CITATION: Martin v. Wright Medical Technology Canada 2022 ONSC 4318
COURT FILE NO.: CV-14-499297-0000
CITATION: Rowland v. Wright Medical Technology Canada 2022 ONSC 4319
COURT FILE NO.: CV-14-512824-00CP
DATE: 20220722

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:	
SANDRA MARTIN and JOHN CHARLES DEVEAU Plaintiffs	*Joel P. Rochon* and *Golnaz Nayerahmadi* for the Plaintiffs
- and –	
WRIGHT MEDICAL TECHNOLOGY CANADA LTD., WRIGHT MEDICAL TECHNOLOGY, INC. and WRIGHT MEDICAL GROUP, INC. Defendants	*Peter J. Pliszka* and *Raajan Aery* for the Defendants Wright Medical Technology Canada Ltd., Wright Medical Technology Inc. and Wright Medical Group, Inc.
Proceeding pursuant to the *Class Proceedings Act, 1992*	
AND BETWEEN:	
GAYLE ROWLAND Plaintiffs	*Won J. Kim, Megan B. McPhee* and *Aris Gyamfi* for the Plaintiff
- and –	
WRIGHT MEDICAL TECHNOLOGY CANADA LTD., WRIGHT MEDICAL TECHNOLOGY, INC., WRIGHT MEDICAL GROUP, INC., MICROPORT MEDICAL B.V. and MICROPORT SCIENTIFIC CORPORATION Defendants	*Peter J. Pliszka* and *Raajan Aery* for the Defendants Wright Medical Technology Canada Ltd., Wright Medical Technology Inc. and Wright Medical Group, Inc. *Lawrence G. Theall* and *Christiaan A. Jordaan* for the Defendants MicroPort Medical BV, MicroPort Scientific Corporation and MicroPort Orthopedics Inc.
Proceeding pursuant to the *Class Proceedings Act, 1992*	**HEARD**: In writing

PERELL, J.

Contents

REASONS FOR DECISION

"Der mentsh trakht un got lakht."
("Man plans and God laughs.) [Yiddish proverb]

"The best laid schemes o' mice an' men/Gang aft a-gley." [Robert Burns, *To A Mouse,* 1785]

A. Introduction

[1] The procedural plans of two proposed class actions have gone "aft a-gley", but the plans can be fixed in a way that is fair to the defendants.

[2] In 2014, pursuant to the *Class Proceedings Act, 1992*,[1] Sandra Martin, now deceased, and her spouse, John Charles Deveau, sued: (a) Wright Medical Technology Canada Ltd., (b) Wright Medical Technology Inc. and (c) Wright Medical Group, Inc. (collectively, "Wright Medical").

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

a. The Martin/Deveau Action is about the alleged negligent manufacturing of a prosthetic hip implant for resurfacing surgery.

b. MicroPort is another prosthetic hip manufacturer. It shall be important to note that Ms. Martin and Mr. Deveau did not sue any MicroPort entity of which there are many.

c. Rochon Genova LLP is the proposed Class Counsel for the Martin/Deveau Action.

[3] After Ms. Martin and Mr. Deveau commenced their action, later in 2014, Gayle Rowland sued: (a) Wright Medical (the collective); and also (b) MicroPort Medical B.V. and (c) MicroPort Scientific Corporation, two of the many MicroPort entities.

a. The Rowland Action is about the alleged negligent manufacturing of a prosthetic hip implant for arthroplasty surgery.

b. It shall be important to note that Ms. Rowland did not sue: (a) MicroPort Medical Group, Inc.; (b) MicroPort Orthopedics Ltd.; (c) MicroPort Orthopaedics Inc.; or (d) MicroPort Orthopedics Inc.

c. Kim, Spencer, McPhee Barristers P.C. is proposed Class Counsel for the Rowland Action.

[4] In 2016, Ms. Martin passed away. An Order to Continue has yet to be obtained in the Martin/Deveau Action.

[5] In the Rowland Action, by 2022, Ms. Rowland, had not set a timetable for a certification motion. Ms. Rowland and Kim, Spencer, McPhee Barristers P.C. had different plans than moving forward with the Rowland Action. Originally, those different plans were to consolidate the Rowland Action with the Martin/Deveau Action, which was setting a timetable for a certification motion.

[6] As I shall explain below, the original plan for the Rowland Action was thwarted by the Defendants, and so Class Counsel in the Rowland Action formed a new plan, which involves discontinuing the Rowland Action and recasting the Martin/Deveau action. The Defendants wish to thwart this new plan also.

[7] In furtherance of the new plan for the Rowland Action, Ms. Rowland brings a motion for leave to discontinue her proposed class action. If the discontinuance motion is granted, the plan is that Ms. Rowland will become a Class Member in a recast Martin/Deveau Action.

[8] The Defendants in the Rowland Action do not oppose Ms. Rowland's motion to discontinue; however, they ask that they be paid the costs of the discontinuance. Ms. Rowland requests that she be granted leave to discontinue without costs. As will become more apparent, the Defendants oppose Ms. Rowland's new plan for amendments to the Martin/Deveau Action.

[9] In furtherance of the plans for amendments to the Martin/Deveau Action which is in furtherance of the plans for the Rowland Action, the Plaintiffs in the Martin/Deveau Action bring a motion, which I shall label the Joinder Motion, for an Order:

a. to remove the late Ms. Martin and Mr. Deveau as Plaintiffs;

b. to substitute Alan Chamberlain, Tony Kinney, Pierre Marchand, and Lorrie Chamberlain as Plaintiffs;

c. to add: (a) MicroPort Medical B.V., (b) MicroPort Scientific Corporation, and

(c) MicroPort Orthopedics Inc. as Defendants;

d. to amend the class definition to include persons implanted for both resurfacing and for arthroplasty surgery;

e. for leave to amend the Statement of Claim accordingly; and

f. for leave to file a Fresh as Amended Statement of Claim with the date of commencement of the Fresh as Amended Statement of Claim being February 27, 2014. (The apparent plan is that this date would preserve the old test for certification for the recast action.)

[10] Wright Medical (the collective) and MicroPort Medical B.V., MicroPort Scientific Corporation, and MicroPort Orthopedics Inc. oppose the recasting of the Martin/Deveau Action. They submit that the Joinder Motion should be dismissed.

