

SUPREME COURT OF NOVA SCOTIA

BETWEEN:

RODRICK DESBOROUGH KEN TAYLOR



PLAINTIFF

and

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

DEFENDANTS

Proceeding under the *Class Proceedings Act*, S.N.S 2007, c. 28

AMENDED CERTIFICATION ORDER



Before The Honourable Justice Michael J. Wood in Chambers

The Plaintiff made a motion for certification of this action as a class proceeding, pursuant to section 4 of the *Class Proceedings Act*, SNS 2007, c. 28. The motion was heard on August 15, 2013. A written decision was released on March 7, 2014, by which the action was certified as a class proceeding on certain terms.

On the motion of the Plaintiff, the following is therefore ordered and / or declared:


1. This action is certified as a class proceeding, pursuant to section 7 of the *Class Proceedings Act*.
2. The Class is defined as follows – all Canadian residents who were implanted with a Wright Profemur Hip Implant System ("WPHIS") after February 2001 and who have suffered a fracture of the WPHIS device (the "Class" or "Class Members").

3. The Plaintiff, Rodrick Desborough, ~~Ken Taylor~~, is appointed the representative plaintiff on behalf of the Class.
4. The claims to be determined on behalf of the Class and the relief sought by the Class are as alleged in the Second Fresh as Amended Notice of Action and Statement of Claim, issued on August 16, 2013, as narrowed by the terms of this Certification Order.
5. The common issues for determination in this class proceeding, the resolution of which will bind the Class Members, are as follows:
  - (a) Was the WPHIS defective?
  - (b) Did any of the Defendants breach a duty of care owed to any of the Class Members and, if so, when and how?
  - (c) Does the Defendants' conduct warrant an award for punitive damages, and, if so, to whom should they be paid?
6. The Class Members must be given notice of the certification of this action as a class proceeding in the form of the Notice of Certification, attached as **Schedule "A"** to this Certification Order and in the manner as provided in the Litigation Plan attached as **Schedule "B"** to this Certification Order.
7. The cost of providing such notice to the Class Members will be borne by the Plaintiff, subject to same being awarded to the Plaintiff as disbursements at the conclusion of the common issues trial if liability is established against the Defendants.
8. Notice of the certification of this action in the form and manner as ordered at paragraph 6 of this Certification Order satisfies the requirements of subsection 22(6) of the *Class Proceedings Act*.

9. The Litigation Plan attached as **Schedule “B”** to this Certification Order sets out a workable method of advancing this class proceeding, all of which is subject to clarification and amendment by the Court if required.
10. A Class Member may opt-out of the Class by sending a completed and signed Opt-Out Form, a copy of which is attached as **Schedule “C”** to this Certification Order, to Plaintiff’s counsel on or before the date to be determined by agreement of counsel approved by Justice Wood or (in the absence of any agreement of counsel) as directed by Justice Wood.
11. The Defendants must file and serve a Notice of Defence within 45 days of the issuance of this Certification Order, pursuant to subsection 4(6) of the *Class Proceedings Act*.
12. Costs arising from the certification motion will be as agreed to between counsel, failing which submissions can be made to Justice Wood in relation to the Court’s ultimate determination of same.

Issued June 25, 2014.

Issued April 30, 2019.


  
Prothonotary

AMANDA HAWBOLDT

AMANDA HAWBOLDT  
Deputy Prothonotary

**CONSENTED AS TO FORM:**

  
Madeleine Carter  
Counsel for the Plaintiff

  
Scott R. Campbell  
Counsel for the Defendants

## SCHEDULE "A"

### NOTICE OF CERTIFICATION OF THE WRIGHT PROFEMUR HIP IMPLANT SYSTEM CLASS ACTION

#### To: Recipients of a Wright Profemur-Hip Implant System

##### Notice Of Certification:

Class Members be advised of a certification of a class action lawsuit regarding alleged defects of the Wright Profemur Hip Implant System.

