

SUPERIOR COURT OF JUSTICE (ONTARIO)

RE: JUDITH LOGAN (Plaintiff)

- and -

HER MAJESTY THE QUEEN IN RIGHT OF CANADA AS REPRESENTED BY THE
MINISTER OF HEALTH, THE ATTORNEY GENERAL FOR CANADA,
REGULATORY INSTITUTION 1, REGULATORY INSTITUTION 2, JOHN DOE and
JANE ROE (Defendants)

BEFORE: WINKLER J.

COUNSEL: *John Legge, for the Plaintiff*
Christopher A. Amerasinghe, Q.C., for Her Majesty the Queen
William E. Pepall and Patrick J. Cotter, for Montreal General Hospital

HEARD: By Written Submissions concluding February 12, 2002

PROCEEDING UNDER THE *CLASS PROCEEDINGS ACT, 1992*

ENDORSEMENT

[1] This is a motion by the plaintiff to add Wendy Bulloch-MacIntosh, a member of the putative class, as a representative plaintiff in this proposed class proceeding. The proceeding relates to allegedly defective jaw implants known as TMJ implants. HMQ is a defendant in this class proceeding and in another individual action in which Bulloch-MacIntosh is the plaintiff, brought on substantially the same basis as the class proceeding. There are defendants named in the individual action who are not parties to this class proceeding. Accordingly, the motion also seeks a stay of Bulloch-MacIntosh's individual action as against HMQ only, pending a disposition of the class proceeding.

[2] The stated purpose of the proposed amendment is to augment the certification record with the information elicited from HMQ through the discovery process in the individual

action. The motion is opposed by HMQ and Montreal General Hospital, a defendant in the individual action only who has asserted a cross-claim against HMQ in that action. HMQ opposes the motion on the grounds of prejudice and on the basis that the addition of Bulloch-MacIntosh for the purpose of using the information obtained in her individual action in the class proceeding violates the deemed undertaking rule (r. 30.1) of the *Rules of Civil Procedure*, R.R.O.1990, Reg.194. Montreal General Hospital also opposes the motion, contending that a stay of the individual action, an integral part of the relief sought in the plaintiff's motion, is prejudicial to it and other defendants in that action in view of the cross-claims being asserted.

[3] It is premature to decide the issues relating to the requested amendment, including the issue of the deemed undertaking rule, at this time. There is a threshold issue which must be determined first. Namely, if the motion to add Bulloch-MacIntosh as a representative plaintiff in the class proceeding is granted, should an essential term of any such order be the discontinuance or dismissal of the individual action, rather than a stay.

[4] The *Class Proceedings Act, 1992*, S.O.1992, c. 6 provides:

14.(1) In order to ensure the fair and adequate representation of the interests of the class or any subclass or for any other appropriate reason, the court may, at any time in a class proceeding, permit one or more class members to participate in the proceeding.

(2) Participation under subsection (1) shall be in whatever manner and on whatever terms, including terms as to costs, the court considers appropriate.

[5] As stated, Bulloch-MacIntosh is a member of the putative class. As such, without deciding the point, it would be open to this court in the exercise of its discretion under s. 14 of the *Act* to make an order permitting her to participate in the class proceeding as a representative plaintiff on whatever terms the court deems appropriate. However, the plaintiff's request for a stay against HMQ in the individual action, as opposed to discontinuance or dismissal of that action, is an integral element of the motion.

[6] To permit a litigant to maintain their individual action, albeit subject to a stay, while at the same time acting as a representative plaintiff in a class proceeding in respect of the same issues appears, *prima facie*, to be inimical to the objects of the CPA, and in particular to the stated goal of judicial economy or litigation efficiency. The conduct of proceedings in this way creates duplicative litigation in respect of those issues which remain alive if the individual action is merely stayed while the plaintiff in that action participates in the class proceeding. Additionally, the stay against one defendant in the individual action creates the risk of an inherent prejudice through delay to the other defendants, who are not parties to the class proceeding and who have cross-claims to assert against the defendant subject to a stay. The class proceeding has the potential to continue for a significant time, especially if appeals are pursued. As well, there is the potential for a conflict of interest for Bulloch-MacIntosh and her counsel, who are also class counsel, if both actions are permitted to continue. Each will have obligations in the context of their respective roles as representative plaintiff and class counsel in the class proceeding. Those obligations cannot be performed where an individual action is being

maintained by the representative plaintiff at the same time as the class proceeding is being prosecuted.

[7] Moreover, in light of the inherent prejudice of delay, the prospect of duplicative litigation, the complexity occasioned by the presence of cross-claims and the appearance of a conflict of interest on the part of the representative plaintiff and class counsel, it is arguable that granting a stay as opposed to a discontinuance or dismissal, would defeat the elements of fairness, efficiency and manageability that must exist in a class proceeding. See: *Hollick v. Toronto (City)*, [2001] S.C.J. No.67.

[8] There is no question that Bulloch-MacIntosh can continue with her individual action. Any member of a putative class may do so. They must however, in the normal course, opt out of the class proceeding at the appropriate time. In the present circumstances, and in the absence of further evidence or argument, given that Bulloch-MacIntosh would be a representative plaintiff as opposed to a mere class member, this would be improbable, and in light of the purported reason for her insertion as representative plaintiff, unacceptable.

[9] These considerations give rise to a concern on the basis of the record before me. Prior to ruling on the motion, I am prepared, however, to hear further submissions directed to the threshold issue raised in these reasons. Further, I believe that the issue is such as to

require the attendance of counsel to present oral argument. Counsel may obtain a hearing date by appointment.

A handwritten signature in black ink, appearing to read "Winkler J.", is written above a horizontal line.

WINKLER J.

Released: February 13, 2002

COURT FILE NO.: 99-CV-181819CP
DATE: 20020213

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

JUDITH LOGAN

Plaintiffs

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