[11] In my opinion, this muddle of bad procedural planning and bad implementation by Class Counsel from both the Rowland Action and the Martin/Deveau Action can be fixed fairly for Class Counsel, the Class Members, and for the Defendants. Therefore, for the reasons that follow:

a. The Rowland Action shall be discontinued with costs payable to the Defendants and on terms that notice of the discontinuance and of the recasting of the Martin/Deveau Action be posted on the web pages of Kim, Spencer, McPhee Barristers P.C. and Rochon Genova LLP along with a copy of these Reasons for Decision.

b. The discontinuance of the Rowland Action shall come into effect 60 days after the release of these Reasons for Decision. (The postponement of the discontinuance will allow the pleadings in the Martin/Deveau Action to be amended while the limitation period remains suspended.)

c. The Plaintiffs in the Martin/Deveau Action, within 60 days after the release of these Reasons for Decision, shall deliver a Fresh as Amended Statement of Claim, in which they shall:

i. remove themselves as Plaintiffs;

ii. substitute Alan Chamberlain, Tony Kinney, Pierre Marchand, and Lorrie Chamberlain as Plaintiffs;

iii. join (a) MicroPort Medical B.V., and (b) MicroPort Scientific Corporation as Defendants; and

iv. amend the class definition to include persons implanted with the hip prosthetics for both resurfacing and arthroplasty surgery.

d. The Martin/Deveau Plaintiffs' request to have the date of the Fresh as Amended Statement of Claim as of February 27, 2014 is dismissed. The Fresh as Amended Statement of Claim shall be dated in the normal course.

e. The Martin/Deveau Plaintiffs' request to join MicroPort Orthopedics Inc. as a Defendant is dismissed.

f. It shall be a term of the court's order in the Martin/Deveau Action that the recast action be governed by the amended *Class Proceedings Act,1992*.

g. The Plaintiffs shall pay the Defendants their costs for the motion to discontinue and

for the Joinder Motion.

B. Evidentiary Background

[12] Ms. Rowland supported her motion for a discontinuance with the affidavit dated April 8, 2022 of **Rachael Sider**. Ms. Sider is an associate of Kim, Spencer, McPhee Barristers P.C.

[13] The Plaintiffs in the Martin/Deveau Action supported their Joinder Motion with:

a. affidavits dated April 8, 2022, June 28, 2022, and July 13, 2022 of **Sarah J. Fiddes**. Ms. Fiddes is an articling student at Rochon Genova LLP.

b. affidavit dated May 27, 2022 of **Pritpal Mann**. Mr. Mann is an articling student at Rochon Genova LLP.

c. affidavit dated May 27, 2022 of **Dr. Paul Zalzal**. Dr. Zalzal is an orthopaedic surgeon and an Associate Clinical Professor at McMaster University, Faculty of Medicine, Department of Surgery.

[14] The Wright Medical Defendants in the Martin/Deveau Action and the Proposed MicroPort Defendants from the Rowland Action resisted the Plaintiffs' motion with the following evidence:

a. affidavit dated May 13, 2022 of **Jeanine Redden**. Ms. Redden is the former Director of Regulatory Affairs at Wright Medical Technology Inc.

b. affidavit dated May 13, 2022 of **Cameron J. Reed**. Mr. Reed is a legal assistant with the law firm Theall Group LLP, which is counsel for (a) MicroPort Medical B.V. and (b) MicroPort Scientific Corporation.

c. affidavit dated May 13, 2022 of **Irina Timmerman**. Ms. Timmerman is the Vice President of Clinical Affairs, the former Vice President of Applied Research and Technology Development at MicroPort Orthopedics, and was formerly an employee of Wright Medical Technology, Inc., where she was the Senior Director of Applied Research.

C. Legislative Background

[15] For the purposes of the discontinuance motion and the Joinder Motion, the relevant sections of the amended *Class Proceedings Act, 1992* are sections 5, 28 (1), 29.1, 30 (1) and 39, which state:

Certification

5 (1) The court shall, subject to subsection (6) and to section 5.1, certify a class proceeding on a motion under section 2, 3 or 4 if,

(a) the pleadings or the notice of application discloses a cause of action;

(b) there is an identifiable class of two or more persons that would be represented by the representative plaintiff or defendant;

(c) the claims or defences of the class members raise common issues;

(d) a class proceeding would be the preferable procedure for the resolution of the common issues; and

(e) there is a representative plaintiff or defendant who,

(i) would fairly and adequately represent the interests of the class,

(ii) has produced a plan for the proceeding that sets out a workable method of advancing the proceeding on behalf of the class and of notifying class members of the proceeding, and

(iii) does not have, on the common issues for the class, an interest in conflict with the interests of other class members.

Same

(1.1) In the case of a motion under section 2, a class proceeding is the preferable procedure for the resolution of common issues under clause (1) (d) only if, at a minimum,

(a) it is superior to all reasonably available means of determining the entitlement of the class members to relief or addressing the impugned conduct of the defendant, including, as applicable, a quasi-judicial or administrative proceeding, the case management of individual claims in a civil proceeding, or any remedial scheme or program outside of a proceeding; and

(b) the questions of fact or law common to the class members predominate over any questions affecting only individual class members.

{*****}

Limitations

Suspension in favour of class member

28 (1) Any limitation period applicable to a cause of action asserted in a proceeding under this Act is suspended in favour of a class member on the commencement of the proceeding and, subject to subsection (2), resumes running against the class member when,

(a) the court refuses to certify the proceeding as a class proceeding;

[…]

(d) the member opts out of the class proceeding;

[…]

(g) the proceeding is dismissed without an adjudication on the merits, including for delay under section 29.1 or otherwise;

(h) the proceeding is abandoned or discontinued with the approval of the court; or

[…]

{*****}

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.

Mandatory dismissal for delay

29.1 (1) The court shall, on motion, dismiss for delay a proceeding commenced under section 2 unless, by the first anniversary of the day on which the proceeding was commenced,

(a) the representative plaintiff has filed a final and complete motion record in the motion for certification;

(b) the parties have agreed in writing to a timetable for service of the representative plaintiff's motion record in the motion for certification or for completion of one or more other steps required to advance the proceeding, and have filed the timetable with the court;

(c) the court has established a timetable for service of the representative plaintiff's motion record in the motion for certification or for completion of one or more other steps required to advance the proceeding; or

(d) any other steps, occurrences or circumstances specified by the regulations have taken place.

Notice

(2) If a proceeding is dismissed for delay under subsection (1), the court shall order that the solicitor for the representative plaintiff give notice of the dismissal by,

(a) publishing the notice and a copy of the order on the website of the solicitor or of the law firm or other entity through which the solicitor practices law;

(b) sending the notice and a copy of the order to every class member who has contacted the solicitor to express an interest in the proceeding; and

(c) taking any other steps to give notice that the court may specify.

Same

(3) Section 20 applies, with necessary modifications, with respect to a notice required to be given under subsection (2).

Costs

(4) The solicitor for the representative plaintiff shall bear the costs of giving notice under subsection (2), and shall not attempt to recoup any portion of the costs from the class or any class member, or from the defendant.

[…]

Appeals Appeals: certification

30 (1) A party may appeal to the Court of Appeal from an order,

(a) certifying or refusing to certify a proceeding as a class proceeding; or

(b) decertifying a proceeding.

[…]

{*****}

Transition

39 (1) Except as otherwise provided by this section, this Act, as it read immediately before section 35 of Schedule 4 to the *Smarter and Stronger Justice Act, 2020* came into force, continues to apply with respect to,

(a) a proceeding commenced under section 2 before that day;

(b) a proceeding under section 3 or 4, if the motion for certification was made before that day; and

(c) any other proceeding under this Act that may be prescribed, in the prescribed circumstances, including a proceeding commenced under this Act on or after that day.