##### Who is included?

a) All Canadian residents who were implanted with a Wright Profemur Hip Implant System after February 2001 and who have suffered a fracture of the Wright Profemur Hip Implant System.

##### What is the nature of the claims?

As against the Defendants, the Plaintiff alleges negligence or other breach of a duty of care in relation to any defect in the Wright Profemur Hip Implant System.

A judgment on these common issues for the Class will bind all Class Members who do not opt-out.

##### What options do Class Members have?

Class Members may opt-out of the class action by sending an "Opt-out Form," signed by the Class Member, to counsel for the Plaintiff on or before the deadline stipulated in the Opt-Out Form. No person may opt-out of the class action after this date. Further notice will be provided following any settlement or judgment by the Court. Upon any such settlement or judgment in favour of the Class, Class Members may be required to register, file a claim and prove additional facts in order to obtain compensation.

##### Class Counsel Compensation:

The Representative Plaintiff has entered into a Contingency Fee Agreement. Should settlement or judgment be awarded in favour of the Class, the Plaintiff's counsel will receive a percentage of the net award, subject to Court approval.

##### Where can Class Members get more information?

You may participate in the common issues trial by contacting Class Counsel.

For more information, or to access opt-out forms, visit <http://www.wagners.co>

or contact Class Counsel at the address below:

Wagners  
1869 Upper Water Street  
Suite PH 301, Pontac House  
Historic Properties  
Halifax NS B3J 1S9  
Office: 902-425-7330  
Toll Free: 1-800-465-8794  
Fax: 902-422-1233

##### Representative of the Class:

Ken Taylor

c/o Wagners  
1869 Upper Water Street  
Suite PH 301, Pontac House  
Historic Properties  
Halifax NS B3J 1S9  
Email: [seriousinjury@wagners.co](mailto:seriousinjury@wagners.co)

This summary notice has been approved by the Supreme Court of Nova Scotia. Do not Contact the Court about this Certification.

**SCHEDULE "B"**  
**PLAINTIFF'S LITIGATION PLAN**

**DEFINED TERMS**

1. Capitalized terms that are not defined in this litigation plan (the "**Litigation Plan**") have the meanings as particularized in the Second Fresh as Amended Notice of Action and Statement of Claim, issued on August 16, 2013 in this proceeding.

**CLASS COUNSEL**

2. The Plaintiff has retained Wagners Law Firm as Class Counsel to prosecute this class action. Class Counsel have the requisite knowledge, skill, experience, personnel and financial resources to prosecute the action to resolution.

**THE COMPOSITION OF THE CLASS**

3. The Plaintiff represents the following Class, as ordered by the Court:

All Canadian residents who were implanted with a Wright Profemur Hip Implant System ("**WPHIS**") after February 2001 and who have suffered a fracture of the WPHIS device (the "**Class**" or "**Class Members**").

**NOTICE OF CERTIFICATION OF THE ACTION AS A CLASS PROCEEDING AND  
THE OPT-OUT PROCEDURE**

4. Notice of certification is intended to inform Class Members of what has happened, of the effect on their individual rights, and what steps they can take and the consequences of doing so. Notice of certification will therefore contain the following:
  - (a) a description of the Class that has been certified;
  - (b) a general description of the claims asserted by the Representative Plaintiff for which the action has been certified;
  - (c) an explanation of the significance of the certification of the action for Class Members;
  - (d) an explanation of Class Members' right to "opt-out" or exclude themselves from the litigation, and the significance of doing so; and
  - (e) contact information for Class Counsel to allow Class Members to appropriately direct their inquiries.
5. More specifically, notice of certification will advise Class Members that:
  - (a) the Court has certified this action as a class proceeding;
  - (b) the claims being advanced by the Representative Plaintiff relate to allegations of defect in the WPHIS;
  - (c) persons falling within the definition of the Class will be bound by the determination of the common issues unless they opt-out;
  - (d) a Class Member may only opt-out of the class proceeding by sending a written election to opt-out to Class Counsel before the date provided by this Litigation Plan;
  - (e) no Class Member may opt-out of the class proceeding after the date provided by this Litigation Plan;
  - (f) further notice will be provided following judgment or settlement on the common issues; and
  - (g) if the common issues are resolved in favour of the Class Members, claimants may be required to register, file a claim and prove additional facts in order to obtain compensation.

