CITATION: Parker v. Pfizer Canada Inc., 2017 ONSC 2418
COURT FILE NO.: CV-08-368950CP
DATE: 20170420

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:	
KENNETH R. PARKER Plaintiff	*Douglas Lennox* for the Plaintiff
– and –	
PFIZER CANADA INC. and PFIZER INC. Defendants	*Randy Sutton* for the Defendants
Proceeding under the *Class Proceedings Act, 1992*	**HEARD:** In writing

PERELL, J.

REASONS FOR DECISION

[1] In 2012, pursuant to the *Class Proceedings Act, 1992*, S.O. 1992, c. 6, I certified this action as a class proceeding; see *Parker v. Pfizer Canada Inc.*, 2012 ONSC 3681.

[2] The Representative Plaintiff, Kenneth R. Parker, now moves to have the action discontinued.

[3] The factual background is that the Defendant, Pfizer Canada Inc. ("Pfizer"), sells the prescription drug varenicline under the brand name CHAMPIX®, as a treatment for tobacco (nicotine) addiction.

[4] In his certified class action, Mr. Parker alleged that as a consequence of ingesting CHAMPIX®, he and other Class Members experienced neuropsychiatric adverse events, including suicidal and homicidal ideation. He sued Pfizer for a breach of a duty to warn.

[5] In February 2013, similar litigation in the United States, which was ready for trial, settled, and the defendants paid $273 million.

[6] The action did not settle in Canada and, following certification, the parties engaged in documentary and oral discovery. Pfizer produced over 60,000 documents.

[7] Before the examinations for discovery were complete, Mr. Parker decided that it was appropriate to pause to await the outcome of the EAGLES Study, a large-scale epidemiological clinical study about the safety of varenicline.

[8] In April 2016, the EAGLES Study was released, and its outcome did not support Mr. Parker's allegations of generic causation.

[9] On the basis of the scientific evidence from the EAGLES Study, Mr. Parker gave Class Counsel instructions to discontinue the action. Pfizer consents to a discontinuance without costs. There is also an agreement to discontinue the related proposed class actions in British Columbia, Alberta, and Québec.

[10] The results of the EAGLES Study were published in April 2011 as Anthenelli et al., "Neuropsychiatric safety and efficacy of varenicline, bupropion, and nicotine patch in smokers with and without psychiatric disorders (EAGLES): double blind, randomized, placebo controlled clinical trial," *Lancet*, Vol. 387, No. 10037, pp. 2507-2520, 18 June 2016. The study did not show a significant increase in the neuropsychiatric adverse events attributable to varenicline or bupropion relative to nicotine patch or placebo.

[11] Following publication of the EAGLES Study, the United States Food and Drug Administration, the European Medicines Agency, and Canada's Health Canada, all removed black box warnings on the product monographs for varenicline.

[12] As mentioned above, Class Counsel recommended that the class action be discontinued. The chances of success in the class action are now remote. Class Counsel has so advised the 450 Class Members who registered with Class Counsel to receive reports about the litigation.

[13] Mr. Parker received funding and a costs indemnity from the Class Proceedings Fund. The Fund has paid $162,638.32 in disbursements to date. Of this, $52,168.43 was on account of experts' fees, $48,737.02 was on account of the notice of certification, and $61,732.87 was on account of electronic document management.

[14] Class Counsel received in excess of $300,000 in costs for interlocutory awards, a portion of which went to disbursements not covered by the Fund. The value of Class Counsel's work in progress on the file greatly exceeds the costs recovered to date.

[15] Section 29 (1) of the *Class Proceedings Act, 1992* requires court approval for the discontinuance of a class action. Section 29 (1) states:

> 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.

[16] Pursuant to s. 29, court approval is required if a proposed class action is converted into an individual action or if a class action is discontinued: *Chopik v. Mitsubishi Paper Mills Ltd.*, [2003] O.J. No. 192 (S.C.J.); *Epstein v. First Marathon Inc.*, [2000] O.J. No. 452 (S.C.J.); *Vennell v. Barnado's* (2004), 73 O.R. (3d) 13 (S.C.J.); *Frank v. Farlie, Turner & Co., LLC*, 2011 ONSC 7137.

[17] Before giving approval of discontinuance, the court must be satisfied that the interests of the class will not be prejudiced: *Darling v. Sunrise Propane Energy Group Inc.*, [2009] O.J. No. 5969 (S.C.J.) at paras. 14-29; *Sollen v. Pfizer*, [2008] O.J. No. 4787 (C.A.), aff'g [2008] O.J. No.

866 (S.C.J.); *Frank v. Farlie, Turner & Co., LLC, supra*; *Coleman v. Bayer Inc.*, [2004] O.J. No. 1974 at paras. 30-39 and [2004] O.J. No. 2775 (S.C.J.).

[18] A motion for discontinuance should be carefully scrutinized, and the court should consider, among other things: whether the proceeding was commenced for an improper purpose, whether there is a viable replacement party so that putative class members are not prejudiced or whether the defendant will be prejudiced. See: *Logan v. Canada (Minister of Health)*, [2003] O.J. No. 418 (S.C.J.), aff'd (2004), 71 O.R. (3d) 451 (C.A.).

[19] The case law about s. 29 explains that policy rationale for requiring court approval for the discontinuance of a proposed class action include: (1) deterring plaintiffs and class counsel from abusing the class action procedure by bringing a meritless class proceeding (a so-called strike suit) to extract a payment as the price of discontinuing the class proceeding; and (2) providing an opportunity to ameliorate any adverse effect of the discontinuance on class members who might be prejudiced by the discontinuance: *Hudson v. Austin*, [2010] O.J. No. 2015 (S.C.J.); *Durling v. Sunrise Propane Energy Group Inc., supra*; *Sollen v. Pfizer, supra*.

[20] The immediate case is one where it is appropriate to grant approval for a discontinuance. The action was brought in good faith, and it was reasonably prosecuted based on the available information. Class Counsel and Mr. Parker will achieve no private benefit from the discontinuance of the action. The discontinuance will not prejudice Class Members who retain the right to pursue individual claims, if so advised. Pursuant to s. 28 (1)(e) of the *Act*, the running of the limitation period has been suspended, and this suspension will continue for 60 days after which the discontinuance will come into effect. Class Members who have registered with Class Counsel will be given notice of the pending discontinuance directly and, otherwise, by postings on Class Counsel's webpage. Given the remote prospects of success, it is opportune to allow the Fund to end its exposure to costs in what is now an extraordinarily risky litigation to pursue.

[21] I, therefore, grant an order: (a) discontinuing the action on a without costs basis with the discontinuance to come into effect 60 days from the release of these Reasons for Decision; (b) approving the form of notice attached as Schedule "A" to the Notice of Motion; and (c) approving the manner of publication of the notice as described above.

[22] Order accordingly.

Perell, J.

Released: April 20, 2017

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Released: April 20, 2017