Same

(2) Section 29.1 applies, with necessary modifications, to a proceeding referred to in clause (1) (a), except that the reference in subsection 29.1 (1) to the day on which the proceeding was commenced shall be read as a reference to the day on which section 35 of Schedule 4 to the *Smarter and Stronger Justice Act, 2020* came into force.

D. Facts

[16] For the purposes of the motions now before the court, it is necessary to describe only a few substantive material facts associated with the Martin/Deveau Action and with the Rowland Action. What matters for the purposes of resolving the motions before the court are the facts of the lamentable procedural history of both actions and the impact of the amendments to the *Class Proceedings Act, 1992*, a procedural statute, introduced by the *Stronger Justice Act, 2020*,[2] another statute dedicated to the procedure for class proceedings.

[17] The narrative of the procedural facts for the Martin/Deveau Action and for the Rowland Action are described in the following section of these reasons. In this section, I shall describe the few pertinent material or substantive facts underlying the Martin/Deveau Action and the Rowland Action.

1. Scientific and Technological Background

[18] For the purposes of the motions now before the pertinent substantive material facts are as follows.

[19] Wright Medical (the collective) designed and manufactured two hip implant prosthetics: (a) the "Conserve Plus Total Resurfacing Hip System", for "resurfacing" surgery; and (b) the

[2] S.O. 2020, c. 11, Sched. 4.

"ProFemur Hip System and/or the Conserve Hip System" for "total arthroplasty" surgery.

[20] Both prosthetics involve a metal-on-metal acetabular cup component, however, the devices have different other components including different femoral heads, and different metallurgy, and the devices are designed for different hip replacement surgeries. The different devices' component parts had separate regulatory approvals.

[21] For the purposes of opposing the Joinder Motion, Wright Medical and MicroPort note that: (a) the two hip devices systems were manufactured for very different surgeries; and (b) the resurfacing device and the arthroplasty device were represented differently to Health Canada in Wright Medical's licence applications.

[22] Wright Medical and MicroPort submit that the regulatory history for product approval was temporally or substantively different for the resurfacing prosthetic than for the prosthetic for arthroplasty. They submit that the products were marketed differently and accompanied by different labeling and warnings.

[23] The Plaintiffs, however, counter with the allegation that both systems employ metal-on-metal technology, which allegedly has a disproportionately high rate of failure with early revisions compared with conventional hip implants.

[24] For the purposes of the Joinder Motion, the Plaintiffs in the Martin/Deveau Action proffered the evidence of Dr. Zalzal. Dr. Zalzal opined that the Resurfacing Hip System and the Conserve A-Class Hip System for arthroplasty surgery are substantially similar because of their metal-on-metal composition.

[25] It is Dr. Zalzal's opinion that the metal-on-metal design causes an increased risk of early revision and complication. Dr. Zalzal opined that the distinction between a hip resurfacing procedure or a total hip replacement procedure is immaterial to the Plaintiffs' core complaint about metal-on-metal implants.

2. The Plaintiffs' Surgeries and Implants

[26] Gayle Rowland underwent total arthroplasty surgery, and she was implanted with a Conserve Hip System, specifically a Conserve A-Class.

[27] The late Sandra Martin underwent hip resurfacing surgery, and she was implanted with a Conserve Hip System, specifically a Conserve Plus.

[28] In 2014, Pierre Marchand underwent hip resurfacing surgery, and he was implanted with a Conserve Hip system, specifically a Conserve A-Class. He was implanted after MicroPort Scientific Corporation had purchased Wright Medical Group Inc.'s OrthoRecon business. Mr. Marchand's prosthetic device was removed in 2016.

[29] Alan Chamberlain underwent hip resurfacing surgery, and he was implanted with a Conserve Hip system, specifically a Conserve Plus.

[30] Lorrie Chamberlain is Alan's wife.

[31] Tony Kinney underwent total arthroplasty surgery, and he was implanted with a Conserve Hip system, specifically a Conserve Plus.

[32] In 2016, Ms. Martin passed away. Her estate is a putative Class Member, but the executrix

of her estate does not wish to take on the responsibilities associated with being a representative plaintiff for a class action. Hence, Class Counsel has recruited Pierre Marchand, Tony Kinney, Alan Chamberlain, and Lorrie Chamberlain.

E. Procedural History

[33] The procedural history of the Martin/Deveau Action and the Rowland Action follows.

[34] On **February 27, 2014**, with Rochon Genova LLP as proposed Class Counsel, Ms. Martin and Mr. Deveau sued: (a) Wright Medical Technology Canada Ltd.; (b) Wright Medical Technology, Inc.; and (c) Wright Medical Group Inc. (collectively "Wright Medical") for negligence with respect to "the Conserve Plus Total Resurfacing Hip System", a metal-on-metal hip resurfacing system. The class was defined as follows:

> All persons resident in Canada who were implanted with a Conserve Plus Total Resurfacing Hip System (the "Class" and/or "Class Members")
>
> All persons on account of a personal relationship to a Class Member are entitled to assert a derivative claim for damages pursuant to section 61 (1) of the *Family Law Act*, R.S.O. 1990, c. F.3 as amended and comparable provincial and territorial legislation ("Family Class" and or "Family Class Members"

[35] On **September 24, 2014**, with Kim, Spencer, McPhee Barristers P.C. as proposed Class Counsel, Ms. Rowland sued: (a) Wright Medical Technology Canada Ltd.; (b) Wright Medical Technology, Inc.; and (c) Wright Medical Group Inc. (collectively "Wright Medical"). She also sued (d) MicroPort Medical B.V. and (e) MicroPort Scientific Corporation, on behalf of all persons implanted in Canada with the Conserve Hip System for arthroplasty surgery. The class was defined as follows:

> All persons implanted in Canada with the ProFemur Hip System and/or the Conserve Hip Systems, as defined below ("the Class").
>
> All provincial or territorial health insurers who are entitled to assert a claim pursuant to the *Alberta Hospitals Act*, R.S.A, 2000, c. H-12, the *Health Insurance Act*, R.S.O. 1990, c. H.6 as amended and related provincial and territorial legislation (the "Health Insurer Class").

[36] It should be noted that Ms. Rowland sued on behalf of all persons implanted in Canada with the ProFemur Hip System and/or the Conserve Hip System. However, since the ProFemur Hip system was part of a national class proceeding that subsequently settled in Nova Scotia ([1] *Taylor v. Wright Medical Technology Ltd.*), for present purposes, I shall ignore that aspect of her claim, since it has been resolved.

[37] Thus, the Martin/Deveau Action was with respect to the implantation of the "ConservePlus Total Resurfacing Hip System" for resurfacing surgery, and the Rowland Action was with respect to the "Conserve Hip System" for total arthroplasty surgery.