6. Notice of certification will be disseminated to Class Members in the following manner:
  - (a) posted by Class Counsel on its website: <http://wagners.co>;
  - (b) direct mailed by Class Counsel to the last known addresses of known Class Members as known by the Plaintiff or his counsel;
  - (c) direct mailed by Class Counsel to the last known addresses of known Class Members as can be identified and disclosed by the Defendants;
  - (d) appended to a press release circulated by wire service;
  - (e) provided by Class Counsel to any person who requests it;
  - (f) available orally by recorded message at Class Counsel's toll-free line; and
  - (g) in the form and manner that will be endorsed by the Court at a future date.
7. The cost of disseminating the notice of certification in the above manner will be paid by the Plaintiff in the first instance, reserving the right to seek the recovery of these costs from the Defendants by order of the judge presiding at the trial of the common issues.
8. Class counsel will report to the Court and the Defendants' counsel the names and addresses of the persons who opt-out of this class. In addition, Class Counsel will report to the Court and the Defendants' counsel the names and addresses of all Class Members who have overtly contacted Class Counsel to express an interest in this class proceeding.
9. The Defendants agree that they will not communicate directly with any Class Members in relation to the matters in issue in this proceeding, by their counsel or otherwise.
10. The date by which a Class Member must opt-out of this class proceeding is 60 calendar days from the date on which notice of certification is disseminated in the form and manner as endorsed and directed by the Court pursuant to paragraph 6(g) of this Litigation Plan. For greater certainty, the delivery of any such "opt-out" by a Class

Member must be postmarked by the last day of this 60 day period. Otherwise, any such Class Member will be bound by the results of the common issues trial.

## **REPORTING AND COMMUNICATION**

11. Current information on the status of the action is posted and will be updated regularly on Class Counsel's website at [www.wagners.co](http://www.wagners.co). Copies of some of the publicly filed Court documents, Court decisions, notices, documentation and other information relating to the action are and will be accessible from the website. Website updates will come within two weeks of a Court proceeding. Court documents will be made accessible within two weeks of their receipt.
12. The website also provides direct dial contact information for a member of Class Counsel's staff, who can provide further information should a Class Member request or require personal contact.

## **LITIGATION SCHEDULE**

13. The Court will continue to monitor the litigation schedule as set out in this Litigation Plan for the remaining steps in the action.

## **DISCOVERY**

14. At the first scheduled case management conference following issuance of the Certification Order, the parties will seek directions as to the exchange and delivery of



Affidavits Disclosing Documents, including directions in relation to the timing and scope of same and such related productions.

15. The parties will conduct any examinations for discovery within a reasonable amount of time following exchange of the Affidavits Disclosing Documents, as agreed by counsel or determined by the case management judge (the “**Case Management Judge**”). Until otherwise directed by the Court, the Case Management Judge shall be the Honourable Justice Michael J. Wood of the Supreme Court of Nova Scotia.

#### **CASE MANAGEMENT**

16. There will be case management conferences before the Case Management Judge at least once every three months, unless the parties and the Court agree that such hearings are not required or can take place along a different timeline.
17. In advance of such case management conferences, the parties must provide the Court with a brief written submission about the topics to be discussed (and their position thereon) at least 2 weeks in advance of same.
18. The first three of such case management conferences have been scheduled to take place as follows, each of which will commence at 9:30 a.m. at the Law Courts in Halifax, Nova Scotia:
  - (a) October 10, 2014;
  - (b) January 16, 2015; and
  - (c) April 10, 2015.

