on an action brought before it if another action, between the same parties, based on the same facts and having the same subject is pending before a foreign authority, provided that the latter action can result in a decision which may be recognized in Québec, or if such a decision has already been rendered by a foreign authority.

[18] The approach to be taken to *lis pendens* in the context of private international law was elaborated by the Supreme Court of Canada in *Canada Post Corp. v. Lépine*:

[51] [...] The conditions for *lis pendens* are well established in the domestic context in Québec civil law. Like *res judicata*, *lis pendens* depends on identity of the parties, identity of the cause of action and identity of the object (J.-C. Royer, *La preuve civile* (4th ed. 2008), Nos. 788-89, at p. 635; *Rocois Construction Inc. v. Québec Ready Mix Inc.*, 1990 CanLII 74 (SCC), [1990] 2 S.C.R. 440). However, in private international law matters, the nature of the required identities is altered somewhat in the *Civil Code of Québec* in the case of *lis pendens*. In particular, in art. 3137, as in art. 3155(4), the *Code* retains identity of the parties and identity of the object but substitutes identity of the facts on which the actions are based for identity of the cause of action [2009] 1 SCR 549.

[19] Moreover, in the class action setting, "identity" refers to the legal, as opposed to the physical, identity of the parties. In other words, the Court should look to the

putative class rather than the applicant and proposed representative plaintiff in its analysis.<sup>1</sup>

**(a) Same Parties**

[20] The Defendants named in the Ontario Action and in the Québec Action are the same.

[21] The class members in the Ontario Action include the class members in the Québec Action. Indeed, the Ontario Action proposes a national class, which includes Québec residents, while the Québec Action proposes a provincial class composed of Québec residents only.

**(b) Same Cause**

[22] The essential facts in support of the Québec Action and the Ontario Action are related to the implantation of Retrievable IVC Filter Products, which were allegedly manufactured, marketed and/or sold by each of the Defendants. The causes of action in both proceedings arise from the harm that these products allegedly caused to those that received them and to their family members. Both actions also allege that the Defendants failed to adequately warn of such harm.

[23] Furthermore, the legal duties and grounds of negligence alleged in the Québec Authorization Application are substantially reiterated in the Ontario Statement of Claim.

**(c) Same Object**

[24] The object of the Québec Action and the Ontario Action is the same: both seek the authorization/certification of a class action relating to the compensation of those who have allegedly suffered harm as a result of the implantation of Retrievable IVC Filter Products.

**IV. RECOGNITION OF AN ONTARIO JUDGMENT**

[25] The Court is satisfied that a final decision in the Ontario Action is capable of recognition and enforcement in Québec.

[26] *Prima facie*, the Ontario Superior Court of Justice has jurisdiction over the Applicant and the Defendants.

[27] This Court is, moreover, satisfied that the Ontario Superior Court of Justice will uphold the fundamental principles of procedure and public order.

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<sup>1</sup> *Hotte v. Servier*, 1999 CanLII 13363 (QC CA), pp. 11, 12.

[28] As counsel for the parties have informed the Court, the existence of the Québec Action will not be a bar to the recognition and enforcement of the decision arising out of the Ontario Action since the parties undertake to discontinue the Québec Action if the Ontario Superior Court of Justice grants certification. A decision in the Ontario Action can therefore result in enforcement and recognition in Québec.

[29] Counsel have informed the Court that if the Plaintiffs in Ontario are successful on their motion to certify the Ontario Action, the Defendants undertake not to oppose a national class, which would include Québec residents, subject to the Defendants' right to challenge certification, any rights of appeal and the definition of the class in all other respects.

[30] Counsel further confirm that if the Plaintiffs are successful on their motion to certify the Ontario Action, the Defendants will not oppose the recognition and enforcement of the final decision in the Ontario Action in Québec, subject to any rights of appeal.

**V. THE RIGHTS AND INTERESTS OF QUÉBEC CLASS MEMBERS ARE PROTECTED**

[31] The Court is satisfied that the rights and interests of the Québec class members will be protected.

[32] According to article 577 C.C.P.:

**577.** The court cannot refuse to authorize a class action on the sole grounds that the class members are part of a multi-jurisdictional class action already under way outside Québec.

If asked to decline jurisdiction, to stay an application for authorization to institute a class action or to stay a class action, the court is required to have regard for the protection of the rights and interests of Québec residents.

If a multi-jurisdictional class action has been instituted outside Québec, the court, in order to protect the rights and interests of class members resident in Québec, may disallow the discontinuance of an application for authorization, or authorize another plaintiff or representative plaintiff to institute a class action involving the same subject matter and the same class if it is convinced that the class members' interests would thus be better served.

The stay of the Québec Action in favour of a national class proceeding in Ontario is consistent with the court's duty to protect the rights and interests of Québec residents.

[33] As noted above, the causes of action advanced in the Ontario Action are equivalent to the wrongs alleged in the Québec Action, such that if the rights and

interests of the proposed class members in the Québec Action were adjudicated in Ontario, those rights and interests would be similarly treated.

[34] By prosecuting the IVC filter class actions in a single proceeding, Québec residents will benefit from judicial economy and their counsel will not invest time and costs simultaneously in two jurisdictions.

[35] Québec residents will not suffer any prejudice because the Québec Action is not dismissed but is only stayed pending a final determination in the Ontario Action. In the event that certification is not successful in the Ontario Action, the Applicant will be able to defend the rights and interests of Québec residents by seeking a lift of the stay of the proceedings in the Québec Action. If such a lift is granted, the Court will ensure that the Québec Action proceed diligently.

[36] If the Applicant seeks to discontinue the Québec Action and this Court is not satisfied that the rights and interests of the Québec class members will be protected, the Court will continue to be seized of the matter and will have the jurisdiction and authority to refuse a discontinuance, if warranted.

[37] Furthermore, counsel for the parties have undertaken to:

- provide the Court with periodic reports on developments in the Ontario Action and the B.C. Action;
- diligently advise the Court of any judgment or ordinance issued in the context of the Ontario Action and provide the Court with a copy of same.p

[38] The Ontario Superior Court of Justice has likewise stated that it would require class counsel in Ontario to periodically report to this Court on the progress of the Ontario Action and provide this Court with a copy of all directions, orders or judgments forthwith after they are released.

[39] Granting a temporary stay of the Québec Action is consistent with the principle of proportionality.

[40] Such a temporary stay will likewise avoid contradictory judgments and multiple proceedings.

**FOR THESE REASONS** the Court:

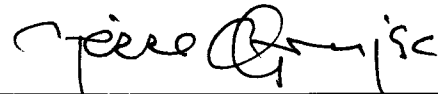
[41] **GRANTS** the temporary stay sought by the parties;

[42] **STAYS** the Application for Authorization to Institute a Class Action and to Appoint the Status of Representative Plaintiff filed by Applicant Arthur John Boehmer until January 16, 2017;

[43] **ACKNOWLEDGES** the undertakings made by the parties to keep the Court periodically advised of developments in the Ontario Action and the B.C. Action, and to diligently advise the Court of, and provide it with, any judgment or ordinance rendered with respect to the Ontario Action;

[44] **RESERVES** the right of the parties to seek a further temporary stay or a permanent stay in the present file;

[45] **WITHOUT COSTS.**



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PIERRE-C. GAGNON, J.S.C.

Mtre Karim Diallo  
*SISKINDS, DESMEULES*  
Attorneys for the Applicant

Mtre André Ryan  
Mtre Shaun E. Finn  
*BCF LLP*  
Attorneys for the Defendants