[38] In other words, the Martin/Deveau Action was against Wright Medical (the collective) with respect to the resurfacing device, and in comparison, the Rowland Action was against: (a) Wright Medical (the collective) and also (b) MicroPort Medical B.V., and (c) MicroPort Scientific Corporation with respect to the arthroplasty device.

[39] It shall become important to note what in particular the Rowland Action Statement of Claim pleads about the MicroPort Defendants. The particular pleadings are set out below:

22. MicroPort Scientific Corporation ("MicroPort Scientific") is a publicly traded company on the Hong Kong stock exchange with headquarters in Shanghai, China. MicroPort Scientific is in the business of developing, manufacturing, and selling interventional medical devices.

23. MicroPort Medical B.V. ("MicroPort Medical") is a privately held corporation based in Tiel, the Netherlands. It manufacturers and distributes orthopaedic products, including the ProFemur and Conserve Hip Systems, from Arlington, Tennessee. MicroPort Medical is a wholly owned subsidiary of MicroPort Scientific (collectively, the "MicroPort Defendants").

24. On June 19, 2013, Wright Medical Group, Inc. entered into an agreement with MicroPort Scientific to sell its OrthoRecon business, which manufactured orthopaedic implants including the ProFemur and Conserve Hip Systems to MicroPort Medical. Accordingly, the MicroPort Defendants are also liable for claims arising from defects in the ProFemur and Conserve Hip Systems after this date.

[…]

26. The MicroPort Defendants manufactured, licensed, assembled, distributed, marketed and sold the ProFemur and Conserve Hip Systems that were implanted into Class Members in Canada.

[…]

28. MicroPort Scientific is responsible for the acts and omissions of the MicroPort Medical for the following reasons:

a. MicroPort Scientific operated itself and its subsidiary MicroPort Medical as a single entity;

b. MicroPort Scientific completely controlled the day to day operations of MicroPort Medical such that MicroPort Medical did not function independently;

c. the MicroPort Defendants prepared their annual reports and financial statements on a consolidated basis and reported profits from the sale of the ProFemur and Conserve Hip Systems;

d. the MicroPort Defendants each associated their name with the ProFemur and Conserve Hip Systems on packaging, information for use, and marketing materials;

e. the MicroPort Defendants share common directors and officers; and

f. to permit the MicroPort Scientific to avoid vicarious liability for its subsidiary MicroPort Medical would yield a result flagrantly opposed to justice and the interests of Canadians.

[…]

65. The ProFemur and Conserve Hip Systems are also manufactured, licensed, assembled, distributed, marketed and/or sold by the MicroPort Defendants.

[40] Pausing here to foreshadow the discussion in the analysis portion of these Reasons for Decision, it shall be important to note that the design of the Rowland Action Statement of Claim is that Ms. Rowland sues only MicroPort Medical B.V. and MicroPort Scientific Corporation, which are alleged to be directly negligent but also vicariously liable for MicroPort Medical Group., which is not named as a defendant. There is no mention of MicroPort Orthopedics Inc. or other MicroPort entities. It shall be important to keep in mind that the Rowland Action focuses on: (a) MicroPort Medical B.V. and (b) MicroPort Scientific Corporation.

[41] To foreshadow the discussion later, the precision of the pleading in the Rowland Action is significant because s. 28 (1) of the *Class Proceedings Act, 1992* suspends any limitation period

applicable to a cause of action asserted in a proceeding in favour of a class member on the commencement of the proceeding. The operation of s. 28 (1) of the *Class Proceedings Act, 1992* means that in the immediate case the claims against: (a) Wright Medical Technology Canada Ltd., (b) Wright Medical Technology Inc. and (c) Wright Medical Group, Inc. (collectively, "Wright Medical"), (d) MicroPort Medical B.V. and (e) MicroPort Scientific Corporation were suspended on September 24, 2014. However, in the immediate case, the limitation periods for causes of action against MicroPort Orthopedics Inc. was not suspended, and those causes of action would be subject to the presumptive two-year limitation period of the *Limitations Act, 2002*.[3]

[42] Returning to the procedural narrative, on **October 1, 2020**, pursuant to the *Smarter and Stronger Justice Act, 2020* amendments to the *Class Proceedings Act, 1992* came into force.

[43] Pausing again in the procedural narrative, it shall be important to note that once they came into force, the amendments of the *Class Proceedings Act, 1992* would, amongst other things, modify some of the criteria for the certification of an action as a class proceeding. Generally speaking, the changes in the criteria make it more difficult than previously was the situation to satisfy the test for certification. The new test is stricter, and in a sense the test is more pro-defendant than the old test. As will be seen later, there is a bitter dispute about whether and how the modified criteria would apply in the immediate case if the Joinder Motion were granted. Wright Medical and MicroPort rely on the difficulties presented by the modified certification criteria as a reason the court should dismiss the Joinder Motion altogether.

[44] Returning to the narrative, on **September 23, 2021**, counsel for Wright Medical consented to the Martin/Deveau Plaintiffs' delivery of a Statement of Claim on December 3, 2021. In other words, to use the language of s. 29.1 (1)(b) of the *Class Proceedings Act, 1992*, "the parties […] agreed in writing to a timetable for service of the representative plaintiff's motion record in the motion for certification or for completion of one or more other steps required to advance the proceeding and have filed the timetable with the court." This consent meant that the Martin/Deveau action was not vulnerable to a motion for dismissal for delay pursuant to s. 29.1 (1) of the Act.

[45] Sometime in **2021**, Kim, Spencer, McPhee Barristers P.C and Rochon Genova LLP decided to collaborate using the Martin/Deveau Action, and on **December 3, 2021**, Rochon Genova LLP delivered a motion record seeking to certify the Martin/Deveau Action as a class proceeding.

[46] As part of the Martin/Deveau Certification Motion Record, the Martin/Deveau Plaintiffs sought leave to, among other things, consolidate the Martin/Deveau Action with the Rowland Action. The motion material contained a draft Consolidated Statement of Claim infusing the Martin/Deveau Action with the parties and the causes of action from the Rowland Action.

[47] After the enactment of the *Smarter and Stronger Justice Act, 2020*, the Rowland Action could have continued without procedural objection by Wright Medical or the MicroPort Defendants, if Class Counsel had filed a final and complete motion record in the motion for certification by October 1, 2021, but the plan of Class Counsel in the Rowland Action was to instead consolidate the Rowland Action with the Martin/Deveau Action.

[48] I imagine, but do not know, but it may be that Class Counsel in the Rowland Action anticipated that the Wright Medical Defendants in the Rowland Action would welcome being sued in just one proposed class action instead of two, but if that is what Class Counsel anticipated, their

[3] S.O. 2002, c. 24, Sched. B.

anticipation was a false hope. In a procedural gotcha, the Defendants to the Rowland Action, did not accede to Class Counsel's plans for a consolidation, and rather the Defendants advised Class Counsel that the Rowland Action must be dismissed for its failure to comply with s. 29.1 of the *Class Proceedings Act, 1992*.