## **DOCUMENT MANAGEMENT**

19. Class Counsel will use data management systems to organize, code and manage the documents produced by the Defendants and all relevant documents in the Plaintiff's possession.
20. Class Counsel will share this information (as organized and coded) with the Defendants' counsel, subject to the redaction of any notes or commentary of Class Counsel therein.

## **INTERLOCUTORY MOTIONS**

21. The scheduling of and any directions in relation to any interlocutory motions will be addressed at the periodic case management conferences. If the need for an interlocutory motion should arise in a more time-sensitive manner, a request for dates and directions can be delivered to the Case Management Judge as need be.
22. Unless otherwise agreed to or directed at the periodic case management conferences, the filing deadlines for any such interlocutory motions will be governed by Rule 23 of the *Nova Scotia Rules of Civil Procedure*.

## **MEDIATION**

23. The Plaintiff will participate in mediation before a mutually acceptable mediator if the Defendants are prepared to do so.

## **COMMON ISSUES RESOLUTION**

24. The Plaintiff proposes to resolve as many of the common issues as possible before the Case Management Judge by way of Notices to Admit, or interlocutory motions for a preliminary determination of law or fact.
25. For any common issues that remain to be resolved by trial, the Plaintiff proposes that the parties will deliver any expert reports in a time as agreed by counsel or determined by the Case Management Judge.

## **TRIAL OF THE COMMON ISSUES**

26. The Plaintiff will ask the Case Management Judge to schedule dates for the common issues trial at the case management conference that immediately follows the completion of examinations for discoveries

## **MANNER OF PROOF AT TRIAL**

27. At trial, the Plaintiff expects to rely on the following to prove the facts underlying his claim:
  - (a) admissions made in the pleadings;
  - (b) admissions made in discovery or in interrogatories;
  - (c) admissions made through Request for Admissions (in accordance with rule 20.03);
  - (d) evidence from witnesses; and

- (e) expert evidence, if any.

#### **ISSUES TO BE RESOLVED AT THE TRIAL OF THE COMMON ISSUES**

28. The following issues will be resolved at the common issues trial:

- a) Was the WPHIS defective?
- b) Did any of the Defendants breach a duty of care owed to any of the Class Members and, if so, when and how?
- c) Does the Defendants' conduct warrant an award for punitive damages, and, if so, to whom should they be paid?

#### **NOTICE OF THE RESOLUTION OF THE COMMON ISSUES**

29. Following resolution of the common issues trial, the trial judge will determine and direct the notice (inclusive of form, manner and content) of same to the Class Members.

#### **INDIVIDUAL CLAIMS ASSESSMENT**

30. If the Plaintiff is successful in establishing liability against any of the Defendants on any of the common issues, the trial judge will determine and direct the process for the proof of any claims of the individual Class Members and the process for the assessment of any resulting damages.

#### **FURTHER ORDERS CONCERNING THIS PLAN**

31. This Plan may be amended from time-to-time by directions given at a case management conference or by further order of the Case Management Judge.

2011

**SCHEDULE "C"**

Hfx. No. 355381

**SUPREME COURT OF NOVA SCOTIA**

**BETWEEN:**

**KEN TAYLOR**

**PLAINTIFF**

**- and -**

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

**DEFENDANTS**

***PROCEEDING UNDER THE CLASS PROCEEDINGS ACT, S.N.S 2007, C. 28***

**OPT-OUT FORM**

**DEADLINE – \_\_\_\_\_**

I, (recipient of a Wright Profemur Hip Implant System) do not want to be included in the above-styled class action against Wright Medical Technology Canada Ltd, Wright Medical Technology, Inc., and Wright Medical Group, Inc with respect to alleged defects of the Wright Profemur Hip Implant System.

I want to opt-out (be excluded from) this class action. My information is as follows:

Print Name _____	Postal Code: _____
Date of birth: _____	Telephone: _____
Address: _____	Email address: _____
City: _____	Date: _____
Province: _____	Signature: _____