

ONTARIO
SUPERIOR COURT OF JUSTICE
(Divisional Court)

BETWEEN:

KATHRYN ANNE TAYLOR

Plaintiff

- and -

THE ATTORNEY GENERAL OF CANADA

Defendant

Proceeding under the *Class Proceedings Act, 1992*

NOTICE OF MOTION
For Leave to Appeal

THE DEFENDANT, THE ATTORNEY GENERAL OF CANADA, will make a motion to a single judge of the Divisional Court sitting as a judge of the Superior Court of Justice on November 17, 2010 at 10 a.m., at Osgoode Hall , 130 Queen Street West, Toronto, Ontario.

PROPOSED METHOD OF HEARING: the motion is to be heard orally.

THE MOTION IS FOR:

- a) An order pursuant to *Rule 62.02* granting leave to the Attorney General of Canada to appeal to the Divisional Court from the order of the Honourable Justice Cullity dated September 10, 2010, granting the plaintiff leave to amend her Statement of Claim and denying the defendant's motions to strike and decertify the class action.
- b) Costs of this motion; and
- c) Such further and other relief as this Honourable Court deems just.

THE GROUNDS FOR THE MOTION ARE:

1. This is a proposed class action on behalf of putative class members who allegedly suffered damages as a result of the insertion into their jaws of a medical device (Vitek™ TMJ Implants).

2. The plaintiff alleges that Health Canada had a duty to her and the putative class members in connection with regulating the importation, sale and distribution of such implants.

3. The plaintiff does not allege that she was aware of or relied upon any representations made by Health Canada regarding the safety of the implant she received.

4. Following the Ontario Court of Appeal's decision in *Drady v. Canada*, [2008] O.J. No. 3772 which disapproved of the decision to certify the present class action, the Attorney General of Canada (AGC) brought motions to strike and decertify the action on the basis that the Crown did owe a private law duty of care to the plaintiff.

5. Justice M. Cullity ultimately denied the AGC's motions to strike and decertify the class action based upon amendments made to the Statement of Claim for which leave was granted.

6. The decision of the Honourable Judge conflicts with other decisions of Canadian courts, including this Honourable Court, dealing with the existence of a

reasonable cause of action in the context of regulatory negligence. These conflicts cannot be explained as a proper exercise of judicial discretion based upon different facts. It is desirable, therefore, that leave to appeal be granted pursuant to *Rule* 62.02(4)(a).

7. There also appears to be good reason to doubt the correctness of the learned Judge's decision pursuant to *Rule* 62.02(4)(b) in that, *inter alia*:

- (a) the learned Judge erred in his analysis of the duty of care required by the Supreme Court of Canada in *Cooper v. Hobart*, [2001] 3 S.C.R. 537, *Edwards v. Law Society of Upper Canada*, [2001] 3 S.C.R. 562 and *Odhavji Estate v. Woodhouse*, [2003] 3 S.C.R. 263;
- (b) the learned Judge erred in applying to the Statement of Claim the test for proximity established by the Ontario Court of Appeal's decisions in *Attis v. Canada*, [2008] O.J. No. 3766 and *Drady v. Canada*, [2008] O.J. No. 3772; that he failed to apply binding jurisprudence directly on point preferring instead jurisprudence which was clearly inappropriate and distinguishable on the facts;
- (c) the learned Judge erred in his analysis of the statutory framework;

8. This proposed appeal involves matters of such importance, as provided in *Rule* 62.02(4), that leave should be granted. The effect of the learned Judge's decision, *inter alia*, is:

- (a) to press a doomed action to trial along with more than 30 other similar individual TMJ implant cases presently before the Courts;
- (b) to allow countless lawsuits against the federal government based on a private law duty of care to individuals in circumstances where the government is carrying out its public law mandate pursuant to a regulatory scheme. This is contrary to the direction of the Supreme Court of Canada, the Ontario Court of Appeal, and other Superior Court decisions; and
- (c) to create a regulatory scheme which imposes a private law duty of care on the federal government towards private individuals, where Parliament's intent is to provide a regulatory framework for the purpose of regulating manufacturers in the general public interest;

9. Such further and other grounds as counsel may advise and this Honourable Court may permit.

THE FOLLOWING DOCUMENTARY EVIDENCE will be used at the hearing of the motion:

10. Motion Records for the Defendant's motions to strike and decertify the class action and the Plaintiff's motion records seeking leave to amend before Justice Cullity; and

11. Supplementary Motion Record including:

- (a) Notice of Motion for leave to appeal;
- (b) Order dated September 10, 2010;
- (c) Reasons for Decision dated September 10, 2010
- (d) Order dated January 11, 2010; and
- (e) Reasons for Decision dated January 11, 2010

12. Such further and other evidence as counsel may advise and this Honourable Court may permit.

THE BASIS OF THE APPELLATE COURT'S JURISDICTION IS section 30(2) of the *Class Proceedings Act*, R.S.O. 1992 c.6, section 19(1)(b) of the *Courts of Justice Act*, R.S.O. 1990, C.43, and *Rule 62.02(1)* of the *Rules of Civil Procedure*.

September 15, 2010

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KATHRYN ANNE TAYLOR

Plaintiff

AND

HER MAJESTY THE QUEEN IN
RIGHT OF CANADA, et al.

Defendant

UNIVERSITY HEALTH NETWORK,
ET AL.
Third Parties

ONTARIO
SUPERIOR COURT OF JUSTICE
(Divisional Court)

Proceeding Commenced at
Toronto

**NOTICE OF MOTION FOR LEAVE TO
APPEAL**

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