[49] Having been got, Class Counsel in the Rowland Action responded with their new plan which involved a discontinuance of the Rowland Action with prejudice and with the idea of joining MicroPort Defendants and causes of action against MicroPort and the causes of action against Wright Medical to the Martin/Deveau Action. Consolidation was to be replaced with discontinuance and joinder.

[50] With respect to the new plan, the Defendants in the Rowland Action did not oppose discontinuance, but they ask that they be paid costs. The Defendants do oppose the new plan for the resurrection of the Rowland Action like a litigation phoenix as a part of the Martin/Deveau Action.

[51] On **March 3, 2022**, there was a case management conference in both proposed class actions. The Defendants in the Rowland Action advised that they intended to move to have the Rowland Action dismissed for delay because Ms. Rowland and her Class Counsel had not complied with the requirements of s. 29.1 of the amended *Class Proceedings Act, 1992.*

[52] On **March 25, 2022**, there was another case management conference in both proposed class actions. At the case management conference there was a further discussion about whether the Rowland Action could go forward as part of the Martin/Deveau Action. There was also a discussion about the so-called *Ragoonanan Principle* that for a cause of action against a defendant to be certified under the *Class Proceedings Act, 1992*, there must be a Representative Plaintiff who personally has a cause of action against that defendant.[4]

[53] After hearing the discussion at the case conference, I issued the following File(s) Direction:

> This is a case management conference in two proposed class proceedings: (1) *Martin v. Wright Medical Technology Canada Ltd. et al*.; and (2) *Rowland v. Wright Medical Technology Canada Ltd. et al.* Both of these proceedings need to be regularized in order to move forward. In order to do that, I set the following timetable for both actions:
>
> > a. In the *Rowland* action, the Plaintiffs shall have two weeks from today to deliver a motion in writing for leave to discontinue the action. The motion shall be served on the defendants in both the *Rowland* and the *Martin* actions.
> >
> > b. In the *Martin* action, the Plaintiffs shall have two weeks to deliver from today to deliver a motion in writing for leave: (a) to add an additional plaintiff, Pierre Marchand; (b) to add the MicroPort defendants from the *Rowland* action as party defendants; and (c) to deliver a Fresh as Amended Statement of Claim The motion shall be served on the defendants in both the *Rowland* and the *Martin* actions.
> >
> > c. The Defendants in both actions shall have six weeks from today to deliver responding materials in both motions as they may be advised.
>
> […]

[54] On **April 8, 2022**, Ms. Rowland delivered a Motion Record for leave to discontinue the Rowland Action.

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[4] *Vecchio Longo Consulting Services Inc. v. Aphria Inc*., 2021 ONSC 5405; *Ragoonanan Estate v. Imperial Tobacco Canada Ltd*. (2000), 51 OR (3d) 603 (S.C.J.).

[55] On **April 13, 2022**, the Plaintiffs in the Martin/Deveau Action delivered a "Joinder Motion" for an Order granting the Plaintiffs leave to:

> a. amend the Statement of Claim in the form of the proposed Amended Statement of Claim, attached as Schedule "A" to this Notice of Motion;
>
> b. file a Fresh as Amended Statement of Claim in the form attached as Schedule "B", with the date of the commencement of the fresh as Amended Statement of Claim as February 27, 2014, being the date on which the Statement of Claim in this action was issued;
>
> c. add Alan Chamberlain, Tony Kinney, Pierre Marchand and Lorrie Chamberlain as proposed Representative Plaintiffs;
>
> d. add MicroPort Medical B.V. and MicroPort Scientific Corporation ("MicroPort Entities") to this action as party defendants; and to
>
> e. remove Sandra Martin and John Charles Deveau as named Plaintiffs.

[56] The Motion Record for the Joinder Motion contained a draft proposed Amended Statement of Claim and a draft proposed Fresh as Amended Statement of Claim. The amended pleading names Wright Medical (the collective), MicroPort Medical B.V., and MicroPort Scientific Corporation as defendants. MicroPort Orthopedics Inc. is not named as a defendant.

[57] In the proposed Amended Statement of Claim the classes are defined as:

> All persons resident in Canada who were implanted with a Conserve Hip System (the "Class and/or "Class Members").
>
> All persons who on account of a personal relationship to a Class Member are entitled to assert a derivative claim for damages pursuant to section 61 (1) of the *Family Law Act*, R.S.O. 1990, c. F.3, as amended, and comparable provincial and territorial legislation. ("Family Class" and/or "Family Class Members").

[58] On **May 13, 2022**, MicroPort Medical B.V. and MicroPort Scientific Corporation delivered a Responding Motion Record. The same day Wright Medical (the collective) delivered its Responding Motion Record.

[59] On **May 27, 2022**, the Martin/Deveau Plaintiffs delivered their Reply Motion Record for the Joinder Motion containing Pritpal Mann's affidavit and Dr. Zaizal's expert report.

[60] On **June 3, 2022**, the Martin/Deveau Plaintiffs delivered their Factum for their Joinder Motion and a Supplementary Motion Record for the Joinder Motion. Although nothing ultimately turns on this, in their blundering way, the Class Counsel sought to add "MicroPort Medical Group, Inc." as a defendant, though neither the Notice of Motion nor the proposed amended pleading refers to it.

[61] On **June 10, 2022**, MicroPort Medical B.V. and MicroPort Scientific Corporation delivered their Responding Factum to the Martin/Deveau Plaintiffs' Joinder Motion. The factum opens with what MicroPort Medical B.V. and MicroPort Scientific Corporation no doubt believe are two stakes in the heart of the Joinder Motion. Paragraphs 1 to 3 of MicroPort's factum state:

> 1. [MicroPort Medical B.V and MicroPort Scientific Corporation] does not oppose the discontinuance with prejudice of the action commenced by Gayle Rowland under court file number CV-14-512824CP (the "Rowland Action"). However, MicroPort does oppose the plaintiffs' motion

> to add it as a defendant and otherwise amend the statement of claim in the action commenced by Sandra Martin and John Charles Deveau in court file number CV-14-499297 (the "Martin Action").
>
> 2. First, that motion cannot succeed because the proposed amended pleading does not assert a tenable cause of action against MicroPort. Instead, it asserts that responsibility for any alleged failures with Conserve hip replacement products implanted after June 19, 2013, lies with MicroPort Orthopaedics, Inc. ("MicroPort Orthopaedics"), an entity that is not a proposed defendant and was never named in the Rowland action. The limitation period against MicroPort Orthopaedics was never tolled by that proceeding, so that any claim against it is out of time.
>
> 3. Second, the motion intends to circumvent changes to the *Class Proceedings Act, 1992* (the "CPA") that came into force on October 1, 2020. Their purpose was to combat delay, to improve the fairness of class proceedings, and to promote access to justice. Since the amendment motion seeks to avoid the consequences of those changes, it is an abuse of process that should not be allowed.

[62] It is good practice to conduct corporate searches before commencing to sue a corporation, and one can intuit from Ms. Fiddes' affidavits of June 28, 2022, and July 13, 2022, that Class Counsel in the Martin/Deveau action were not having a good day or a good time on June 10, 2022 reading MicroPort's factum.

[63] So, after reading the factum, Class Counsel immediately conducted a corporate search of Canadian corporations to ascertain whether MicroPort Orthopaedics Inc. still existed and was operational. The corporate search disclosed no such corporation. However, there was a MicroPort Orthopedics Ltd. and so Class Counsel decided to revise the draft amended Statement of Claim and to add MicroPort Orthopedic Ltd. as a Defendant and to clean up the misnomer with its Reply factum.

[64] Meanwhile, on **June 13, 2022**, Wright Medical (the collective) delivered its Responding Factum to the Martin/Deveau Plaintiffs' Joinder Motion.

[65] On **June 28, 2002**, Class Counsel in the Martin/Deveau Action filed a further draft proposed Amended Statement of Claim in their Further Supplementary Motion Record. The June 28, 2022 draft of the pleading names: (a) MicroPort Medical B.V, (b) MicroPort Scientific Corporation, and (c) MicroPort Orthopedics Ltd. as Defendants. Also on June 28, 2022, the Martin/Deveau Plaintiffs delivered their Reply Factum for their Joinder Motion.

[66] On **June 29, 2022**, MicroPort Medical B.V. and MicroPort Scientific Corporation delivered a Sur-Reply Factum to the Martin/Deveau Plaintiffs' Joinder Motion.

[67] As a result of reading the MicroPort's Sur-Reply Factum, Class Counsel in the Martin/Deveau Action realized that just searching Canada's corporation filings was a blunder. So, a corporate search of American corporations was conducted, and low and behold Class Counsel learned about an American corporation, "MicroPort Orthopedics Inc.", [*i.e.*, "Inc." not "Ltd."] headquartered in Arlington, Tennessee. Class Counsel was able to verify that this MicroPort entity was operational.

[68] On **July 5, 2022**, Class Counsel advised the Defendants that the plan was <u>not</u> to join the "Ltd." but to join the "Inc." and on **July 13, 2022**, the Plaintiffs filed a Further Further Supplementary Motion Record with an amended Notice of Motion and a revised proposed Amended Statement of Claim.

[69] On **July 14, 2022**, MicroPort Medical B.V., MicroPort Scientific Corporation, and

MicroPort Orthopedics Inc. delivered a Sur-Sur Reply Factum.

[70] On **July 19, 2022**, the Martin/Deveau Plaintiffs delivered a Sur-Sur-Sur Reply Factum.

[71] The Defendants have not delivered a Statement of Defence. Wright Medical Group, Inc. and Wright Medical Technology Canada Ltd., reserve their right to challenge jurisdiction, and they have refrained from taking procedural steps pending determination of the jurisdiction issues.

F. Discussion and Analysis

[72] There is a Rubik's cube degree of procedural problems to solve in the immediate case. I shall solve them sequentially in the following order of topics:

a. The Discontinuance of the Rowland Action.

b. The Suspension and Running of Limitation Periods and the Joinder of Parties and Causes of Action.

c. Whether the Former Test, a Hybrid Test, or the New Test for Certification Applies to the Certification Motion in the Immediate Case.

d. Whether the Fresh as Amended Statement of Claim may be Dated as of February 27, 2014.

1. The Discontinuance of the Rowland Action

[73] Section 29 of the *Class Proceedings Act, 1992* requires court approval for the discontinuance, abandonment, dismissal, or settlement of a proceeding commenced under the Act.

[74] 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.[5]

[75] The crucial factor in whether or not to approve a discontinuance of a proposed class action is the matter of prejudice to the putative class members or to the defendants of the proposed class action if the proposed class proceeding is discontinued.

[76] If a proposed class action is discontinued, section 29 of the *Class Proceedings Act, 1992*, protects the putative class members who may be relying on the proposed class proceeding or postponing a decision about an individual action by requiring court approval for the discontinuance. The court will examine whether there is any prejudice in the discontinuance and may address the prejudice, for instance, by requiring that notice be given to the putative class members so that they can consider an independent action instead of relying on the pending class proceeding.

[77] The determination of whether there is prejudice to the putative class members focuses on the policy notion that putative class members should be able to defer exercising their own litigation autonomy because there is a pending proposed class proceeding upon which they may depend to achieve access to justice. If the pending action is certified as a class proceeding, then the putative class members will be given notice and an opportunity to opt-out to exercise their own litigation

[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.).

autonomy. Section 28 of the *Class Proceedings Act, 1992* protects the litigation autonomy of the putative class members by suspending the operation of limitation periods until the matter of certification is resolved and by then providing notice and a right to opt out if the action is certified.

[78] In the immediate case, as I have foreshadowed above, the putative Class Members of the Rowland Action will not be prejudiced by the discontinuance of the Rowland Action provided that the discontinuance does not take effect for 60 days and provided in the meantime the Martin/Deveau Action is recast to include the claims of the putative Class Members of the Rowland Action.

[79] Discontinuing the Rowland Action in this way also does not prejudice the Defendants to the Rowland Action because but for the blunder of Class Counsel of not delivering a motion record for certification before seeking consolidation with the Martin/Deveau Action, the Rowland Action could have been continued and not been vulnerable to a dismissal under s. 29.1 of the *Class Proceedings Act, 1992*.

[80] Moreover, and more to the point, even a dismissal for delay does not preclude another plaintiff from cloning the proposed class action and, in effect, continuing it against the same defendants. The case law establishes that a dismissal order under s. 29.1 of the *Class Proceedings Act*, does not preclude another putative class member from coming forward and commencing a new action on behalf of the class.[6] In this regard, it is worth noting that s. 28 (1) keeps the limitation periods suspended until the dismissal order is made, and s. 29.1 (2) mandates that notice be given to the putative class members who may have been depending on the class action. The giving of notice secures an opportunity for the putative class member to clone a possible class proceeding or to commence his or her own individual action.

[81] In the immediate case, it is, therefore, appropriate that I exercise the court's jurisdiction to approve the discontinuance of the Rowland Action, with the discontinuance to take effect in 60 days. Class Counsel in the Rowland Action shall give notice of the discontinuance by posting a notice and also a copy of these Reasons for Decision on its web page and on the web page of Class Counsel for the Martin/Deveau Action.

[82] The discontinuance should be with costs payable to the Defendants in the Rowland Action for the discontinued action.

[83] In the circumstances of the immediate case, the discontinuance arose as a way to advert the mandatory dismissal of the Rowland Action for delay. The Defendants only forbore bringing a dismissal for delay motion because Class Counsel decided to seek a discontinuance with prejudice. Had the Defendants moved for a dismissal for delay, then Class Counsel would be obliged to pay costs to the Defendants. The same result should follow in the immediate case.

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[6] *LeBlanc v. The Attorney General of Canada*, 2022 ONSC 3257; *Bourque v Insight Productions Ltd*., 2022 ONSC 174.

2. The Suspension and the Running of Limitation Periods and the Joinder of Parties and Causes of Action

(a) The Joinder of Defendants

[84] From its commencement and until the Joinder Motion, the Martin/Deveau Action was an action exclusively against Wright Medical (the collective) and solely about its hip prosthetic for resurfacing. By the Joinder Motion, the Plaintiffs in the Martin/Deveau Action seek to join new causes of action against Wright Medical (the collective) with respect to the prosthetic device for arthroplasty surgery. And by the Joinder Motion, the Plaintiffs in the Martin/Deveau Action seek to add several MicroPort Defendants with respect to the prosthetic device for arthroplasty surgery.

[85] The Defendants, however, submit that this attempt to join parties and causes of action to the Martin/Deveau Action: (a) is contrary to s. 29.1 of the *Class Proceedings Act, 1992*, and (b) is not possible because the joinder of the MicroPort Defendants and the joinder of the additional causes of action is precluded because the joinder of parties and causes of action is statute-barred.

[86] For the reasons expressed above, there is no circumvention of s. 29.1 of the *Class Proceedings Act, 1992*. The existing Martin/Deveau Action is not vulnerable to being dismissed for delay. An amended Martin/Deveau Action is not different from the outcome, which is possible, that a putative class member from the discontinued Rowland Action launched a cloned action before the suspension of limitation periods is removed.

[87] I shall return to the topic of the alleged circumvention of s. 29.1 in the next section of these reasons where I discuss the matter of what certification test applies to the amended Martin/Deveau Action. In this section, I will discuss the matter of whether the joinder of parties and causes of action is statute-barred.

[88] As I have explained above, the effect of s. 28 of the *Class Proceedings Act, 1992* is that there has been a suspension of the running of the limitation period with respect to the claims advanced in the Rowland Action. Pursuant to s. 28 of the *Class Proceedings Act, 1992,* the running of the limitation periods would recommence with a dismissal of the Rowland Action for delay or in the immediate case it will recommence in 60 days when the Rowland Action is discontinued.

[89] I have purposely ordered that the discontinuance of the Rowland Action to take effect 60 days after the release of these Reasons for Decision so that the Martin/Deveau Action may be amended during the time when the running of limitation periods has been suspended.

[90] Thus, the joinder of the causes of action against Wright Medical (the collective) from the Rowland Action and the joinder of the causes of action against (a) MicroPort Medical B.V. and (b) MicroPort Scientific Corporation with respect to the prothesis for arthroplasty surgery is not precluded by the *Limitations Act, 2002*.

[91] The situation, however, is different for MicroPort Orthopedics Inc. Any claims against it are barred by the tolling of the two-year limitation period under the *Limitation Act, 2002*. A plaintiff may not amend his or her statement of claim to add a new cause of action if the claim is statute-barred.[7]

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[7] *French v. H&R Property Management Ltd*., 2019 ONCA 302 *French v. H&R Property Management Ltd.*, 2019 ONCA 302; *United Food and Commercial Workers Canada, Local 175, Region 6 v. Quality Meat Packers Holdings*

[92] MicroPort Orthopedics Inc. was never in the style of cause nor directly sued in the Rowland Action. The running of the limitation period has continued to run against MicroPort Orthopedics Inc. since before 2014 against these proposed Defendants, and it is conceivable that some individual causes of action may be barred by the 15-year absolute limitation period of the *Limitations Act, 2002.*

[93] MicroPort Orthopedics Inc. was never named in the Rowland Action, which was quite specific about its targeted defendants. There is no misnomer here around which any MicroPort entities might be brought into the Rowland Action, and obviously, there is no misnomer in the Martin/Deveau action about MicroPort entities, because before the Joinder Motion, there was no allusion to MicroPort in the Martin/Deveau Statement of Claim.

[94] There is no misnomer or misdescription in either the Rowland Action or the Martin/Deveau Action insofar as MicroPort Orthopedics Inc. is concerned. The Joinder Motion does not correct the name of a party misnamed or alluded to in a pleading; rather, the Joinder motion seeks to add a party and to pursue causes of action against a party after the limitation period has tolled.[8] Such an amendment to the Statement of Claim is not permissible.

[95] I, therefore, conclude that within 60 days of the release of these Reasons for Decision, the Martin/Deveau Statement of Claim should be amended: (a) to add causes of action with respect to the prosthetic for arthroplasty surgery against Wright Medical (the collective); and (b) to join MicroPort Medical B.V. and MicroPort Scientific Corporation to advance claims with respect to the prosthetic for arthroplasty surgery.

[96] In making this Order, I have not ignored MicroPort's counsel's arguments that: the proposed amended pleading does not assert a tenable cause of action against MicroPort Medical B.V. or MicroPort Scientific Corporation because the only tenable claim is against MicroPort Orthopedics Inc., which is not a party to the litigation. That is a purely pleadings point that can be addressed at the certification motion under the cause of action criterion (s. 5 (1)(a) of the *Class Proceedings Act, 1992*).

(b) <u>The Substitution of Plaintiffs in the Martin/Deveau Action</u>

[97] It is not an infrequent occurrence in class action litigation that there is a change in the plaintiff with substitutions and additions of proposed representative plaintiffs. It is a sad reason that Ms. Martin and Mr. Deveau need to be replaced in the immediate case, but they do need to be replaced for the Martin/Deveau action to proceed.

[98] Alan Chamberlain, Tony Kinney, Pierre Marchand, and Lorrie Chamberlain have volunteered to be the substituted Plaintiffs and it is appropriate to add them.

[99] Since Alan Chamberlain, Tony Kinney, Pierre Marchand, and Lorrie Chamberlain have pleaded causes of action against the Defendants of the recast Martin/Deveau Action, they are appropriate substitutes for Ms. Martin and Mr. Deveau. I, therefore, order that Ms. Martin and Mr. Deveau be removed and that Alan Chamberlain, Tony Kinney, Pierre Marchand, and Lorrie Chamberlain be joined as plaintiffs.

Limited, 2018 ONCA 671; *1100997 Ontario Limited v. North Elgin Centre Inc*., 2016 ONCA 848; *Dee Ferraro Ltd. v. Pellizzari*, 2012 ONCA 55; *Frohlick v. Pinkerton Canada Ltd*. 2008 ONCA 3.

[8] *Streamline Foods Ltd v. Jantz Canada Corp*, 2012 ONCA 174, aff'g 2011 ONSC 1630 (Div. Ct.).

[100] In making this Order, I have not ignored MicroPort's Counsel's arguments with respect to the qualifications of Mr. Marchand as a representative plaintiff. Once again that is a matter that can be addressed at the certification motion under the representative plaintiff criterion (s. 5 (1)(d) of the *Class Proceedings Act, 1992*).

3. Whether the Former Test, a Hybrid Test, or the New Test for Certification Applies to the Certification Motion in the Immediate Case

[101] Wright Medical (the collective) submits that the Rowland Action claims and causes of action cannot be combined with the Martin/Deveau Action because this would mean that pursuant to the transition provisions of the amendments to the *Class Proceedings Act, 1992*, the original claims against Wright Medical with respect to the prosthesis for resurfacing surgery would be governed by the former less stricter certification test and the appeal route to the Divisional Court (appeal as of right if certification is denied; appeal with leave if certification granted) while the transposed claims from the Rowland Action against Wright Medical and MicroPort Medical B.V. and MicroPort Scientific Corporation would be governed by a more strict certification test and the appeal route to the Court of Appeal (appeal as of right whether certification is granted or denied). Wright Medical submits that such an assembled class action would be unmanageable, untenable, and contrary to the legislature's intent when it enacted the amendments to the *Class Proceedings Act, 1992*.

[102] Wright Medical submits that the existing claims of the original Martin/Deveau Action and the new claims transposed from the Rowland Action cannot be included within the same legal proceeding and the claims from the Rowland Action can only proceed as a separate legal proceeding that is subject to the amended *Class Proceedings Act, 1992*.

[103] Once again, Wright Medical seems to like the idea of being sued in two separate class proceedings and there is of course the irony that if it is true that combining the Rowland Action with the Martin/Deveau Action would make the proceedings unmanageable that would provide Wright Medical with a useful argument to have the combined action not certified for failure to satisfy the common issues or the preferable procedure criterion.

[104] Be all that as it may, I can address any possible unfairness to Wright Medical and MicroPort B.V. and MicroPort Scientific Corporation by making it a term of the Joinder Motion order that the assembled class action be governed by the amended *Class Proceedings Act, 1992*; *i.e.*, the recast Martin/Deveau Action shall be governed by the revised certification criteria.

[105] The Defendants can hardly complain of this resolution because it avails them of the more stringent pro-defendant test for certification and the more favourable appeal route where defendants may appeal without leave. This resolution is consistent with the transition provisions of the amended Act, which do not directly speak to the situation of what happens when an action to be governed by the older certification test is amended before the certification motion.

[106] In my opinion, the direction that an amended Statement of Claim be governed by the revised certification criteria is within the court's plenary jurisdiction under s. 12 of the unamended Act and under s. 12 of the amended act, the text of which, I have set out below:

Court may determine conduct of proceeding 12. The court, on the motion of a party or class member, may make any order it considers appropriate respecting the conduct of a class proceeding to ensure its fair and expeditious determination and, for the purpose, may impose such terms on the parties as it considers appropriate. 1992, c. 6, s. 12.	*Court may determine conduct of proceeding* 12. The court, on its own initiative or on the motion of a party or class member, may make any order it considers appropriate respecting the conduct of a proceeding under this Act to ensure its fair and expeditious determination and, for the purpose, may impose such terms on the parties as it considers appropriate. 2020, [c. 11, Sched. 4, s. 14.]

[107] In *Gebien v. Apotex Inc*.,[9] a billion dollar proposed class action commenced in 2019, the Plaintiff sued 18 groups of pharmaceutical companies with respect to the distribution of opioids. The action had been commenced before the amendments to the *Class Proceedings Act, 1992,* and when Class Counsel failed to meet the deadline for delivering the certification motion record, the defendants moved to have the action dismissed for delay. The motion was settled when the plaintiff agreed to discontinue a cloned proposed class action filed in Manitoba and agreed that the Ontario action should be governed by the provisions of the amended statute and the Defendants agreed to withdraw their motion to have the action dismissed for delay pursuant to section 29.1 of the *Class Proceedings Act, 1992*. I approved the settlement. This is an example of the revised certification criteria being applied to an action that had been commenced before the *Class Proceedings Act, 1992* was amended.

[108] In the unreported endorsement in *Robertson v. Ontario*,[10] Justice Belobaba reconstituted and reorganized 20 related actions into approximately 10 parallel actions and mused that it would be possible for a court to manage hybrid class actions where some causes of action would be governed by the old certification test and others by the new test. In *Arsalani v. Islamic Republic of Iran,*[11] a carriage motion, Justice Glustein mused that a hybrid action with more than one certification test might be unmanageable.

[109] In the immediate case, I need not muse about the matter of hybrid class action certification tests because I am exercising my jurisdiction in the immediate case to make an order respecting the conduct of a class proceeding to ensure its fair and expeditious determination and my jurisdiction for that purpose to impose terms that I consider appropriate. I consider it appropriate to grant the joinder of some parties and some causes of action to the Martin/Deveau action and to require that the action pursuant to the Fresh as Amended Statement of Claim be governed by the amended *Class Proceedings Act, 1992*.

G. Whether the Fresh as Amended Statement of Claim may be Dated February 27, 2014

[110] In the Joinder Motion, the Martin/Deveau Plaintiffs sought an order that the Fresh as Amended Statement of Claim may be dated February 27, 2014.

[111] Given their ultimately harmless blunders in implementing their plans for the Rowland Action and the Martin/Deveau Action, this presumptuous request was made in order to preserve the old certification test for the bringing together of all the claims. Since the recast Martin/Deveau action will be governed by the new test, this request is moot.

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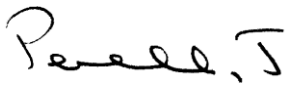
[9] 2022 ONSC 4172.
[10] January 21, 2022 File No. CV20-00648597-00CP
[11] 2020 ONSC 6843.

[112] The Fresh as Amended Statement of Claim should be dated in the normal way.

H. Conclusion

[113] Orders to go in accordance with these Reasons for Decision.

[114] If the parties cannot agree about the matter of costs for the discontinuance of the Rowland Action or about the matter of costs with respect to the motions, they may make submissions in writing beginning with MicroPort's and Wright Medical's submissions within twenty days from the release of these Reasons for Decision followed by the Plaintiffs' submissions within a further twenty days.



Perell, J.

Released: July 22, 2022

CITATION: Martin v. Wright Medical Technology Canada 2022 ONSC 4318
COURT FILE NO.: CV-14-499297-0000
CITATION: Rowland v. Wright Medical Technology Canada 2022 ONSC 4319
COURT FILE NO.: CV-14-512824-00CP
DATE: 20220722

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:

SANDRA MARTIN and JOHN CHARLES DEVEAU

Plaintiffs

- and –

WRIGHT MEDICAL TECHNOLOGY CANADA LTD., WRIGHT MEDICAL TECHNOLOGY, INC., and WRIGHT MEDICAL GROUP, INC.

AND BETWEEN:

GAYLE ROWLAND

Plaintiffs

- and –

WRIGHT MEDICAL TECHNOLOGY CANADA LTD., WRIGHT MEDICAL TECHNOLOGY, INC., WRIGHT MEDICAL GROUP, INC., MICROPORT MEDICAL B.V. and MICROPORT SCIENTIFIC CORPORATION

Defendants

REASONS FOR DECISION

PERELL J.

Released: July 22, 2022